



October 17, 2022

Ms. Sharon Hageman
Deputy Assistant Director
Office of Regulatory Affairs and Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Via electronic submission: www.regulations.gov

**Re: Optional Alternatives to the Physical Document Examination Associated with
Employment Eligibility Verification (Form I-9)
87 Fed. Reg. 50,786 (August 18, 2022)
DHS Docket No. ICEB 2021-0010**

Dear Deputy Assistant Director Hageman:

The U.S. Chamber of Commerce (“the Chamber”) welcomes the opportunity to comment on the notice of proposed rulemaking (“NPRM”) entitled “Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9).” The Chamber strongly supports effort to modernize the employment verification process, as evidenced by our [comments](#) on this issue in response to last year’s Request for Information on this topic from U.S. Citizenship and Immigration Services (“USCIS”). We are eager to work with U.S. Immigration and Customs Enforcement (“ICE”) and the Department of Homeland Security (“DHS”) as they seek to implement more efficient methods for performing their employment verification obligations under the Immigration and Nationality Act (“INA”).

The Chamber received considerable feedback from companies of all sizes and across a host of industries regarding this NPRM. There is significant support for DHS to provide businesses with a permanent option to virtually verify the work authorized status of its employees in the U.S. At the same time, several companies expressed apprehension regarding the potential for this rulemaking to devise new but temporary measures to virtually verify the work authorization status of employees. The overarching reason for such trepidation is that companies believe that creating new temporary measures will not provide the incentives necessary for businesses to utilize these alternative procedures. It is the Chamber’s view that DHS possesses the

statutory authority to create permanent alternatives to the physical document inspection under the I-9 employment verification process and we urge the Department to pursue the implementation of such a policy.

For businesses, the most critical element in new policies targeting employment verification is the level of certainty created by such a policy for their company's planning purposes. Providing businesses with new but temporary measures would, in their collective view, be a significant limitation on the efficacy of a new policy. In order to use new methods for employment verification, companies must make significant investments in time and capital to best utilize these verification measures. If the opportunities to use these new verification methods will only exist during a national emergency, many businesses will decline to utilize any alternative verification means fashioned by the federal government just like they declined to use the temporary procedures implemented during the height of COVID-19 pandemic. The primary reason proffered by the companies that stated they would likely avoid taking advantage of temporary verification measures is the costs associated with adjusting their operations to comply with these temporary policies are likely to outweigh any benefits they may obtain for a brief period.

The temporary remote verification procedures ICE debuted on March 20, 2020, are a case study in the benefits and limitations of a temporary virtual verification regime. The Chamber greatly supports these temporary policies, as they helped many desperate companies during the height of the pandemic, and we were pleased to see DHS extend them beyond their planned expiration at the end of this month.¹ Many companies used this policy flexibility to effectively onboard much-needed workers during the height of the COVID-19 pandemic, but many other employers declined to take advantage of this flexibility altogether. Other companies that utilized this policy flexibility early on in 2020 decided later that the costs of continuing to verify their workers remotely were too great to justify its continued use and they reverted to their old in-person document review processes.

The primary reason for businesses to either forego using the virtual employment verification measures entirely or to discontinue its use after a brief period was the lack of certainty provided to companies, particularly with regard to their obligations when the company went back to in-person work in their offices. In addition, many firms worried about the potential business disruptions that could occur

¹ See ICE Announces Extension to I-9 Compliance Flexibility, (Dec. 15, 2021) (Updated October 11, 2022), available online at [ICE announces extension to I-9 compliance flexibility | ICE](#) (accessed October 11, 2022).

if/when the temporary policy flexibilities expired. The shortcomings associated with the current temporary policy would be best rectified by DHS replacing them with a permanent method for virtual employment verification, not with additional temporary measures that suffer from the same shortcomings as today's temporary relief measures.

