

**NLWJC - Kagan**

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**Immigration - I - 9**

**Verification**

▶ Julie A. Fernandes  
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To: Elena Kagan/OPD/EOP  
cc: Laura Emmett/WHO/EOP  
Subject: I-9 MOU

The Department of Labor and INS have finished work on the I-9 MOU. The significant part of this agreement is that the DOL will only inspect employer compliance with verification requirements in "directed" investigations (i.e., cases that do not arise from a complaint alleging violations of labor standards). The goal of this agreement is to avoid chilling the reporting of worksite wage/hour violations by workers who fear the INS.

Maria has pressed the DOL and INS to complete this by C.O.B. tomorrow. According to INS, they and DOL have not decided whether they want to invite press to witness the signing or whether they would prefer to execute the agreement privately and issue a press release.

I am faxing you a copy of the MOU (very close to final, except for minor editing). Please let me know if you have a view re: the roll-out.

julie

Immig - I9 verification

**DRAFT 10/8/98**  
**Rev. 10/26/98**

**MEMORANDUM OF UNDERSTANDING**

**Between the**

**Immigration and Naturalization Service**

**Department of Justice**

**and the**

**Employment Standards Administration**

**Department of Labor**

**November 18, 1998**

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**MEMORANDUM OF UNDERSTANDING**  
**Between the**  
**Immigration and Naturalization Service**  
**Department of Justice**  
**and the**  
**Employment Standards Administration**  
**Department of Labor**

**I. Purpose**

The purposes of this Memorandum of Understanding (MOU) are to:

- foster appropriate cooperation and coordination between the Immigration and Naturalization Service (INS) of the Department of Justice (DOJ) and the Employment Standards Administration (ESA) of the Department of Labor (DOL), and
- enhance worksite enforcement of employer sanctions and labor standards in order to reduce the employment of unauthorized workers in the U.S. and promote employment opportunities for and the interests of authorized U.S. workers.

To this end, this MOU is intended to clarify the enforcement roles and responsibilities of each agency in areas of shared authority, ensure more efficient use of resources, reduce duplication of effort, and improve communication and appropriate coordination between the agencies.

This MOU affects the following INS and ESA enforcement and compliance components:

- **INS:** Investigations Division  
Office of Business Liaison  
Border Patrol
- **ESA:** Wage and Hour Division (WH)  
Office of Federal Contract Compliance Programs (OFCCP)

Where investigative and enforcement jurisdiction is shared between the signatory agencies, both shall work cooperatively and, in appropriate circumstances, plan and undertake coordinated or joint activities. The Federal statutes and Executive Orders provided for in this agreement include, but are not limited to, the following:

- Immigration and Nationality Act, as amended [Title 8 of the United States Code, Section 1101 et seq., specifically 8 U.S.C. Section 1324a] (INS and ESA)
- Title 18 of the United States Code, Sections 911, 1001, 1015, 1028, 1426, and 1546 (INS)
- Executive Order 12989 (INS)
- Fair Labor Standards Act (ESA)
- Family and Medical Leave Act (ESA)
- Migrant and Seasonal Agricultural Worker Protection Act (ESA)
- Davis-Bacon and Related Acts (ESA)
- McNamara-O'Hara Service Contracts Act (ESA)
- Employee Polygraph Protection Act (ESA)
- Executive Order 11246, as amended (ESA)
- Section 503 of the Rehabilitation Act of 1973, as amended (ESA)
- Vietnam Era Veterans Readjustment Assistance Act of 1974 (ESA)

District Directors for the signatory agencies shall identify areas of mutual local enforcement interest and, in appropriate circumstances consistent with this MOU, plan and develop coordinated or joint actions.

## II. Goals

The goals of this MOU are to:

- reduce the employment of unauthorized workers in the U.S. and the consequential adverse effects on the job opportunities, wages and working conditions of authorized U.S. workers by increasing employers' compliance with their employment eligibility verification obligations;
- reduce the economic incentives for the employment of unauthorized workers and the consequential adverse effects on the job opportunities, wages and working conditions of authorized U.S. workers by increasing employers' compliance with minimum labor standards;
- avoid the victimization of unauthorized workers employed in the U.S. by employers which may seek to use the enforcement powers of the signatory

agencies to intimidate or punish these workers; and,

- promote employment opportunities for authorized U.S. workers and improvements in their wages, benefits, and working conditions.

