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Citizenship and Immigration Services Ombudsman

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OBSERVATIONS ON THE E-VERIFY EXPERIENCE IN ARIZONA & RECOMMENDED CUSTOMER SERVICE ENHANCEMENTS

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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

I. EXECUTIVE SUMMARY

E-Verify is an Internet-based program that permits registered employers to verify a new hire's legal ability to work in the United States. This report explores how E-Verify has been received by some public and private sector employers who have been required to use it.

E-Verify is currently offered to employers on a voluntary basis nationwide. However, some states, including Arizona, have enacted legislation mandating the use of E-Verify with varying trigger requirements. In Arizona, all private and public sector employers are required to use E-Verify regardless of the number of workers they employ.[1]

The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman) interviewed a variety of employers in Arizona to gain insights into how E-Verify is working in a universal, mandatory-use environment, and to determine how E-Verify might perform if nationally mandated by immigration reform legislation.

The Ombudsman determined from this study that mid-sized and large employers appear relatively satisfied with the speed and accuracy of E-Verify. Smaller employers, however, expressed varying levels of concern with user-friendliness. Also, confusion remains about the exact timing, and the specific processes, that must be followed by employers and employees after E-Verify returns a Tentative Nonconfirmation (TNC) determination. Apart from these operational observations, the Ombudsman found that USCIS outreach and education efforts have been well received by system users, but may not be reaching smaller sized employers that represent 50 percent of the existing private U.S. payroll.[2]

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[1] The Citizenship and Immigration Services Ombudsman (Ombudsman) selected Arizona as an appropriate venue for study as it became the first state to mandate E-Verify usage state-wide beginning January 1, 2008. *See* "Legal Arizona Workers Act" (HB 2779) enacted July 2, 2007.
[2] Small Business Administration, Office of Advocacy, Frequently Asked Questions (updated Sept. 2008), http://www.sba.gov/advo/stats/sbfaq.pdf (accessed Dec. 8, 2008).

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The Ombudsman also notes that significant E-Verify system enhancements were put into place in May 2008 which eliminated the issuance of TNC determinations on newly naturalized U.S. citizens and newly arrived immigrants. Another important system enhancement was implemented by the Social Security Administration (SSA) on October 1, 2008 to simplify the verification and correction process when TNCs do occur.

Based on observations and analysis of E-Verify, the Ombudsman recommends that USCIS:

1. **Simplify the language used in all E-Verify instructions and supporting documentation.**

2. **Make all registration and operational documents publicly available on-line for review by prospective E-Verify end-users and employees.**

3. **Ensure its education and outreach efforts reach small business communities.**

4. **Develop and add a tickler/calendar system into E-Verify capable of issuing timely system prompts to employers to advise them of their next appropriate course of action for each specific open and unresolved TNC.**

5. **Announce as a stated goal an intention to replace the current Form I-9 process for employers that voluntarily use E-Verify.**

II. BACKGROUND

Legislative History

In 1986, as one component of a broad piece of legislation which provided a legalization process for approximately three million illegal immigrants then present in the United States, Congress included an employment verification requirement in the "Immigration Reform and Control Act of 1986" (IRCA).[3] With the enactment of IRCA, all U.S. employers were required (for the first time) to verify that any newly hired employee is legally authorized to work in the United States, and to maintain proof that they verified the work eligibility of the new hire by completing and maintaining certain records (i.e., I-9 Employment Eligibility Forms). Ten years later, Congress authorized the Immigration and Naturalization Service (legacy INS) to test several pilot projects to augment and enhance efforts to assist enforcement and compliance with this earlier legislation.[4] The final funded pilot, an electronic employment eligibility verification system connected to government databases, first referred to as the "Basic Pilot," was re-branded by USCIS in 2007 as E-Verify.

[3] The "Immigration Reform and Control Act of 1986" (IRCA), also known as the "Simpson-Mazzoli Act," is found at Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. §§ 1324a-d (Nov. 6, 1986).