DHS Has the Authority to Implement Permanent Virtual I-9 Verification Procedures

The provisions of the INA that provide DHS with the authority to create a new, permanent option for companies to perform their federal employment verification obligations are contained under INA § 274A(b).² Specifically, the relevant language that Congress passed in this paragraph focuses on the word “examine.” Congress required any employer hiring, recruiting, or referring an individual for employment in the U.S. make specific attestations about the putative employee's work authorization status “...after examination of documentation” that would establish the individual's identity and employment authorization.³ The statute further elaborates on an employer's obligations by requiring the employer to attest that the individual is not an unauthorized alien by examining the relevant types of documentation set forth under the INA.⁴ Critically, there are no qualifying terms on the use of the words “examine” or “examination” under this section of the INA, thus evidencing Congress' intent to allow the executive to best determine how employers must perform the document examination required under the I-9 employment verification process.

As to the regulations that implemented this section of the INA, the language is more proscriptive in that it requires an employer or an employer's agent to “physically examine” the documentation offered by the individual to establish his/her identity and employment authorization.⁵ However, as the Chamber noted in its [prior comments](#) on virtual employment verification to USCIS last year, these regulations do not require that this document review must take place in person. Moreover, the statutory text of the INA provides DHS with the flexibility to examine these documents using various cutting-edge technologies, particularly through the usage of video conferencing tools.

There are many ways that DHS, ICE, and USCIS could amend the governing regulations to allow for a permanent virtual employment verification option for employers to use. The Department could remove the references to “physical”

² See 8 USC § 1324a(b).

³ 8 USC §1324a(b)(1).

⁴ See 8 USC §1324a(b)(1)(A).

⁵ See 8 CFR §274a.2(b)(1)(ii)(A)

examinations under the governing regulations. Alternatively, it could define references to “physical examination” and “physically examine” in a manner that allows an employer or an employer’s agent to use video conferencing as a tool to “physically examine” the documents being proffered by the putative worker during the I-9 process.

Under the current regulations, the physical examination requirements are based upon outdated assumptions on what the most effective means are to verify whether the individual’s identity and employment eligibility documents are genuine. Today, internet video conferencing is no longer a novel technology where the images conveyed to the employer’s representative on his/her computer screen are so unclear as to prevent a legitimate examination of one’s documents. A putative employee can physically manipulate his or her documents during a video conference to show the employer’s representative they are genuine documents that relate to him/her, as is required under the INA and its corresponding regulatory requirements.⁶

When one balances the new technological capabilities with all the attendant benefits to moving towards a permanent virtual verification option for employers, including improved operational efficiencies for business, cost/resource savings for companies and employees, etc., DHS has a unique opportunity to enact a meaningful policy change that would help American businesses compete in an increasingly competitive global marketplace. We urge the Department to seize this opportunity and earnestly pursue the creation and implementation of permanent virtual verification procedures. Doing so will not only meet DHS’s stated goal of providing an equivalent level of security that is yielded by today’s current employment verification processes,⁷ but surpass it by increasing employers’ ability to accurately verify identity and employment authorization documentation.

DHS Must Ensure a Smooth Transition to New Virtual Verification Policy

As stated above, the Chamber continues to support the continued authorization of the temporary virtual I-9 policies that were first instituted in 2020. Companies that took advantage of the current remote document examination policy improved the onboarding experience not only for their businesses, but also for their employees. Chamber members found the remote process to be much more efficient and cost-effective than the traditional in-person procedure. These temporary measures allowed

⁶ See INA 274A(b)(1)(A)(ii) and 8 CFR 274a.2(b)(1)(v)(A)

⁷ 87 Fed. Reg. 50786 (August 18, 2022).

many companies to avoid significant workforce disruptions during the worst periods of the pandemic.

In addition, many companies that utilized these remote document verification procedures conveyed to us that they benefited from a compliance perspective because the temporary virtual document verification policy provided their business with the ability to consolidate their internal processes for reviewing these documents. This provided them with not only the ability to save time and costs in performing the document review, but also increased the accuracy in verifying the legitimacy of documents, as well as ensuring that the documents related to the putative employee presenting them to the company. This inures additional security benefits to our nation.

Unfortunately, the benefits brought about by the current virtual verification policy could be squandered if that policy is allowed to expire without sufficient time for companies to adjust to a new verification paradigm. There are several reasons why a sufficient transition period is necessary to avoid business disruptions. Many companies that chose to utilize these procedures are worried that once they resume normal, in-office operations, all the employees they onboarded using the remote verification procedures must report to their employer within three business days for an in-person verification of their identity and employment eligibility documents. Several companies reported to us that since the pandemic began, they've onboarded thousands of workers. In some cases, many of the employees onboarded by these companies have never set foot inside a company facility, and within this cohort, a significant number of those workers were employed on a temporary basis and are no longer employed by these firms.