### III. Background

Historically, INS and ESA have maintained working relationships in areas of mutual law enforcement interest. Immigration reform legislation over the last decade has significantly expanded and intensified this interaction.

The U.S. continues to face a serious problem of illegal migration as unauthorized workers are drawn to and remain in the U.S. workplace. Deterring illegal migration and overstaying of authorized periods of admission or employment in the U.S. must include reducing the magnet of employment opportunities through worksite enforcement of both immigration laws and labor standards. As an essential part of his efforts to reduce illegal immigration, President Clinton directed INS and DOL to establish complementary strategies to increase and improve worksite enforcement. The President's directive requires INS and ESA to enhance their existing relationships to facilitate identifying high risk industries and metropolitan zones of deterrence for coordinated enforcement. In addition, information will be shared, as appropriate, when industries or occupational settings are identified in which visa overstayers who are not authorized to work are a common problem.

INS has primary responsibility for enforcing Section 274A of the Immigration and Nationality Act (INA), the provisions commonly referred to as "employer sanctions." These provisions are an integral part of the INS enforcement mission, expanding and supporting the complementary goal of securing our borders as illegal aliens are often lured to the U.S. by promises or prospects of employment. Many migrants fall into the hands of ruthless and exploitative criminal alien smuggling operations and abusive employers who intentionally violate the law by knowingly employing unauthorized aliens and subjecting their employees to substandard wages and working conditions.

Vigorous enforcement of our immigration laws can deter violations of labor standards by preventing the employment of unauthorized workers whose willingness to accept sub-standard wages and working conditions artificially suppresses wages, leads to the degradation of overall conditions in the workplace, and deprives authorized U.S. workers of decent job opportunities. Thus, by targeting employers in industries and locations with a history of reliance on

unauthorized labor, worksite enforcement initiatives can manifestly increase deterrence of unauthorized alien employment, remove unauthorized workers from the workplace, disrupt alien smuggling and harboring operations, and make decent jobs available for authorized workers.

The INA provides DOL a role in the enforcement of employer sanctions. However, ESA's primary responsibility is the enforcement of labor standards statutes with the goal of ensuring that all covered workers - irrespective of their immigration status - are afforded the full benefits and protections of our labor laws. Vigorous targeted enforcement of labor standards can serve as a meaningful deterrent to illegal immigration by denying some of the business advantages that may be gained through the employment of highly vulnerable and exploitable workers at sub-standard wages and working conditions. Labor law enforcement not only helps ensure fairness and acceptable workplace standards, but also helps foster a level competitive playing field for employers who seek to comply with the law. Consequently - consistent with its primary labor standards compliance mission - in carrying out this MOU, the ESA agencies will take no action which will compromise their ability to carry out the fundamental worker protection mission. Likewise, INS will take no action which will compromise its ability to effectively carry out its primary mission of immigration law enforcement.

INS and ESA have historically sought to identify appropriate circumstances warranting efforts to coordinate worksite enforcement activities in order to achieve a legal workforce that enjoys the full range of employment standards protections available under law and Executive Order.

#### IV. Implementation

##### A. National Procedures

###### Liaison

The Headquarters enforcement/compliance components of INS and ESA shall maintain liaison concerning matters of mutual interest and jurisdiction, and shall actively seek to improve communication at all levels of the organizations. Information sharing at the Headquarters level of each agency will include cooperation and coordination in the development of policies, procedures, regulations, enforcement priorities and approaches, training materials, and activity reports.

In order to implement this MOU, INS and ESA agree to exchange, periodically update, and disseminate to all their field offices information concerning office locations and jurisdictional areas of responsibility of their respective operational field units.

INS shall provide to ESA sufficient quantities of the Handbook for Employers (M-274) for distribution to all employers inspected by ESA investigators.

