

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

4401 Wilson Boulevard, Suite 1110

Arlington, Virginia 22203

703-570-4120

August 7, 2015

FILED VIA ELECTRONIC MAIL

uscisfrcomment@uscis.dhs.gov

U.S. Citizenship and Immigration Services
Office of Policy and Strategy, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: OMB Control Number 1615-0092
USCIS
Docket ID USCIS-2007-0023
Changes to E-Verify through the Paperwork Reduction Act form change process
80 Federal Register 32408 (June 8, 2015)

Dear Sir or Madam:

On behalf of the undersigned association member of the Council of Defense and Space Industry Associations (CODSIA)¹, we are writing in opposition to the proposed expansion of the Information Collection Request published on June 8, 2015.² The U.S. Citizenship and Immigration Services (USCIS) proposal acknowledges (1) expanding the use of E-Verify to include so-called “reverification” of expiring temporary worker documents and (2) revising the mandatory Memorandum of Understanding (MOU) and related processes for E-Verify use to create a formal review process when Final Non-Confirmations (FNCs) are issued. This proposed expansion of E-Verify conflicts with the governing E-Verify statute and the Federal Acquisition Regulation (FAR). Unrelated to the possible desirability of the underlying policies U.S. Citizenship and Immigration Services is promoting, there is no legal authority to expand E-Verify through a Paperwork Reduction Act process beyond the statutory terms, and in a manner that is inconsistent with the Federal Acquisition Regulation, without first seeking substantive revisions to those foundation authorities.

The terms and conditions of the E-Verify program were signed into law in 1996 as part of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).³ That law makes

¹ The Council of Defense and Space Industry Associations (CODSIA) was formed at the suggestion of the Department of Defense, in 1964 by industry associations with common interests in federal procurement policy issues. CODSIA consists of six associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Chamber of Commerce of the United States, the Information Technology Alliance for Public Sector, the National Defense Industrial Association, and the Professional Services Council. CODSIA acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures.. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

² 80 Fed. Reg. 32408 (June 8, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-06-08/pdf/2015-13935.pdf>

³ Pub. L. 104-208 (September 30, 1996).

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clear that E-Verify is limited in scope to use at the time of hire. Specifically, sections 403(a), 403(a)(A), and 402(c)(2)(A) of IIRIRA only mention and authorize the use of E-Verify as associated with hiring:

A person or other entity that elects to participate in the E-Verify program described in this subsection agrees to conform to the following procedures in the case of the hiring (or recruitment or referral) for employment in the United States of each individual covered by the election. §403(a) of IIRIRA (emphasis added)

The person or other entity shall make an inquiry...using the confirmation system to seek confirmation of the identity and employment eligibility of an individual, by not later than the end of 3 working days (as specified by the Secretary of Homeland Security) after the date of hiring (or recruitment or referral as the case may be). §403(a)(3)(A) of IIRIRA (emphasis added)

[A]ny electing person or other entity may provide that the election under subsection (a) shall apply (during the period in which the election is in effect) to all its hiring (and all recruitment and referral) in the State (or States) in which the pilot program is operating... §402(c)(2)(A) of IIRIRA (emphasis added)

Federal contractors, all of whom are required by Executive Order and the FAR to be E-Verify users, cannot be subjected to unplanned changes in their employer responsibilities and to mandates that are inconsistent with public laws and the governing contracting regulations. The Federal Acquisition Regulatory Council (“Council”) is a congressionally established executive branch council responsible for coordinating federal government-wide procurement policy. The Council consists of the Administrator of the Office of Federal Procurement Policy (OFPP) and designated representatives of the Secretary of Defense, Administrator of the National Aeronautics and Space Administration (NASA), and the Administrator of the General Services Administration (GSA). Substantive changes to the FAR are required by law to follow specific notice and comment rulemaking under the Office of Federal Procurement Policy Act to promulgate FAR regulations. That Council followed that mandatory procedure when, on November 14, 2008, it imposed the current E-Verify rules on federal contractors.⁴

The U.S. Citizenship and Immigration Services is seeking to impose new substantive requirements through this Paperwork Reduction Act (PRA) information collection process that are inconsistent with the FAR and in our view constitutes an amendment to the FAR without complying with statutory procedures to amend the FAR. No FAR Council notice has been issued regarding these proposed changes and no proposed changes to the FAR have been published. There is no evidence that the FAR Council was consulted in USCIS’s PRA process.

