CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA
1615 H STREET, N.W.
WASHINGTON, D.C. 20062

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

AMY M. NICE
EXECUTIVE DIRECTOR
IMMIGRATION POLICY

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FILED VIA ELECTRONIC MAIL
uscisfrcomment@uscis.dhs.gov
oira_submission@omb.eop.gov

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

U.S. Citizenship and Immigration Services
Enterprise Services Directorate, Verification Division
131 M Street, NE
Washington, DC 20002

Executive Office of the President
Office of Information and Regulatory Affairs
OIRA Administrator
725 17th Street, NW
Washington, DC 20503

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:

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation. The Chamber represents the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system. We are writing in response to the published Paperwork Reduction Act (PRA) notice where U.S. Citizenship and Immigration Services (USCIS) proposes an expansion of E-Verify.[1] Because the

[1] E-Verify is an electronic verification system run by U.S. Citizenship and Immigration Services as a pilot program authorized under a statute signed into law September 30, 1996. While E-Verify is not a "form" it is thought of as an extension of the I-9 Employment Verification form, and is regulated as such. E-Verify use is voluntary, although all

proposed expanded collection of information is not authorized by the controlling statute, is in conflict with existing Federal Acquisition Regulation provisions promulgated through notice and comment rulemaking, creates several critical operational issues for E-Verify users that have not been considered by the agency, and is not accompanied by appropriate and necessary information and documents for the public to fully assess the proposed expanded information collection, the Chamber writes to ask that the proposed information collection expansion be abandoned.

THE PROPOSED EXPANSION OF THE INFORMATION COLLECTION THROUGH E-VERIFY IS NOT AUTHORIZED BY THE CONTROLLING STATUTE

When E-Verify was created as a pilot program[2] in 1996 in the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA),[3] it was limited in scope to use at time of hire, and did not contemplate use when temporary work authorization expires. From 1996 to the present, use of E-Verify has been strictly limited to new hires, and not available for use regarding any existing employee except for specific exceptions for federal contractors under the Federal Acquisition Regulation (FAR)[4] that apply solely to an initial time period after a federal contractor initially joins E-Verify (in order to ensure that all workers employed on federal government contracts are authorized workers, as required by the FAR).

IIRIRA sections 402 and 403 limit the scope of the E-Verify program to the initial hiring for employment and did not contemplate use of E-Verify for reverification of work authorization when temporary work authorization expires. The IIRIRA statutory language makes this clear:

> 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)
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> 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)

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federal contractors are required to use E-Verify pursuant to an Executive Order and subsequent Federal Acquisition Regulation rules that were finalized November 14, 2008 and went into effect in September 8, 2009. Since it remains a pilot program, E-Verify must be periodically reauthorized by Congress, with current authorization expiring September 30, 2015.

[2] E-Verify was initially referred to as the "Basic Pilot" program in 1996 and was renamed "E-Verify" in 2007.

[3] Public Law No. 104-208 (signed into law September 30, 1996 by President Clinton).

[4] Under the FAR, federal contractors may choose to run E-Verify queries on all employees subject to E-Verify (there are many specifically exempted employees, such as those working with security clearances and those working on Commercial Off The Shelf (COTS) products or services) or just those employees working on federal contracts. See 48 CFR §§22.1802(c), 22.1803(c), 52.222-54(b), (d).

> [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)

That the current statute does ***not*** authorize the use of E-Verify for reverification when temporary work authorization expires is further evidenced by the fact that the Legal Workforce Act, legislation introduced in the U.S. House of Representatives and voted off the House Judiciary Committee in the 112th, 113th and 114th congresses, explicitly includes provisions to authorize the use of E-Verify for reverification.[5] Similarly, the Senate's comprehensive immigration bill in the 113th Congress, S. 744, also included provisions adding new authority to use E-Verify for reverification.[6]

USCIS has no authority to require employers to use the E-Verify system to reverify expiring temporary work authorization because the governing statute currently limits E-Verify as a program used in connection with hiring. For this reason standing alone, the proposed information collection expansion should be halted by the Office of Information and Regulatory Affairs (OIRA).