### Policy and Procedures

INS has primary responsibility for employer sanctions enforcement, including assessing civil penalties and initiating legal proceedings under Section 274A of the INA. In addition, INS has responsibility for promulgating employer sanctions program policy. Because of possible resource implications, INS will advise and consult with ESA regarding any significant proposed changes in the employer sanctions program policy which may affect ESA activities or policies and, as changes are implemented, the two agencies will coordinate to modify their implementing procedures accordingly.

INS and ESA will work to develop criteria and procedures for referral of suspected violations. Such referrals will be subject to appropriate tracking and follow-up by the respective agencies.

The agencies will develop and implement policies – consistent with INS Operations Instruction 287.3a – to avoid inappropriate worksite interventions where it is known or suspected that a labor dispute is occurring and the intervention may or may be sought so as to interfere in the dispute. The agencies will develop and implement policies concerning circumstances when it is known (or appears) to INS that a labor dispute is occurring and an INS law enforcement action may be appropriate at the worksite. ✓  
✓  
✓

### Information Exchange

INS and ESA will promote the exchange of information and interaction among their respective field offices so as to avoid any extensive reporting burden on either field staff. INS and ESA shall continue to examine the possibility of mutual access to any automated information systems, where such systems relate to the enforcement of statutes of shared jurisdiction. ESA and INS will exchange periodic reports of employer sanctions enforcement activities, including data on employer compliance.

Effective inter-agency communication has been essential to the agencies' relationship; this MOU reinforces the importance of communication and information exchange. INS and ESA representatives will continue to meet regularly at both the Headquarters and field levels to identify appropriate circumstances and explore avenues for coordinated and joint enforcement efforts. Refinements in enforcement strategies will be shared between the agencies on a periodic basis. Coordinated enforcement will seek to maximize the effective use of limited resources while having the greatest impact on employers who violate immigration and labor laws. In this regard, INS will share available information with ESA that will help identify areas and industries where visa overstayers who may not be authorized to work are frequently employed.

### Training

INS shall assist ESA in revising and delivering employment eligibility verification training. Staff in local ESA offices will assist INS in training INS officers to identify suspected violations of labor standards under the jurisdiction of ESA, as determined to be appropriate. Training materials and checklists for determining possible labor standards violations (possibly including "self-audit" tools to be provided to employers subject to worksite enforcement interventions) will be prepared by ESA and supplied to INS.

### B. Field Procedures

#### Liaison

Field level liaison between INS and ESA is principally the responsibility of the INS District Directors/Chief Patrol Agents (or designees) and the District Directors of the appropriate ESA offices (or designees). The District Directors of both agencies will identify a point-of-contact within their respective offices who will be responsible for liaison and coordination on all information exchange and enforcement initiatives at the local level.

An important goal of this liaison is the free flow of information between the agencies and the effective utilization of such information. The points-of-contact for ESA shall be responsible for ensuring that information is furnished to INS in a timely manner and that it conforms to prescribed criteria. The points-of contact for INS shall likewise be responsible for ensuring that information is furnished to ESA in a timely manner and that it conforms to prescribed criteria. Further, the INS point-of-contact shall be responsible for ensuring that information received from

ESA is promptly reviewed, acted upon appropriately, and that timely feedback on referrals on which INS has taken action finding non-compliance and follow-up results is provided to their ESA counterparts.

When INS receives a request from ESA to review INS records or to interview an individual in INS custody, it will make every effort to comply promptly with that request, to the extent permitted by law, upon presentation of proper credentials by the ESA investigator. When ESA receives a request from INS to review ESA records, it will make every effort to comply promptly with that request, to the extent permitted by law, upon presentation of proper credentials by the INS officer. The agency making the request will expeditiously follow through on any records review or interview requested so as not to unduly interfere with law enforcement activities.

INS and ESA field personnel shall cooperate in identifying appropriate opportunities to coordinate enforcement activities, and - to the extent that resources permit - shall conduct coordinated or joint investigations where appropriate, with each agency pursuing violations within its own jurisdiction. In those circumstances where joint efforts are not appropriate or possible, the agency conducting the investigation/inspection will provide the employer subject of the intervention with compliance information to facilitate any future contact by the non-participating agency.

