AMERICAN IMMIGRATION LAWYERS ASSOCIATION

June 20, 2016

The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: E-Verify Program; Revision of a Currently Approved Collection
OMB Control No.: 1615-0092

Submitted Via: oira_submission@omb.eop.gov

Dear Madam or Sir:

The American Immigration Lawyers Association (AILA)[1] submits the following comments in response to the 30-day notice of revisions to the E-Verify Program published in the Federal Register on May 20, 2016.

We incorporate by reference the comments we submitted on August 7, 2015, in response to the 60-day notice published on June 8, 2015.[2] Our comments raised legal and practical concerns with the proposed revisions to E-Verify. We were disappointed to note that USCIS disagreed with our concerns and expressed its intent to seek OMB approval of the collection without meaningfully addressing the significant statutory and regulatory issues we raised.

The expansion of E-Verify to include reverification of existing employees is not a simple revision and extension of an existing collection; it is a change in the mission of a congressionally supervised statutory pilot program that was specifically authorized for the electronic verification of newly-hired employees. The proposed reverification of existing employees exceeds the scope of what Congress authorized and appropriated for the E-Verify program. In fact, USCIS has had many opportunities over the past several years to inform Congress of its intent to expand E-Verify to include reverification and has inexplicably failed to seek authorization or appropriations for this major program revision.

Should USCIS wish to expand E-Verify to include reverification, it must do so by proposing the expansion in its next budget request and seeking authorization from Congress when it revisits the E-Verify program authorization and earmarked appropriations which are scheduled to sunset on September 30, 2016. Thus, we oppose this proposed revision and ask OMB to disapprove it.

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[1] Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

[2] 80 Fed Reg. 32408 (June 8, 2015).

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I. USICS Failed to Provide a Statutory or Regulatory Mandate Authorizing the Expansion of E-Verify to Include Reverification

As noted in the proposed E-Verify Memorandum of Understanding (MOU) and Supporting Statement, USCIS seeks to mandate E-Verify member employers to reverify all employees with expiring work authorization. However, preliminarily, we note that the Supporting Statement is deficient in a number of ways, as follows:

The Supporting Statement fails to comply with 5 CFR §1320.5(a)(1)(iii), which requires that it be accompanied by "(G) Copies of pertinent statutory authority, regulations, and such related supporting materials as OMB may request." The instructions for the Supporting Statement for Paperwork Reduction Act Submissions, OMB Form 83-I, further state:

> *Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection.* ***Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information****.* (Emphasis added).

The Supporting Statement does not contain "a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information." Instead, USCIS simply states, "Electronic reverification is not prohibited by the E-Verify statute or any other law, and logically matches the reverification process long-established under the Form I-9 regulations."[3] This is inadequate. USCIS must provide OMB with the statutory or regulatory authority that allows it to expand E-Verify to include reverification. Because the Supporting Statement does not provide this information, it is contrary to the regulation that dictates what must accompany a Supporting Statement. Furthermore, because E-Verify is governed by statute and is supervised by Congress, it is not possible to cure an incomplete PRA submission with an oversimplified argument. For this reason, the proposal should be disapproved.

In our comments to the 60-day notice, we raised the issue that statutory authority is required to support this change. This was unfortunately disregarded by the agency. The Appendix to the Supporting Statement states:

> *3e. Four (4) commenters believe that the reverification proposal is not authorized by statute and DHS cannot mandate reverification. Additionally, reverification is outside the scope of the "hiring" process and would gut employer protections.*
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> *Response: Section 274A(b) of the Immigration and Nationality Act provides verification requirements for employers "in the case of an [employer] hiring, recruiting or referring an individual for employment in the United States." Since the initial regulatory implementation of these requirements in 1987, they have been interpreted by USCIS and its predecessor, without dispute, both to authorize and to require reverification of expiring temporary work authorization. Essentially, this is an extension of the original verification at the time of hire when that verification is effectively time-limited from its*

[3] USCIS Appendix to the Supporting Statement.

> *outset by the expiration date.* ***This basic framework for Form I-9 verification was well-established at the time the E-Verify provisions were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.*** *Applying the principle that like terms in statutes should be construed consistently, and in light of their contemporaneous interpretation at the time of enactment, we consider that just as the term "hiring" was construed in the Form I-9 context to include reverification, references to "hire" in the E-Verify provisions similarly can and should be construed to authorize it in operating E-Verify.* (Emphasis added).