[4] Authority for the E-Verify program is found in Title IV, Subtitle A of the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, as codified in scattered sections of the U.S. Code (Sept. 30, 1996). Among other things, this legislation required legacy INS and the SSA co-develop and pilot three new employment verification systems for the express purpose of improving IRCA compliance and enforcement. Participation in these programs was made voluntary for the three pilots in 1997.

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E-Verify was developed and remains the product of a partnership between USCIS and SSA. E-Verify presently draws upon information stored in various Department of Homeland Security (DHS) and SSA databases to determine an individual's employment eligibility status. To date, participation in the E-Verify program remains largely voluntary.

Congress appropriated $100 million for continued funding of E-Verify within the DHS' FY 2009 budget, but E-Verify's authorization as a pilot expires on March 6, 2009, absent congressional action.[5]

Current Employer Usage and Operational Statistics

As of December 4, 2008, more than 96,349 employers have registered to use E-Verify.[6] This figure includes voluntary users and those obligated to participate pursuant to state law.[7] It excludes an estimated 168,000 federal contractors and subcontractors that will be added to E-Verify beginning in January 2009 when the final rule amending the existing Federal Acquisition Regulation becomes effective.[8]

E-Verify usage, as measured by the number of inquiries, is likewise substantial. During fiscal year 2008, more than 6.6 million employment verification queries were run by employers.[9]

According to statistics provided to USCIS by Westat (an independent research group), just over 96 percent of E-Verify queries are processed within twenty-four hours as work authorized.[10] For a variety of reasons, the other four percent are not so quickly determinable. Typically, an underlying mismatch exists between the specific employee information entered into E-Verify by the employer and the

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[5] A short extension of E-Verify to move its sunset date from November 29, 2008 to March 6, 2009 was contained within the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009," Pub. L. No 110-329, 122 Stat. 3574 (Sept. 30, 2008).

[6] Data supplied by USCIS to the Ombudsman (Dec. 5, 2008). According to a 2003 U.S. Census Bureau Report on "County Business Patterns," the United States had 7,254,745 business establishments.

[7] Twelve states now mandate usage of E-Verify for public or private employers, or both. The following list identifies those states, the underlying bill number, and the year of enactment: Arizona (HB 2779/2007 -- all public and private employers), Colorado (HB 1343/2006 -- state contractors), Georgia (SB 529/2006 -- state agencies, state contractors, and subcontractors), Idaho (Executive Order/2006 -- state agencies), Minnesota (Executive Order/2008 -- state agencies, state contractors), Mississippi (SB 2988/2008 – all public and private employers), Missouri (HB 1549/2008 -- public employers and specified state contractors), North Carolina (SB 1523/2006 -- state agencies), Oklahoma (HB 1804/2007 -- public employers, state contractors, and subcontractors), Rhode Island (Executive Order/2008 -- state agencies and state contractors), South Carolina (HB 4400/2008 – state and local government employers), and Utah (SB 81/2008 -- public employers). Note that Illinois state law prohibits its employers from using E-Verify until USCIS and SSA can establish that it can make a determination on 99 percent of the Tentative Nonconfirmation notices within three days, but this law has been stayed pending resolution of a DHS initiated suit in U.S. District Court in Illinois.

[8] The estimated number of new federal contractor and subcontractor employers that would be loaded onto the E-Verify system is set forth in the Proposed Rule "FAR Case 2007-013: Employment Eligibility Verification," 73 Fed. Reg. 33374-33381 (June 12, 2008). This proposed rule was made final on publication in the Federal Register on November 14, 2008 (73 Fed. Reg. 67651-67705) and becomes effective on January 15, 2009. With few exceptions, the final rule mandates that all new and existing federal contracts shall contain a provision requiring government contractors (and subcontractors) to use E-Verify to ensure that new hires, and all existing employees who are directly performing federal contract work, are legally authorized to work in the United States.