With regard to those temporary employees who have since left the employment of the company that performed the I-9 document verification for the employee virtually, there is a lack of guidance as to what companies should do to verify former employees, notwithstanding the statutory record retention requirements and the ability of the company to copy the documents under the INA.⁸ As for the workers that were onboarded by a company using these virtual procedures and are still employed by said company, it is simply impractical for a business that onboarded thousands of people using virtual means to perform a physical inspection of the identity and employment eligibility documentation for thousands of workers in a 72 hour period.

⁸ See 8 U.S.C. 1324a(b)(3) and 1324a(b)(4), which, respectively, clarify the duration of time in which a company must retain I-9 records, and allow for the copying of the documents the employee presented to the employer to comply with the I-9 document review process.

The disruption that this would cause for firms in this type of situation would be significant and the only practical way to avoid those problems is for DHS to ensure that when the current temporary verification procedures are wound down, that process coincides with the simultaneous implementation of a permanent virtual verification option for businesses to utilize.

The Chamber appreciates how arduous the formal rulemaking process under the Administrative Procedure Act can be. Once the comment period for this NPRM ends, DHS will need a significant amount of time to not only review stakeholder comments, but also devise its plan on how to move forward in issuing a final rule. We urge the Department to maintain its temporary “virtual” policy until it can publish and implement its final rule and provide stakeholders with sufficient notice as to when it will discontinue the temporary policy that is currently in place.

To that end, it will be critically important for DHS to provide clarity and guidance with regard to employers’ compliance burdens as the Department moves away from its temporary policy to permanent, virtual verification procedures, particularly with regard to whether companies must reverify workers whose documents were reviewed remotely under the current guidance. In our view, if DHS implements new virtual procedures, it would be best for the Department to not require companies to reverify all of their employees using in-person means during the transition. Alternatively, if DHS decides to require companies that verified thousands of employees across the country using the remote verification option under the current guidance to reverify their documents in-person, 72 hours is woefully insufficient for those types of companies to perform the required employment verification. To avoid disruptions associated with a potential mass reverification of workers, 180 days would provide many employers with the flexibility and certainty they need to maintain compliance with their verification obligations.

Feedback Regarding Anti-Fraud and Anti-Discrimination Training Inquiry

Businesses understand the desire of DHS to ensure that companies that intend to utilize any new virtual verification procedures they create will use them in a manner that does not discriminate against any group of people or unintentionally allow fraud to occur in the employment verification process. These are laudable goals that our members generally support. Nevertheless, businesses have some concerns about potential training programs being crafted in a manner that places unreasonable compliance burden upon employers and they have several recommendations for DHS to implement training programs that are acceptable to all stakeholders.

If DHS institutes training requirements as a condition precedent for utilizing new virtual employment verification procedures, there was broad agreement among our members about the role that DHS should play with regard to the implementation and enforcement of these training requirements. Specifically, our members believe that DHS should be responsible for developing the training plans, monitoring whose companies or representatives have completed the training, and making these training modules easily accessible on the internet free of charge. Doing so will not only encourage certainty in adjudications, but it will also provide employers of all sizes with equal access to the Department's insights and what their expectations are from employers with respect to compliance.

DHS should also make clear in its training modules that in no way does this training change the legal obligations of an employer with regard to the employment verification process. While the training modules will certainly help employers better identify fraud, such training will not turn Human Resources officers into forensic document experts. Simply put, a company should not be held to higher liability standards merely because they chose to virtually verify the identity and work authorized status of its employees. Moreover, DHS should be clear that any training requirement should only apply to employers that use the virtual verification process.