THE PROPOSED EXPANSION OF THE INFORMATION COLLECTION THROUGH E-VERIFY IS IN CONFLICT WITH THE FEDERAL ACQUISITION REGULATION (FAR) GOVERNING THE REQUIRED USE OF E-VERIFY BY ALL FEDERAL CONTRACTORS

Moreover, though, the proposed information collection expansion is inconsistent with ***existing federal regulations impacting a large segment of the economy and the federal government's procurement process***.

The Office of Federal Procurement Policy Act (OFPP Act) controls the process for promulgating the Federal Acquisition Regulation (FAR) and it is not appropriate for USCIS to make changes in E-Verify usage without going through the OFPP Act procedures especially when the proposed changes seem inconsistent with the FAR.

The Chamber, working with the Council of Defense and Space Industry Associations (CODSIA)[7] of which it is a member, filed a separate comment voicing opposition from the federal procurement community about the USCIS proposed expansion of E-Verify. CODSIA is not a trade association itself but was formed in 1964, at the encouragement of the Department of Defense, to ***communicate broad industry reactions to new or revised regulations, policies, and***

[5] See H.R. 2885 (112th Congress), H.R. 1172 (113th Congress), H.R. 1147 (114th Congress). "Reverification for Individuals with Limited Work Authorization" is new Section 274A(b)(2) created in each House bill (p. 23 of H.R. 2885 as introduced, p. 20 of H.R. 1172 as introduced, p. 21 of H.R. 1147 as introduced).
[6] See Section 3101in S. 744, specifically the text created a new Section 274A(d)(4)(B)(iii) in the Senate bill (p. 550 of the bill as finally engrossed).
[7] CODSIA currently includes the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the Contract Services Association (CSA), the Electronic Industries Alliance (EIA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), and the U.S. Chamber of Commerce.

procedures related to federal procurement. The USCIS proposed expansion of the E-Verify information collection through a Paperwork Reduction Act process is one such revision.

As explained in the CODSIA comment, many of those subject to the FAR as federal contractors oppose the prospect of USCIS expanding E-Verify without statutory or regulatory authority. The CODSIA comment requests that the information collection to be withdrawn.

THE PROPOSED EXPANSION OF THE INFORMATION COLLECTION THROUGH E-VERIFY CREATES SEVERAL CRITICAL OPERATIONAL ISSUES FOR E-VERIFY USERS THAT HAVE NOT BEEN CONSIDERED BY THE AGENCY

The PRA notice suggests two changes to the E-Verify process: (1) a new formal agency review process for Final Non Confirmations (FNCs), and (2) a new obligation to make E-Verify queries when reverifying expiring temporary work authorization. Even if legally authorized and in full compliance with the Paperwork Reduction Act, which is not the case, and even if the policy goals underlying the changes to the E-Verify process are laudable, the two suggested expansions of the information collection through E-Verify are woefully deficient in how they are proposed, explained, and documented because of operational issues impacting E-Verify users.

FNC Review

The Chamber agrees that the E-Verify system should build on the longstanding agency practice to provide an informal review process for Final Non Confirmations (FNCs). However, the USCIS proposal regarding a new, formal FNC Review is not thought out, creates operational difficulties for E-Verify users, and has not permitted stakeholder review of the new Memoranda of Understanding necessary to be fine-tuned to implement a new formalized FNC review process (since the agency failed to provide all but one of these new memoranda and of the single Memorandum of Understanding provided all of the edits to the document were not identified by USCIS).

It is vital that any FNC review process explicitly confirm in a way that both employers and employees understand that the employer ***may*** terminate employment even if the employee appeals the FNC and that any employer who does ***not*** terminate employment ***may*** face a penalty for continuing to employ the individual. The instructions proposed by USCIS are not sufficiently clear in this regard.