[9] USCIS Fact Sheet, "USCIS Makes Major Strides During 2008" (Nov. 6, 2008), http://www.uscis.gov/files/article/2008accomFS_3nov08.pdf.

[10] According to "E-Verify Statistics" (Oct. 23, 2008), www.uscis.gov (accessed Dec. 19, 2008). *See also* Westat, "Findings of the Web Basic Pilot Evaluation" (Sept. 2007); Report submitted to the U.S. Department of Homeland Security www.uscis.gov/files/article/WebBasicPilotRptSept2007.pdf; 73 Fed. Reg. 33374-33381 (June 12, 2008).

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employee information stored in a SSA or DHS database. According to Westat, E-Verify has a 99.5 percent accuracy rate for correctly confirming work eligible employees.[11] Also, examination and testing of the E-Verify technology and infrastructure conducted by USCIS in July 2007 suggests that E-Verify is capable of accommodating up to 45,500 new employer registrations daily, and as many as 240 million employee specific inquiries annually, rendering it sufficiently robust for all projected near and mid-term usage scenarios.[12]

E-Verify Process Overview

Employers must first complete an E-Verify registration process. This registration process includes the execution of a memorandum of understanding, and the taking of a required on-line tutorial. As required of all employers who employ three or more employees, registered E-Verify employers must obtain an I-9 from newly hired employees within three days of their actual start date.[13] The same timing requirement holds true for running the E-Verify electronic check.[14] The employer begins this check by entering the specific employee's personal data (name, date of birth, gender, social security number), and immigration status (for example, U.S. citizen/lawful permanent resident/work authorized nonimmigrant) into E-Verify. In most cases, E-Verify will return one of the following system responses:

1. Employment Authorized
2. SSA Tentative Nonconfirmation
3. DHS Tentative Nonconfirmation
4. DHS Verification in Process
5. DHS Case in Continuance

If the employer receives an "Employment Authorized" response, that response will be displayed along with a photo of the employee (assuming a photo is available).[15] If the photo identification presented by the employee matches the photo displayed by E-Verify's photo tool, the employer may close out the verification case. If the photo does not match, further action, including sending to USCIS a copy of the photo identification document which was provided by the employee, is required.

If the employer receives a TNC from E-Verify, the employer is expected to print and provide to the employee an E-Verify generated "Notice to Employee of Tentative Nonconfirmation." The employer is to review that notification with the employee, and the employee must then decide whether or not to contest the TNC. If the employee does not contest the determination, the employer is expected to immediately terminate the employee, and to indicate this conclusion within E-Verify.

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[11] U.S. House Judiciary Committee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing on "Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse" (June 10, 2008) (testimony of Jonathan "Jock" Scharfen, former USCIS Acting Director).
[12] "Employment Verification: Challenges Exist In Implementing A Mandatory Electronic Employment Verification System," GAO-08-729T, p. 10 (May 6, 2008).
[13] 8 C.F.R. § 274a.2(b)(1)(iii) (2007).
[14] IIRIRA § 403(a)(3)(A).
[15] The E-Verify "photo tool" does not deliver a photo for every Employment Authorized response. Currently, it provides a DHS stored photo of foreign nationals who are issued Employment Authorization Documents (Form I-766) and those who are Lawful Permanent Residents (LPRs, are informally referred to as "green card" holders). DHS is in the process of completing or implementing information sharing agreements with other federal and state government entities to increase the number of secure photo identification documents that may be available for use in the E-Verify photo tool.

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Alternatively, if the employee chooses to contest the TNC, the employer is expected to print out and provide the employee a "Referral" notification which instructs the employee to make contact with either USCIS or SSA to resolve the existing work eligibility discrepancy within eight federal government working days. In many cases, including most cases involving U.S. citizens and lawful permanent residents, the employee will be given the option of resolving the mismatch discrepancy over the phone by contacting USCIS via a toll-free number. Some individuals, however, must visit a SSA field office to resolve a SSA TNC determination.