### ESA Enforcement

In the course of all on-site activities at employers' facilities and where appropriate in technical assistance activities with employer/employee groups, ESA staff will advise employers about their employment eligibility verification and anti-discrimination responsibilities and distribute copies of the Handbook for Employers: Instructions for Completing Form I-9 (Employment Eligibility Verification Form) [INS publication M-274] and available informational material on the anti-discrimination provisions from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Distribution of the Handbook for Employers shall be documented on any ESA-91 referral.

Investigators of ESA's Wage and Hour Division (WH) and Office of Federal Contract Compliance Programs (OFCCP) shall conduct thorough inspections of employers' compliance with their employment eligibility verification obligations (Forms I-9) in conjunction with ESA's labor standards enforcement, except in any investigation based on a complaint alleging labor standards violations. (The

limitation to conduct employment eligibility verification inspections only in "directed" – i.e., non-complaint cases – is intended and will be implemented so as to avoid discouraging complaints from unauthorized workers who may be victims of labor standards violations by their employer.) This employment eligibility verification compliance inspection by ESA investigators shall not involve making any inquiry regarding the immigration status of workers, nor shall the conduct of an employment eligibility verification inspection be the basis for ESA on-site investigation.

At the conclusion of the employment eligibility verification inspection and generally before the completion of the investigation or review, ESA investigators will advise employers of their findings regarding the employment eligibility verification (I-9) inspection. In cases where it appears that violations uncovered are serious – such as no I-9's or refusal to provide I-9's, previous warning notice issued or an indication of fraudulent documents – the ESA I-9 inspection (but not the labor standards compliance investigation of which it is a part) shall be terminated without close-out with the employer, INS contacted by telephone and the ESA-91 referral form prepared and forwarded to INS as soon as possible.

ESA investigators will not issue warning notices or Notices of Intent to Fine to employers which are found to be violating their employment eligibility verification obligations.

#### Referrals to INS

ESA will be responsible for the prompt referral to INS of all suspected serious violations that are uncovered through its directed investigations. "Serious" violations include: ✓

- evidence of fraud, especially in instances where admissions (rather than allegations) are made that fraudulent documents were used to obtain employment or where the employer knew about or assisted in obtaining fraudulent documents; ✓
- where I-9 forms are not regularly maintained by the employer;
- violations of the provisions against knowingly hiring or continuing to employ unauthorized workers (though DOL investigators will make no inquiry regarding workers' immigration status); ✓

- violations of the prohibition against indemnity bonds;
- where the employer refuses to provide the necessary documents for review (subject, as appropriate to the circumstances, to the existing regulation's three-day notice provision); or, ✓
- it is known that a warning notice or Notice of Intent to Fine has previously been issued by INS.

ESA-91 referral forms will be forwarded to INS field offices by ESA for suspected serious violations as quickly as possible. These ESA-91 forms shall specify the kinds of violations disclosed, identify a point-of-contact at ESA, and include a brief but substantive narrative containing any information and/or supporting documentation which may be available. ESA-91 forms from inspections that reveal less serious paperwork violations based on jointly established criteria will be furnished on a timely basis. ESA-91 forms from inspections which indicate employer compliance will be forwarded to INS only on request.

In order to promote more effective coordination, INS Headquarters will provide a database quarterly indicating the disposition of INS employer sanctions cases, including (and indicating) those which were based on ESA-91 referrals, indicating the results of those cases. This report will be provided to ESA Headquarters.

The Immigration Officer's Field Manual for Employer Sanctions will emphasize that ESA-91's are a primary source of credible information for predicating employer inspections and/or investigations. INS field offices will utilize this source of lead information effectively, as described above, and will provide feedback to the point-of-contact in the appropriate local ESA office of the action taken as a result of information furnished by ESA. If INS declines to follow-up a case in which ESA suspects a serious violation has occurred, INS will advise the appropriate ESA field office of the basis for that decision.

