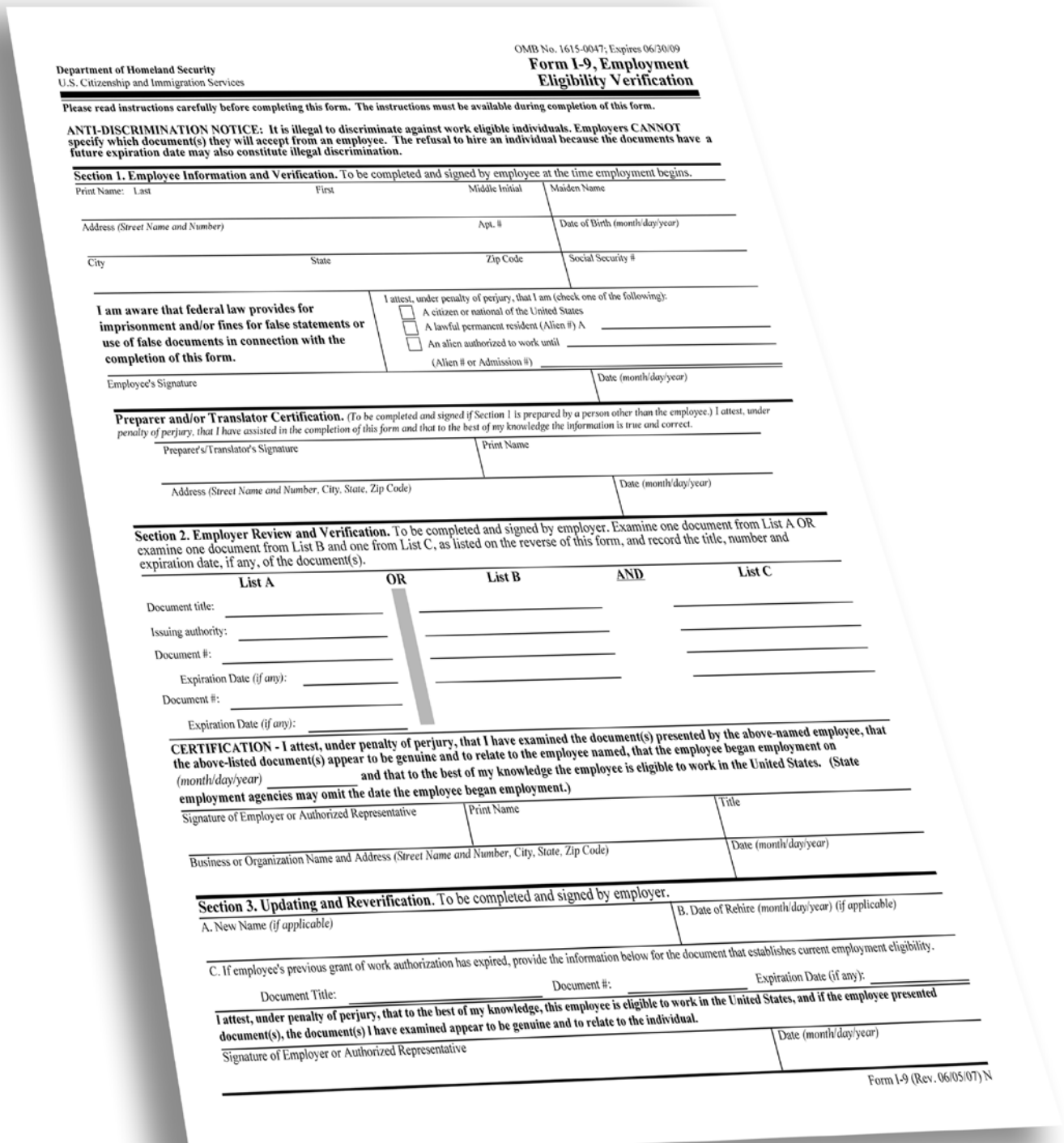


Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0047; Expires 06/30/09

Form I-9, Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last | First | Middle Initial | Maiden Name

Address *(Street Name and Number)* | Apt. # | Date of Birth *(month/day/year)*

City | State | Zip Code | Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
- ☐ A citizen or national of the United States
- ☐ A lawful permanent resident (Alien #) A _____
- ☐ An alien authorized to work until _____ (Alien # or Admission #) _____

Employee's Signature | Date *(month/day/year)*

Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature | Print Name

Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

List A	OR	List B	AND	List C
Document title:				
Issuing authority:				
Document #:				
Expiration Date *(if any)*:				
Document #:				
Expiration Date *(if any)*:				

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* _____ **and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative | Print Name | Title

Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name *(if applicable)* | B. Date of Rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title: _____ Document #: _____ Expiration Date (if any): _____

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative | Date *(month/day/year)*

Form I-9 (Rev. 06/05/07) N

The ICE Storm: Employer Compliance and Worksite Enforcement

By Melissa M. Chase

"No employer, regardless of industry or location, is immune… ICE and our law enforcement partners will continue to bring all our authorities to bear in their fight using criminal charges, asset seizures, administrative arrests and deportations… If you're blatantly violating our worksite enforcement laws, we'll go after your Mercedes and your mansion and your millions. We'll go after everything we can, and we'll charge you criminally."