After the contesting employee visits SSA or contacts USCIS by phone, the applicable agency will provide a final work authorization determination within two business days. The employer is therefore expected to make a second E-Verify query on the employee ten business days after issuance of the Referral notification. By then, in most cases, a final E-Verify determination will have been made. If the employee was found work eligible, E-Verify will display an "Employment Authorized" result; if not, a Final Nonconfirmation (FNC) will issue. In a small percentage of cases, the DHS verification process exceeds ten days. In such cases, the querying employer will receive a "DHS Case in Continuance" message from E-Verify to signify that the query remains under active consideration. The employer must check E-Verify a third time for such employees.

Importantly, employers and employees both are warned that an initial TNC determination must not be misinterpreted as a definitive determination that the queried employee is in the United States unlawfully or is otherwise not work authorized. Employers are prohibited from terminating the employee (due to the TNC) or changing the terms or conditions of his/her employment during this contest period.[16] An E-Verify-based employee termination may only occur after the issuance of a FNC, or the employee abandons the resolution process.

Arizona Survey

Effective January 1, 2008, all public and private Arizona employers were required to use E-Verify to determine the employment eligibility of newly hired employees pursuant to Arizona state law. The Ombudsman visited Arizona to see what lessons might be learned if E-Verify were mandated for all employers nationwide. The Ombudsman met with a variety of professional advisors and business entities in Arizona, including large and small chambers of commerce. Industry groups represented in these meetings included: high tech, Internet service providers, retail, hospitality, legal, real estate, construction, landscaping, fast food, agriculture, big box stores, health care, and employee staffing and payroll companies.[17]

E-Verify/SSA Interface

The concern most frequently identified by Arizona employers with E-Verify is that TNCs are sometimes issued on work-authorized individuals. According to USCIS, this happens in less than 0.4 percent of the

[16] IIRIRA § 403(a)(4)(B)(iii).
[17] The Ombudsman also met with officials from the State of Arizona Department of Administration to learn from their experience with implementing E-Verify as a governmental entity. Additionally, the Ombudsman met with officials from the National Association of Foreign Student Advisors to obtain their comments and unique perspectives on E-Verify as many foreign students obtain approved work permission during and/or after the completion of their academic programs. During this study the Ombudsman also met several times with USCIS E-Verify managers and employees, as well as various managers and individuals at SSA and Immigration and Customs Enforcement (ICE).

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total number of queries run.[18] Both USCIS and SSA are proactively working to reduce this occurrence rate**.**

Systemically, E-Verify is designed to query SSA's database if the employee claims to be a U.S citizen or a lawful permanent resident. For all others workers, E-Verify queries one or more DHS databases. The SSA Office of the Inspector General found that the SSA database has an approximate plus or minus 4 percent error rate.[19] This error rate could result from a misspelled name, an unreported name-change, an incorrectly recorded date of birth, or gender error. Regardless, any such underlying defect could be the basis of a SSA generated TNC due to a mismatch with the employee-data entered into E-Verify, and data stored in SSA's database. When this occurs, the employee must visit a SSA office to correct and/or to update their personal identifying data. Once the SSA database is corrected/updated, the employee should not be issued another TNC absent, for example, a data entry problem or a subsequent unreported name change.

To reduce TNCs that are caused by mechanical data entry error, in September 2008, USCIS instituted a pre-mismatch typographical error check routine within the E-Verify process that prompts employers to double-check the information they entered against the documents presented by the employee. Preliminary data indicate that this enhancement reduces SSA mismatches by as much as 30 percent.[20]

To simplify the TNC resolution process, on October 1, 2008, SSA implemented a system enhancement to "EV-Star," its electronic interface with E-Verify. The system upgrade will instantaneously report in real time a correction of the mismatched personal identifying information causing the TNC, and in effect, proactively push a corrected E-Verify response back converting the prior TNC determination to an "Employment Authorized" determination. The EV-Star upgrade addresses a concern that E-Verify did not immediately capture corrections made in the SSA database. This system enhancement will dramatically improve the E-Verify user experience.