The E-Verify program, initially named the Basic Pilot Program, was authorized in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[4] Though its name has changed, its statutory provisions have remained consistent over the past 20 years. According to the statute, E-Verify has always applied to initial hires, but not to the reverification of existing employees who were already verified through the program at the time of hire. Because the mission provisions in IIRIRA §403 already exist, USCIS's statutory and regulatory construction argument is irrelevant.[5] The reason that the E-Verify statutory language does not include reverification is that reverification was created by agency regulation, not by statute. Because E-Verify was created by statute, its provisions can only be changed by an amendment to the statute. USCIS may seek a statutory program expansion in advance of the E-Verify sunset date of September 30, 2016.

We also reiterate the fact that one of the key benefits of E-Verify is that employers are provided a rebuttable presumption that there has been no violation of INA §274A(a)(1)(A), with regard to the knowing hiring of an unauthorized worker, if the employee's identity and employment eligibility has been confirmed by the system. The statute clearly provides this protection only in the context of an initial hire and only if the employer confirms both the identity and employment eligibility of the new hire. When reverifying an employee, the employer does not reverify identity.

The rule of construction that is binding here is the plain meaning rule,[6] which directs us to consider the unambiguous, relevant provisions of IIRIRA Section 403:

> *(a) BASIC PILOT PROGRAM. 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;*
>
> *…*
>
> *(3) SEEKING CONFIRMATION.—*
>
> *(A) IN GENERAL.—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*

[4] Division C of Pub. L. 104-208, 110 Stat. 309, INA § 274A, Note 3 (Sept. 30, 1996).
[5] IRIRA §403, INA §274A, Note 3.
[6] As the General Accountability Office explains: "By far the most important rule of statutory construction is this: You start with the language of the statute." GAO, Principles of Federal Appropriations Law, Vol. I at 2-74.

> *Homeland Security) after the date of **hiring** (or recruitment or referral as the case may be).*[7] (Emphasis added).

Therefore, the E-Verify statute permits employers to verify the employment authorization of employees only in the context of the "hiring" and "recruitment and referral" processes. The statute does not authorize, and never has authorized, DHS to mandate E-Verify for purposes of reverification, a process which clearly falls outside the scope of the "hiring" process.[8]

In administering E-Verify as a pilot program, USCIS is well-aware that it must obtain congressional authorization and appropriations on a yearly basis. This requires testimony before the congressional immigration subcommittees and a specific appropriation of funds. USCIS did not include an E-Verify reverification program expansion in its budget requests from 2014 to 2017 or in its congressional testimony.[9]

The current dilemma was created by the fact that, unlike the statutory E-Verify program, reverification on Form I-9 was established by regulation.[10] The INA does not mention reverification, and the system of statutory paperwork violations and penalties deals only with violations of the employer and employee attestation requirements at the time of initial hire, and does not include a failure to reverify an existing employee.[11]

In summary, USCIS cannot require employers to use E-Verify to reverify existing employees because IIRAIRA limits its use and the associated protections to the initial hiring process. The Supporting Statement contains nothing more than an extended narrative of how the existing program operates with a questionable, conclusory declaration that the requested expansion is not prohibited. Because USCIS has failed to provide the required statutory or regulatory mandate for expanding E-Verify as proposed, OMB has good cause to disapprove the proposal.

II. Congressional Authorization and Appropriation for E-Verify Is Limited to the Current Purpose of the Program: the Initial Electronic Verification of Newly-Hired Employees

As noted above, USCIS must obtain congressional authorization and appropriation for its E-Verify operations each fiscal year. This requires testimony before both immigration

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[7] *See also* IIRIRA §402(c)(2)(A) regarding the scope of an election to participate in E-Verify or one of the other pilot programs authorized by the statute:
IN GENERAL.— Subject to paragraph (3), any 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)—
> (i) To all its **hiring** (and all recruitment and referral) in the State (or States) in which the pilot program is operating…. (emphasis added).

[8] The USCIS E-Verify User Manual explains that Congress authorized the E-Verify program for "newly hired employees." USCIS, M-775, E-Verify User Manual, §1.01 (March 2015). A senior INS and later ICE executive, the late William Odencrantz, had a significant role in the agency's regulatory interpretation of the IRCA employer sanctions provision. He wrote "The regulations begin with a definitional section. It is very helpful in interpreting the rest of the regulations. '**Hire,' for example, means the actual commencement of employment**." Citing 8 CFR §274a.1(c). William Odencrantz, Steven T. Nutter, and Josie M. Gonzalez, *Immigration Reform and Control Act of 1986: Obligations of Employers and Unions*, 10 Berkeley J. Emp. & Lab. L. 92 (1988) (Emphasis added). Available at: http://scholarship.law.berkeley.edu/bjell/vol10/iss1/7 .