From 1996 to the present, use of E-Verify has been strictly limited to new hires, and not available for use regarding reverification of expiring work authorization of any existing employee. The only authority to use E-Verify for existing employees is for federal contractors under 48 CFR §52.222-54 of the Federal Acquisition Regulation, where such authority applies

⁴73 Fed. Reg. 67651 (Nov. 14, 2008), available at <http://www.gpo.gov/fdsys/pkg/FR-2008-11-14/pdf/E8-26904.pdf>

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solely to an initial time-restricted period after a federal contractor joins E-Verify, but does not apply to reverification of expiring work authorization of a continuing employee.

In particular, the current FAR clause in each federal government contract does not ask federal contractors to do what USCIS's proposed expanded E-Verify information collection suggests, because the regulations explicitly state there is no requirement for any federal contractor to:

perform additional employment verification using E-Verify for any employee [w]hose employment eligibility was previously verified by the [c]ontractor through the E-Verify program. 48 CFR §52.222-54(d) (emphasis added).

The current mandatory E-Verify Memorandum of Understanding (MOU) makes it clear in Article II that in fact federal contractors are barred from performing such additional employment verification under the current rules, by establishing that:

[t]he employer agrees not to require a second verification using E-Verify of any assigned employee who has previously been verified as a newly hired employee under this MOU or to authorize verification of any existing employee by any Employer that is not a Federal contractor..." Article II of the MOU at §B.2(g).

Both the addition of a changed Final Non-Confirmation review process through E-Verify and a new obligation to complete reverification of expiring work authorization through E-Verify change the burden and work of federal contractors in using E-Verify. As USCIS's Supporting Statement for the pending PRA process acknowledges, the MOU governing E-Verify use "is a signed agreement between DHS and the employer." Specifically, the MOU provides:

This MOU is effective upon the signature of all parties and shall continue in effect for as long as the SSA and DHS operates the E-Verify program unless **modified in writing by the mutual consent of all parties**. Article V of the MOU at §A.1 (emphasis added).

For a federal contractor subject to the FAR clause, the unilateral imposition of these additional substantive obligations is a burden that cannot be accurately measured in minutes or estimated in dollars based on the standards in the PRA process. A contractor would have entered into the contract with the federal government with knowledge of the current E-Verify requirement, the scope of that requirement, and an opportunity to gain a complete understanding of the E-Verify compliance obligation. To change the E-Verify obligation without the contractor's agreement places that contractor in an untenable position: if the contractor is unwilling to accept the additional obligations, it must stop using E-Verify (with 30 days' notice); but to stop using the system would be a breach of the FAR clause and a breach of their federal contract, subjecting that contractor to potential liability and administrative remedies.

Thus, at least with regard to federal contractor users of E-Verify, we request that the information collection be withdrawn because the unilaterally imposed substantive contract amendments to the E-Verify MOU and FAR provisions are beyond the scope of an action that the information collection process permits under the Paperwork Reduction Act.

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Thank you for your attention to this request. We would be happy to meet with you to discuss our concerns in greater detail. In the interim, if you have any questions or need any additional information, please do not hesitate to contact Amy M. Nice of the U.S. Chamber of Commerce at (202) 463-5694 or at ANice@USChamber.com or Alan Chvotkin of the Professional Services Council at (703) 875-8059 or at chvotkin@pscouncil.org. You may also contact Bettie McCarthy with CODSIA at 703-570-4120.

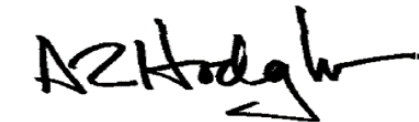
Sincerely,



R. Bruce Josten
Executive Vice President, Government
Affairs
Chamber of Commerce of the United States



Jessica Salmoiraghi
Director of Federal Agencies &
International Programs
American Council of Engineering
Companies



A.R. "Trey" Hodgkins, III
Senior Vice President, Public Sector
Information Technology Alliance for Public Sector



William Goodman
Vice President for Policy
National Defense Industrial Association



Alan Chvotkin
Senior Vice President & Counsel
Professional Services Council

CC:

Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Executive Office of the President
Washington, DC 20503

Honorable Anne Rung
Administrator
Office of Federal Procurement Policy
Executive Office of the President
Washington, DC 20503