Document Retention Feedback

The insight that companies provided on document retention requirements as a prerequisite for their firm being allowed to virtually perform their employment verification obligations is one that was widely viewed as eminently rational. The current temporary virtual verification policy has a document retention requirement and regardless of whether companies took advantage of the current policy flexibility, companies tend to have established internal procedures for document retention purposes. A significant priority that businesses desire with regard to any document retention requirement is that DHS provide companies with the flexibility to choose their preferred electronic format they want to retain the files. Some companies prefer having electronic pictures of the document; one firm suggested using recordings of the actual video conference to provide the evidence of the individual's documents in which the putative employee can manipulate their documents on camera to show they are indeed genuine and belong to them.

Concerns Regarding Eligibility Restrictions for Virtual Employment Verification

Businesses have expressed the most concern over DHS's considerations on limiting employer eligibility to use any alternative employment verification procedures it may implement in the future. DHS suggests limiting eligibility to only those companies that are enrolled and in good standing in the federal E-Verify employment verification program.⁹ There are many businesses that have not enrolled in E-Verify but would nevertheless benefit from being able to utilize virtual verification procedures. We urge DHS to reconsider using enrollment and good standing in E-Verify as a necessity for usage of any new virtual employment verification procedures.

If DHS views this rulemaking as a means to encourage more companies to enroll in E-Verify, the Department should craft policies that would further benefit a company that utilizes the virtual employment verification policy DHS creates in the future. One such idea that the Chamber has pursued for quite some time is to allow E-Verify users to integrate the Form I-9 with E-Verify employers to avoid the duplicative paperwork burdens that E-Verify employers' confront on a daily basis. Integrating these two separate processes into a single step electronic process would save employers a considerable amount time and money on the verification process, while at the same time providing further protections against unauthorized employment in the U.S. If E-Verify employers were able to use that system without the need to separately complete and retain the Form I-9, that would help create the type of incentive structure that would encourage more companies to enroll in E-Verify without erecting arbitrary barriers for companies that want to use new virtual verification procedures crafted by DHS.

The Department's other suggested eligibility criteria suggests that DHS would foreclose an employer from virtually verifying the identity and work authorization status of its workers if the company has a fine, settlement, or conviction related to the company's employment verification practices.¹⁰ The Chamber fully appreciates DHS's desire to provide incentives for good behavior. However, the language used by DHS in the NPRM suggests that the Department is potentially considering the imposition of harsh, inflexible standards upon companies that are well meaning and law abiding but have committed unintentional or minor paperwork violations. We urge DHS to refrain from instituting stringent bars to utilizing virtual employment verification procedures in the future. Companies across the country know that the I-9 employment verification process can be convoluted at times; unintentional errors and untimely completions occur even when employers are well resourced and acting in good faith.

⁹ 87 Fed. Reg. 50786, 50790 (August 18, 2022).

¹⁰ Id.

For DHS to properly balance all stakeholder interests and create the type of incentive structure that violations are investigated and dealt with in a manner that is fair to the accused, DHS could look at the structures for investigations, hearing, fines, and debarments for the H-1B, H-2A, and H-2B nonimmigrant visa programs associated with alleged wrongdoing. While those programs differ from the policy contemplated in the NPRM, all those programs contain transparent processes, criteria, and timelines for investigation, hearings, fines, and debarment if the wrongdoing merits serious punishment. Moreover, the types of fines and penalties that an employer may find itself subject to are based upon the severity of the alleged harm committed by the company. It's one thing to impose modest fines for inadvertent mistakes, but relatively minor mistakes should not lead to permanent or lengthy disbarment from utilizing virtual employment verification processes in the future. Exclusion from eligibility to use new employment verification procedures must be reserved for serious legal misconduct, such as knowingly hiring/ continuing to employ unauthorized workers in the U.S.

Conclusion

The Chamber appreciates DHS's interest in exploring alternative options to the physical document examination associated with the I-9 Employment Eligibility Verification process. Advancements in modern technology and the myriad changes in the business practices of employers over the past few decades necessitate policy changes that allow American companies to be nimble with regard to their hiring practices. The ability of businesses to onboard or maintain desperately needed workers in a timely fashion directly impacts their ability to operate in an increasingly competitive global marketplace. We look forward to working with the Department on this issue moving forward.

Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Baselice', with a large, sweeping flourish extending to the left.

Jonathan Baselice
Vice President, Immigration Policy
U.S. Chamber of Commerce