Moreover, operational confusion will result from the following aspects of the USCIS proposal:

- USCIS proposed procedures specify that the FNC Review process be initiated by an employee. Employers are to receive notification through the E-Verify system that the employee has initiated FNC Review. However, the proposal is unclear as to how the employee who did not provide his or her email address on the I-9 Form

would be notified and thus have knowledge that the E-Verify system returned a FNC.

- The USCIS proposal is silent with regard to safe harbor procedures for employers that continue to employ those employees who request FNC review. The PRA notice does not address whether the statutory penalty for failure to inform the agency of continued employment after receipt of an FNC will continue to be applicable for the employer who chooses to continue the employment while the FNC review process is underway.
- The FNC notification message indicates that the employee may seek to correct the record if the FNC was issued in error, but it provides no instructions for this procedure.
- The FNC notification message itself is lacking important details such as whether it was SSA or DHS that initiated the FNC.
- The Employment Authorized FNC notification message states that "Your employer has also been notified in E-Verify that you are authorized to work." In reality, it is likely that the individual will no longer be employed by the time this message is received. We suggest either listing the name of the employer or indicating that "your employer or former employer has also been notified."
- The Employment Authorized FNC notification message indicates that "your employer may rehire you." This language should be reviewed as to the attendant employment law issues that may result for an employer as the result of this notice.

Reverification

Any E-Verify reverification process should be consistent with existing USCIS regulations and guidance governing the Form I-9 reverification process, and the proposal is not.

It is unclear whether the agency considered how the Form I-9 reverification system operates under the current regulation. There are two particular issues of concern regarding the proposed reverification changes: First, the timeline for reverification is limited in the E-Verify expansion proposal to only allowing verification on or after the expiration of work authorization, and second, the E-Verify expansion proposal in no way reflects the many circumstances where work authorization is extended by regulation and cannot be verified in E-Verify, a fact recognized by USCIS guidance but not in E-Verify's operations.

The existing regulation requires reverification on the Form I-9 not later than the date work authorization expires. This allows the employee who receives a new or extended employment authorization document to bring it to the employer in advance of the expiration date of the previous document. This allows employers to establish an organized and orderly way to provide advanced notice to its employees with temporary work authorization reminding employees of the requirement to present updated employment authorization documents. Being able to develop and implement such a systematic means to address expiring work authorization

benefits both employees and employers, and is critical for businesses to be able to protect their most important asset – their workforce.

For unknown reasons, USCIS creates a burdensome scheme in the E-Verify expansion proposal by ***not*** allowing an E-Verify updated case or case creation until the date the current authorization expires, but allowing a three-day case update or creation window ***afterwards***. This provides for the need for repetitive recordkeeping. The employer who accommodates the Form I-9 reverification ***in advance of the expiration date*** would need to remember to electronically reverify again – on a different, later date – for an E-Verify case creation or update on the former document's expiration date. Moreover, the proposal to create a new three day window after expiration of status is in direct contradiction to USCIS's employment verification regulations.[8]

At a minimum, this creates employer confusion for those that use E-Verify. Does the obligation to reverify expiring work authorization attach prior to expiration or three days after? In addition, though, there is at least a theoretical possibility that – absent corresponding changes to USCIS regulations governing reverification[9] – an employer could be found to have knowingly continued to employ[10] an individual later confirmed to be a lawfully authorized temporary worker because the employer employed the individual after the expiration of the worker's prior period of authorized stay but before completing the E-Verify query.[11]

In addition, the proposal from USCIS does not account for many circumstances where foreign-born workers in the United States extend their work authorization based solely on a hodgepodge of regulatory, statutory, and guidance authority, none of which can be verified through an E-Verify query. Current employees with temporary employment authorization may be subject to special rules such as H-1B portability,[12] H-1B cap gap extension,[13] receipt rules,[14] the 240 day rule,[15] TPS renewals,[16] and temporary evidence of permanent residence.[17] Using the Paperwork Reduction Act process does not seem to require U.S. Citizenship and Immigration Services to revise its regulations or guidance to explain how these situations will be addressed in an E-Verify reverification process, even though hundreds of thousands of such situations arise each year. While all such employees are not presently employed by E-Verify employers, since as a percentage of all U.S. businesses E-Verify users represent a very small percentage, it is not