### Referrals to ESA

ESA District Directors and their INS counterparts will work together to develop protocols (and training) for INS officers to make inquiries during the course of their worksite enforcement activities that are intended to elicit information which would indicate the occurrence of possible labor standards violations at the workplace. When INS obtains or receives information during the course of its worksite enforcement activities which indicates a possible violation of statutes within the

jurisdiction of DOL, the INS shall expeditiously notify the District Director of the appropriate ESA field office covering the area in which the suspected violation occurred. Such notification may be in the form of telephone communication or via timely transmission of copies of INS records prepared in the course of its enforcement operations.

In order to promote more effective coordination, ESA Headquarters will prepare quarterly reports (down to the District Office level) indicating the disposition of labor standards enforcement activities initiated pursuant to INS referrals which resulted in significant findings of violations or monetary recovery for workers.

### Deportation

In certain situations, WH may ask INS to delay deportation of undocumented workers who are cooperating in the development of a case or are otherwise necessary for its prosecution. Criteria will be developed for WH to make such requests and for INS to grant them as may be appropriate.

### Employment Opportunities for Legal Workers

In addition to reducing the magnet of jobs for illegal migration, it is desirable that employers be encouraged to identify and use opportunities to maintain a legal work force. The agencies recognize this goal, and accord it a high priority for both agencies.

In circumstances where INS removes unauthorized workers from the workplace, every effort will be made to ensure that these workers are not deprived of appropriate compensation for the work performed, thereby affording an economic benefit to the employer from the employment of unauthorized workers. This will be accomplished by INS notifying the designated Wage and Hour point-of-contact of the circumstances of the employment so that if the workers are not paid (or appear not to have been properly paid) by the employer, appropriate enforcement and collection activities by DOL can commence.

In addition, INS will make reasonable efforts to help assure that in such circumstances, persons legally authorized to work have the opportunity to gain employment. To do so, INS will refer employers which have been found to employ unauthorized workers to a designated point-of-contact in DOL which will coordinate with local sources of legal workers. The DOL point-of-contact will ensure that the U.S. Employment Service (USES) State Department of Labor job service agencies,

which are funded by DOL, various private organizations, and the local OFCCP officere are informed of job opportunities for authorized workers. OFCCP will contact the employer to facilitate the linkage to additional sources of available legal workers. .  
ESA will work with the USES to develop an appropriate reporting mechanism to track the number of authorized workers referred and gaining employment pursuant to INS contact.

### Referrals to OSC/Immigration-Related Discrimination

ESA and INS officers shall each be responsible for directly referring indications or allegations of discrimination violations under Section 274B of the INA to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

### V. Agreement

The provisions of this Memorandum of Understanding cancel and supersede all previous MOUs and become effective on the date of signature. The provisions may be reviewed and jointly modified or eliminated, as appropriate, if it is determined by either agency that such review and modification or elimination is in the interest of effectively and efficiently enforcing the laws under the agencies' respective jurisdictions.

The preceding constitutes the full Memorandum of Understanding on this subject between the Department of Justice, Immigration and Naturalization Service, and the Department of Labor, Employment Standards Administration.

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Doris Meissner  
Commissioner  
Immigration and  
Naturalization Service

Date: \_\_\_\_\_

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Bernard Anderson  
Assistant Secretary  
Employment Standards  
Administration

Date: \_\_\_\_\_

Immig - I9 verification

▶ **Julie A. Fernandes**  
09/04/98 01:26:20 PM  
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Record Type: Record

To: Maria Echaveste/WHO/EOP, Elena Kagan/OPD/EOP  
cc: Marjorie Tarmey/WHO/EOP, Laura Emmett/WHO/EOP  
Subject: I-9 verification -- DOL/INS

Maria/Elena:

I met with Bob Bach and John Fraser today to discuss next steps in developing a revised MOU between INS and DOL re: I-9 inspections. John F. is going to draft a revised MOU that limits DOL's I-9 inspections to non-complaint cases (so-called "directed" cases). The idea, as you know, is for labor complaints from workers not to serve as the trigger for an I-9 inspection. This MOU will also give the DOL concurrent authority (with INS) to sanction employers for failing to adequately fill out I-9 forms. John hopes to get us a draft by the end of next week.

julie