[9] Ironically, the Final Nonconfirmation Review program expansion was included in the 2016 USCIS Congressional testimony but has been deleted from the proposed collection revision for further study.

[10] 8 CFR §274a.2(b)(1)(vii).

[11] INA §274A(a)(1)(B); INA §§274A(b)(1) and (2); INA §274A(e)(5).

subcommittees and a specific appropriation of funds. USCIS did not propose to expand E-Verify to include reverification in its current 2016 budget or in its supporting congressional testimony.[12] Additionally, the program expansion was not mentioned in testimony or in budget requests for fiscal years 2014 to 2017.

Moreover, USCIS also failed to mention in the Supporting Statement that Congress is currently limiting E-Verify authorization and appropriation to only one year at a time. The expansion of E-Verify to include reverification of existing employees is not simply a revision and extension of authorization of an existing collection; it is a change in the mission of a congressionally supervised statutory pilot program. The General Accountability Office has provided federal agencies with explicit guidance in this situation: "Except to the extent Congress expressly expands or limits authorized purposes in the appropriation act, the appropriation must be used in accordance with the authorization act in terms of purpose."[13] Thus, USCIS may not expand E-Verify to include reverification without congressional authorization.

III. Amendments to the E-Verify Requirements for Federal Contractors Require FAR Rulemaking.

USCIS cannot unilaterally impose an E-Verify reverification requirement on federal contractors by simply revising the MOU. It must be done through rulemaking under the Federal Acquisition Regulation (FAR).

The FAR requires federal contractors to use E-Verify to verify the employment eligibility of all persons hired during a contract term, as well as current employees who perform work under a federal contract within the United States. The FAR E-Verify regulations were based on the 2008 Executive Order 12989, which directed DOD, GSA and NASA to implement E-Verify through amendments to the FAR E-Verify regulation. The three agencies published a notice of proposed rulemaking and the final rule contained a phase-in period.[14] The final rule amending the FAR sets forth exactly which newly hired and current employees must be confirmed through E-Verify and the specific timeframes for doing so. Additionally, under the FAR final rule, the regulatory E-Verify requirements must be inserted into the performance terms of all federal contracts impacted by the rule requirements.[15]

The reverification proposal would affect FAR contractors in a significant way by requiring reverification of current employees with temporary employment authorization. The PRA revision does not provide adequate notice to FAR contractors of the proposed MOU provisions that would become performance requirements under existing federal contracts or subcontracts. Such changes must be implemented by amending the FAR through the full APA notice and comment rulemaking process. Furthermore, under federal contract law, DHS cannot unilaterally change the terms of existing federal contracts that have already been awarded. Thus, even if the FAR

[12] The Final Nonconfirmation Review program expansion was included in the 2016 USICS Congressional testimony but has been deleted from the proposed collection revision for further study.
[13] GAO, Volume I, Third Edition of the Principles of Federal Appropriations Law at page 2-52 (2004).
[14] 73 Fed. Reg. 67651 (Nov. 14, 2008), amending the Federal Acquisition Regulation (FAR) at 48 CFR Parts 2, 22, and 52; 74 Fed. Reg. 17793 (Apr. 17, 2009); 74 Fed. Reg. 26981 (June 5, 2009).
[15] 48 CFR §§22.1803, 52.222-54.

were properly amended to include the proposed reverification requirement, the change could not be unilaterally imposed on existing contracts.[16]

IV. USCIS Did Not Publish the Complete Proposed Collection of Information as Part of the 60-Day Federal Register Notice

The 60-day Federal Register notice lacked sufficient documentation and information for the public to meaningfully review and comment upon the proposal. In fact, the only example of the proposed expansion of E-Verify to include reverification is the document entitled "E-Verify Screenshots" that was posted in the "regulations.gov" docket on May 23, 2016, thus cutting short the 30-day comment period by three days. In sum, the "E-Verify Screenshots," the only example of the proposal's internet interface, was docketed for only 27 days, rather than 90 days.