Individual Employee Customer Service

Employers in Arizona indicated that some employees (especially younger ones) are intimidated when they receive a TNC notice, which looks to them like a formal legal document. As USCIS continues to review and refine the TNC process, and engages in outreach activities to educate employers on E-Verify best practices, the Ombudsman encourages USCIS to approach E-Verify from a multi-dimensional standpoint: to consider not just what works operationally or what is customer-friendly viewed from an employer-user standpoint, but to also consider how its processes and documents can be structured to reduce employee apprehension and anxiety.

Fraud Prevention

Submissions for the record in several congressional hearings indicated concern that E-Verify is susceptible to identity fraud. The Ombudsman heard similar concerns during the Arizona survey. As USCIS designs and develops new programs and system protocols, it should do so in a manner that aligns with a parallel goal of reducing opportunities for identity fraud. The E-Verify photo tool (which USCIS

[18] January through March, 2008, data supplied by USCIS to the Ombudsman (Nov. 14. 2008).
[19] "Accuracy of the Social Security Administration's Numident File," A-08-06-26100 (Dec. 2006), http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf.
[20] *Id.*

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installed in 2007) is a fraud inhibitor, but at present, is limited to LPRs and to certain nonimmigrants who are issued a USCIS Employment Authorization Document.

The Ombudsman notes that with the cooperation and assistance of the Department of State, additional identity photos could be made available for display through E-Verify in 2009, including U.S. passport photos, as well as certain nonimmigrant visa photos. The Ombudsman also understands that USCIS is examining how it may add photographs supplied by motor vehicle records departments around the nation.[21]

The Ombudsman is also aware that USCIS is currently developing a protocol that will register and lock the identity of employees who have been victims of identity fraud outside the E-Verify process. The Ombudsman further understands that USCIS is evaluating how it might integrate biometric technology into future iterations of E-Verify.

III. ANALYSIS

The CIS Ombudsman makes the following recommendations to USCIS:

1. Develop Simplified Customer Friendly Documents. Numerous employers noted to the Ombudsman that the language used in E-Verify documents[22] were confusing or contained difficult legal terminology that may not be readily understood by all users. Consistent with its initiatives to promote Plain Language, USCIS should review and revise the language and layout of publicly disseminated documents to eliminate unnecessary complexity. The Ombudsman further suggests that USCIS consider using focus groups to assist in this redrafting effort.

For these reasons, the Ombudsman recommends that USCIS simplify the language used in all E-Verify instructions and supporting documentation.

2. Increase Transparency. Since the Ombudsman visited Arizona in July, USCIS has placed a number of E-Verify documents on the Internet for public viewing. However, there still are several documents, including the E-Verify tutorial, that are not available for review until after formal registration with E-Verify, which was a cause of complaint for some Arizona employers. Public posting of E-Verify documents and processes would enhance the understanding of employers and employees alike.

For these reasons, the Ombudsman recommends that USCIS make all registration and operational documents publicly available on-line for review by prospective E-Verify end-users and employees.

3. Expand Educational Outreach. Numerous small employers and chambers of commerce advised the Ombudsman that USCIS is not effectively reaching small employers with its existing education and outreach. Historically, USCIS has targeted its E-Verify outreach efforts to larger employers and organizations. However, large employers are normally well informed of such matters through their

[21] "Employment Verification: Challenges Exist In Implementing A Mandatory Electronic Employment Verification System," GAO-08-729T, pp. 15-17 (May 6, 2008).
[22] For example, USCIS should review its memorandums of understanding, contest and referral notifications, user manuals, the E-Verify tutorial, and the E-Verify computer user interface.

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membership in various chambers of commerce and/or industry specific associations. These employers may also receive timely and accurate legal information and assistance through counsel or in-house human resource managers. The same cannot be said of smaller employers, many of which do not belong to chambers of commerce or industry associations, and frequently do not engage counsel.