[8] 8 CFR §274a.2(b)(1)(vii).
[9] Id.
[10] See §274A(a)(2) of the Immigration and Nationality Act, that codifies an employer obligation to not knowingly continue to employ an unauthorized alien.
[11] Such a knowing continue to employ violation could at least theoretically also set up debarment proceedings for a federal contractor.
[12] INA §214(n). There is no codified regulation in the CFR that confirms this work authorization.
[13] 73 Fed. Reg. 18944–18956 (Apr. 8, 2008). There is no codified regulation in the CFR that confirms this work authorization.
[14] 8 CFR §274a.2(b)(1)(vi).
[15] 8 CFR §274a.12(b)(20).
[16] USCIS guidance, Handbook for Employers (Form M-274) p.13-14 (2013).
[17] USCIS guidance, Handbook for Employers (Form M-274) p. 12 (2013).

reasonable for USCIS to be permitted to expand the use of E-Verify without accounting for these hundreds of thousands I-9 reverification transactions that could ultimately be subject to E-Verify.

THE PROPOSED EXPANSION OF THE INFORMATION COLLECTION THROUGH E-VERIFY IS NOT ACCOMPANIED BY ALL OF THE RELEVANT DOCUMENTS THE PUBLIC IS ENTITLED TO REVIEW

The Chamber cannot reasonably estimate the true total burden in costs and hours attributable to the proposed and any future changes in terms of the new Memorandum of Understanding (MOU) that each employer will have to review and understand, because a redlined version evidencing all changes to all MOUs was not provided. The present information collection, contrary to the representation in the Supporting Statement ("Specific proposed changes to the E-Verify MOUs are included in redline documents submitted with this supporting statement"), does not contain any redlined versions of the proposed amendments to all but one of the relevant MOUs and depending on the internet browser used to access the documents the one MOU posted either shows no redlines whatsoever or just three changes. There are multiple changes to the one MOU posted, however, which can only be identified by going through a word-by-word review of the posted MOU and the current MOU.

Given the agency's omission in providing critical documents for the public's review, the Chamber believes that USCIS should be required to provide the original and redlined versions for *all* changed MOUs, and that – should this information collection be further pursued, and, to be clear, the Chamber requests that it be dropped altogether – a new 60-day comment period[18] should follow republication under the PRA in the Federal Register.

It is an absolute requirement of the PRA that USCIS set forth the specific revisions to be made to the MOU. The notice in the Federal Register does not even clearly state that a part of the information collection change includes changes to the very MOU the E-Verify user must sign. In order for any stakeholder to find all the proposed changes requires a very time consuming review process. No diligent stakeholder will be aware of the actual proposed MOU changes unless it undertakes special efforts to identify the changes, because the agency did not provide a redlined copy of all changes, and provided only one MOU even though the agency had previously determined (February 2013) that separate MOUs were needed for different types of E-Verify users (web services employers, employer agent clients, and so forth).

With regard to the new MOU that each employer will be subject to, the Federal Register notice does not estimate a cost burden associated with this aspect of the collection of information. The Federal Register notice states that about 65,000 employers each year will take about 2 hours 16 minutes to review and analyze the MOU but there is no mention of the time

[18] In passing, it is worth noting that USCIS also did not comply with the PRA's requirement to allow a 60 day comment period. The Federal Register notice was published June 8, 2011 but the documents that were shared with the public for review were only posted June 11, 2011. Similarly, it is notable that the documents provided in the public docket at regulations.gov seem to include over three dozen documents that only after review can a member of the public discern are related to ***prior*** E-Verify process changes. Posting so many documents unrelated to the current PRA notice makes it exceedingly difficult for stakeholders to review and assess the relevant documents.

required by the existing over 500,000 companies that are E-Verify users to review, analyze, understand, and train staff on the new MOU. The Supporting Statement (at p. 12-13) does not address this point either.