The absence of explanatory information and supporting documentation for the proposed revision leaves millions of U.S. employers and stakeholders to question whether the proposal is necessary for the proper functioning of the agency, the accuracy of the agency's cost estimate, and its ultimate burden on responders.

V. USCIS Has Failed to Justify the Imposition of Reverification Burdens on E-Verify Employers

Although the proposal to expand E-Verify to include reverification will impose substantial new burdens and obligations on participating employers, the Supporting Statement provides little policy justification for these new obligations. The agency has only stated that reverification will "align E-Verify with Form I-9" and "logically match[es] the reverification process long-established under the Form I-9 regulations."[17] Though USCIS also calls reverification a fraud prevention tool, reverification of an existing employee for whom identification and authorization documents were previously run through E-Verify is not justified by an anti-fraud rationale, particularly when employers are already required to reverify on Form I-9.[18]

The Supporting Statement is deficient and should not be relied upon by OMB to approve the proposal. It fails to provide any information as to how this proposed change benefits employers using the system or why it is necessary for the proper performance of the functions of the agency

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[16] 5 CFR §1.108(d)(3) (*providing* that contracting officers have the discretion to include FAR changes in existing contracts but only with "appropriate consideration"). Interestingly, this FAR clause and requirement was recognized and cited in the effective date section of the final FAR E-Verify rule and specifically stated that, in certain cases, contracting officers should modify on a bilateral basis certain existing federal contracts to include the E-Verify requirement. To impose the new proposed E-Verify requirement on existing contracts would require similar bilateral negotiations between the relevant agency contracting officers and the contractors holding the specific contracts.

[17] *See* E-Verify Proposal Supporting Statement at 3.

[18] 8 CFR §274a.2(b)(1)(vii). **One (1)** commenter stated that the reverification proposal places an impermissible burden on employers as electronic reverification is unnecessarily duplicative and DHS already statutorily mandates that employers keep records of reverification information

Response: Although employers are required to retain Form I-9 information and produce that information to DHS upon request, that process is less inclusive or efficient, and thus less effective at **preventing document fraud**, than requiring E-Verify employers to electronically reverify expiring temporary work authorization. Accordingly, the agency does not believe that individual employer audits will meet **its fraud deterrence goals** as efficiently and effectively as implementing this reverification functionality in E-Verify. USCIS, Appendix to Supporting Statement at 3f (May 20, 2016). (Emphasis added).

as required under OMB's PRA regulations.[19] The failure to justify the proposed changes deprives the public of the opportunity to meaningfully review and provide comments on the rationale, or lack thereof, for this mission change. The lack of justification is also critical because, as discussed below, the proposed reverification process is not logically matched to the I-9 reverification process as the Supporting Statement claims.

VI. The Notice Underestimates the Burden on Potential Responders

The PRA notice also contains insufficient information to assess whether the agency has planned or allocated resources to efficiently and effectively manage the proposed expansion.

a. The Proposal Would Impose an Impermissible Burden on Employers Because the Same Records and Information are Already Available to the Agency

Since 1987, U.S. employers have been required to verify the identity and employment authorization of employees using Form I-9. This verification process includes reverification of employment authorization documents with an expiration date noted in Section 3 of Form I-9. Under 8 CFR §274a.2(b)(1)(vii), "Reverification on the Form I-9 must occur not later than the date work authorization expires," and "in order to reverify on the Form I-9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization." Under the 1986 IRCA amendments, employers are required to retain I-9s for current employees and present them to designated federal agencies upon 72 hours' notice.[20] Given the existing statutorily mandated verification and reverification recordkeeping requirements, and the fact that DHS has access to those records, an additional electronic reverification requirement is unnecessarily duplicative and an unjustified burden on employers.

b. The Proposal Would Require Employers to Engage in Repetitive Tasks and Recordkeeping

The regulation requires reverification on Form I-9 not later than the date work authorization expires.[21] 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. However, under the proposal, the employer can only update or create a case within a three-day window after the underlying document expires. Thus, the employer who conducts the Form I-9 reverification in advance of the expiration date would also need to electronically reverify the employee when the document expires. This is repetitive, burdensome on the employer, and unnecessary.

OMB has asked USCIS to provide information as to whether employers would be required to collect information more often than quarterly. Current employment authorization rules, such as H-1B portability,[22] H-1B cap gap extensions,[23] the receipt rule,[24] the 240-day rule,[25] TPS

[19] 5 CFR §1320.
[20] 8 CFR §274a.2(b)(2)(ii).
[21] 8 CFR §274a.2(b)(1)(vii).
[22] INA §214(n).
[23] 73 Fed. Reg. 18944–18956 (April 8, 2008).

renewals,[26] and temporary evidence of permanent residence,[27] may require E-Verify information collection more than once in a calendar quarter.