For these reasons, the Ombudsman recommends that USCIS ensure its education and outreach efforts reach small business communities.

4. **Develop A Tickler System Upgrade.** Some E-Verify users reported to the Ombudsman that they have difficulty keeping track of the various time-based actions that the employee and employer must follow as they enter and proceed through the E-Verify system.

   Specifically, when an employee contests a TNC determination, an eight federal work day count begins for the employee to initiate contact with either DHS or SSA to resolve the work eligibility discrepancy. In this situation, and others, employers must track multiple open, unresolved, E-Verify cases, and must timely re-enter E-Verify to take one or more additional steps within specified time-frames.

   E-Verify does not prompt an employer to take action when one of the unresolved employee cases has been updated. For those employers that lack a dedicated personnel manager and/or sophisticated human resource software to aid them in keeping track of multiple employees as they move through the E-Verify process, this tracking requirement represents a new responsibility.[23] As it continues to focus its efforts on customer service, and to encourage more employers to use E-Verify, USCIS should address this issue.

   For these reasons, the Ombudsman recommends that USCIS develop and add a tickler/calendar system into E-Verify capable of issuing timely system prompts to employers to advise them of their next appropriate course of action for each specific open and unresolved TNC.[24]

5. **Develop An Interactive I-9 Employment Eligibility Process.** The Form I-9 process was created as part of the mandatory compliance and enforcement regime enacted in IRCA in 1986. In conducting this review, many employers wondered why E-Verify does not replace the existing legal requirement for employers to complete a Form I-9 for their newly hired employees. Some employers logically, but wrongly, believe that because they are using E-Verify they no longer must conduct a separate I-9 process for new hires.

   USCIS may encourage more employers to voluntarily register for E-Verify if it rewarded them with relief from the standard requirement to perform a separate paper-based I-9 process. Taking into account both law and technology, several private vendors currently offer employers an online fee-for-service system that provides a one-step data collection process that satisfies I-9 requirements,

[23] Note however, in the "View cases" section of E-Verify, one can pull cases that are pending action, in process, or resolved, or all open cases. E-Verify does not now alert people outside of the system of any status changes, and will only provide cases' status if the user logs on and affirmatively initiates a query.
[24] In a teleconference with the USCIS Verification Division, the Ombudsman was advised that a tickler system is operationally possible (Oct. 23, 2008).

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and in the background, can seamlessly run an E-Verify query. The Ombudsman acknowledges that DHS' Immigration and Customs Enforcement (ICE) finds it useful in enforcement actions to have access and reference to paper-based I-9s which contain handwritten signatures corresponding to certain compliance attestations. Notwithstanding, ICE itself authorized the use of electronic signatures for I-9 purposes in 2006.[25] USCIS should develop a strategy in coordination with ICE to replace Form I-9 with E-Verify.

For these reasons, the Ombudsman recommends that USCIS announce as a stated goal an intention to replace the current Form I-9 process for employers that voluntarily use E-Verify.

V. CONCLUSION

The Ombudsman believes that the lessons learned from our survey of Arizona employers likely represent the concerns of employers nationwide.

USCIS has been both creative and progressive in working with SSA and other governmental agencies to enhance E-Verify's utility and the E-Verify user experience. The Ombudsman believes the five specific recommendations included in this study merit immediate consideration and adoption.

[25] *See* "To Amend Section 274A of the Immigration and Nationality Act to Improve the Process for Verifying an Individual's Eligibility for Employment," Pub. L. No. 108-390, 118 Stat. 2242 (Oct. 30, 2004) and "Electronic Signature and Storage of Form I-9, Employment Eligibility Verification," 71 Fed. Reg. 34510-35417, 34513 (June 15, 2006), which states "[e]lectronic signatures can be accomplished using various technologies including, but not limited to, electronic signature pads, Personal Identification Numbers (PIN), biometrics, and "click to accept" dialog boxes." (Emphasis added). *See also* 8 CFR § 274a.2(a)(2) (2007).

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