The Supporting Statement is also confusing (at p. 12) regarding the expected impact of the reverification expansion. The Supporting Statement states that about 232,900 employers will each submit one reverification cases through E-Verify each year, taking approximately 4 minutes per case. It is not clear on what basis USCIS has identified only 232,900 annual reverification cases in E-Verify because it seems to represent a very small percentage of the total reverifications that occur today through the I-9 employment verification process.[19] USCIS should explain its methodology in calculating how many reverifications will occur through E-Verify queries.

In relation to the proposed expansion of E-Verify to cover reverification, this is quite a complicated logistical question, given current practice and procedure, especially since USCIS contemplates that individuals not in E-Verify presently will be placed in E-Verify without an identity check by the employer, a transaction that no E-Verify user has ever completed. In trying to confirm how USCIS proposed a reverification query in E-Verify for a current employee who was not previously verified in E-Verify, it took the Chamber about 1 hour 5 minutes to look through the 113 page powerpoint provided by E-Verify in the public docket (on regulations.gov) for this matter, locate the clarifying instruction, review and understand it. Starting on slide 81, USCIS explains how it has created a totally ***new*** type of case in E-Verify, a new case solely for reverification such that the typical new case information will not be requested. If every current E-Verify employer has at least one reverification each year that means each of the current active users will have to spend about 1 hour 5 minutes to understand how to do that. This should be explained much more directly and should be specifically referenced in the Supporting Statement to streamline the time requirement that attaches to a review of a 113 page slide deck. Without an easy to understand and direct explanation, at least 541,666 hours will be spent across the over 500,000 current E-Verify users to understand just this one change.

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[19] There is no readily available public resource to determine the number of extensions of temporary work authorization issued by USCIS each year. Of course, USCIS could provide such an estimate, and should be required to do so if it is obligated to assess the impact of its E-Verify expansion proposal. One possible estimate is to add the number of EADs issued annually with the number of H-1B extensions issued annually. According to data obtained through a Freedom of Information Act request (http://cis.org/government-data-reveal-millions-of-new-work-permits), USCIS issued 7.4 million Employment Authorization Documents (EADs) during the period 2009 to 2014 (6 years) or about 1.23 million EADs annually. According to USCIS, about 315,857 H-1B petitions were approved in 2014 (http://1.usa.gov/1Ec42XZ). Chamber members have indicated that about 58% of H-1B filings are extensions (https://www.uschamber.com/sites/default/files/uscc_rfi_response_1-29-2015.pdf at p. 4). By adding 58% of the H-1B extension numbers (183,197) to the 1.23 million EADs issued annually, one arrives at an ***estimate*** of about 1,383,197 for the annual total of temporary workers who receive new employment authorization that needs to be reverified. This does not include the number of L-1A, L-1B, and TN extensions issued annually to foreign-born individuals temporarily working in the United States, or other expiring temporary work authorizations and can only be considered a ballpark estimate.

Participating employers and the stakeholder community cannot be called upon under the PRA to identify the proposed changes, consider their impact, and comment on the changes if the changes are not clearly identified and provided. Thus the notice provided is insufficient, and the public should be given an opportunity to consider a clear and complete notice of each proposed MOU and the changes to each along with a comprehensive reporting burden explanation.

CONCLUSION

OIRA should reject the expanded information collection proposed by USCIS. The proposed E-Verify expansion is not authorized by current statute, creates conflicts with existing regulations for federal contractors – the only group of employers that must use E-Verify, creates operational difficulties for the affected members of the public, and is not accompanied by documents and information the public is entitled to review.

Thank you for any consideration you can give to the Chamber's concerns including those expressed in the CODSIA comment.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

Amy M. Nice
Executive Director
Immigration Policy