VII. The Reverification Proposal Confuses Rather Than Clarifies Employer Statutory Duties, and Conflicts with the I-9 Reverification Regulation

Under 8 CFR §274a.2(b)(1)(vii), "[r]everification on the Form I-9 must occur not later than the date work authorization expires," and "in order to re-verify on the Form I-9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization." Otherwise, the person may no longer be employed. Under INA §274A(a)(2), "It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Under the plain meaning of the statute, E-Verify employers who follow the proposed three-day reverification procedure rather than the strict expiration date rule of the I-9 reverification regulation could be exposed to liability, in that they would be "continu[ing] to employ" an alien for up to three-days before completing electronic reverification.[28] The proposal does not contain a safe harbor provision from a §274A violation. Moreover, a §274A violation would be sufficient to potentially invoke debarment of a FAR contractor[29] and termination from E-Verify under the terms of the MOU.

FAR §9.046-2(b)(2), implementing President Clinton's 1996 Executive Order 12989, provide for federal contractor and subcontractor debarment, which is the exclusion of "a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period." An employer can be debarred because of a final order for a civil fine for unlawfully hiring or continuing to hire unauthorized workers or engaging in a pattern and practice of knowingly hiring or continuing to employ unauthorized workers. Employers who violate these INA provisions are subject to debarment and placed on an Excluded Parties List System (EPLS), which includes employers who have been debarred as well as those that have been suspended, proposed for debarment, or otherwise declared ineligible from receiving federal contracts.[30] For this reason, the PRA collection revision is inadequate notice to employers, and particularly for FAR contractors for whom the MOU clauses would become performance requirements under their existing federal contracts or subcontracts.[31]

VIII. The Notice Fails to Reasonably Describe the Basis and Methodology for the Agency's Estimate of the Cost to the Government

According to the Supporting Statement:

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[24] 8 CFR §274a.2(b)(1)(vi).
[25] 8 CFR §274a.12(b)(20).
[26] USCIS, Form M-274, Handbook for Employers pp.13-14 (2013).
[27] USCIS, Form M-274, Handbook for Employers p.12 (2013).
[28] 8 CFR §274a.2(b)(1)(vii).
[29] FAR § 9.046-2(b)(2).
[30] Miller, Seid, Stowe, Immigration Compliance Auditing for Lawyers at p.246 (ABA 2011).
[31] Proposed MOU, Article II B (3) p. 7.

14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.

Reverification: The estimated cost to the Government is $61,415. This figure is calculated by:

- Multiplying the total estimated number of Cases 236,214 x $.26"

The Supporting Statement is insufficient in that it fails to reasonably inform the public of, and thus provide a meaningful opportunity to comment on, the basis and methodology for the agency's burden estimate with regard to the cost of the proposal to the government. USCIS has failed to provide a basis for its estimated total number of cases to be reverified (236,214) and the cost per query ($.26).

The annual number of cases to be reverified would be based on data that only USCIS has access to: the percentage of E-Verify employers compared to the total number of employers and employees that apply for extensions of temporary employment authorization. This data has not been supplied to the public in the supporting documentation. Moreover, the total number of reverifications could incrementally increase each year, as employees will need to renew temporary employment authorizations many times throughout their employment. Other temporary authorization transactions, such the receipt rule, will require one or possibly two reverifications in any given year. Nevertheless, there is no methodology or calculation reflecting the case number figure that USCIS has offered. Nor does USCIS explain why the reverification process, which under the proposal could involve either a new case, or the reverification of an existing case, should not have a weighted time cost factor necessitated by the Tentative Nonconfirmation (TNC) and Final Nonconfirmation (FNC) processes. Thus, USCIS's estimate of the burden and cost to the government is inadequate.

Conclusion

For the foregoing reasons, the proposed E-Verify expansion, as described in the notice and supporting documents, would place an unjustifiable burden on E-Verify employers if it were approved by OMB. These inherent deficiencies unreasonably extend the liability of member employers who deserve a well-functioning electronic verification system. Thus, we ask OMB to withhold approval until USCIS seeks and obtains congressional authorization and appropriations for the expansion, as required under the law.

Respectfully Submitted,

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