— Julie L. Myers, Assistant Secretary for Homeland Security, Immigration and Customs Enforcement[1]

BACKGROUND — CLEAR SKIES

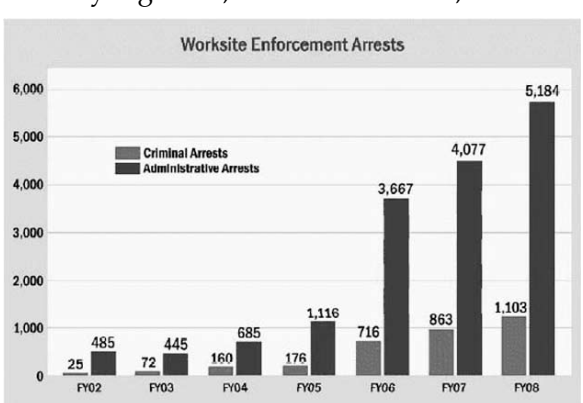
Just over 20 years ago, it was not illegal for an employer to hire an undocumented worker. That changed with the Immigration Reform and Control Act of 1986 (IRCA).[2] This section of law requires three things from every U.S. employer:

First, employers are prohibited from knowingly hiring a noncitizen that is not authorized to work for them.

Second, employers must verify the identity and work eligibility of all employees, even U.S. citizens, on an I-9 form, and are required to terminate employment if they fail to comply with the verification requirements.

Third, IRCA prohibits an employer from intentionally discriminating in hiring and/or firing on the basis of an individual's national origin or citizenship status.[3]

Only in recent years has IRCA truly been enforced, with a dramatic increase since 9/11.[4] Enforcement is now handled by the U.S. Immigration and Customs Enforcement (ICE) agency which is part of the Department of Homeland Security (DHS). Enforcement has become not only vigorous, but in some cases, extreme.



The dramatic increase in worksite arrests is a good indicator of the cultural climate we live in. ICE has surpassed the numbers from all previous years and in fiscal year 2008 there were over 1,100 *criminal* arrests related to worksite enforcement.[5] ICE has very clearly shifted its approach toward worksite enforcement by bringing criminal charges against employers, seizing their assets, and charging more employers with harboring and money laundering violations.[6] There are very few large companies that have *always* accurately filled out, re-verified and maintained every Form I-9 as required under IRCA. Most companies, if ever audited, would be measured, weighed and found wanting. ICE has made a "strategic shift" in enforcement by focusing on employers that knowingly or recklessly hire undocumented workers.[7]

Although the provisions of IRCA preempt any state/local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens, many states have taken enforcement of IRCA into their own hands, especially after Congress did not come to an agreement on Comprehensive Immigration Reform.[8]

Oklahoma passed a law that was to become effective on November 1, 2007, that requires all public employers, as well as their contractors and subcontractors, to use a "status verification system" to verify the immigration status of employees.[9] This law has since been temporarily enjoined and litigation continues.[10]

THE I-9 FORM — THE CALM BEFORE THE STORM

Proper I-9 compliance is the starting point for any employer to somewhat insulate them from sanctions, penalties and criminal charges. Employers must pay attention, not only to detail, but to substance as well.[11] Pursuant to the provisions of IRCA, employers must complete a Form I-9 for every employee, with few exceptions. The exceptions include any pre-November 6, 1986 hires, casual domestic workers in a private home on a sporadic, irregular or intermittent basis and independent contractors and their employees.[12] An employer must *review* original documents within three days of hire or re-hire, *re-verify* work authorization only if the employee's authorization to work expires and *retain* the Form I-9 for three years after date of hire or one year after date of termination, whichever is later.[13]

A new Form I-9 was implemented as of December 26, 2007, which all employers are mandated to use.[14] It is recommended to seek the advice of a corporate immigration attorney if in doubt about any requirements in completing the Form I-9 and/or re-verifying work authorization.

WHAT DOES *"KNOWINGLY"* EMPLOY UNDOCUMENTED WORKERS MEAN?

An employer may have either actual or constructive knowledge of undocumented workers. Actual knowledge is imputed if the employer has tangible knowledge of an employee being undocumented. E.g., an employee discloses that his documents are all false or if the employer assisted the employee in obtaining the false documents.

Constructive knowledge may be imputed to the employer depending on a "reasonable person" standard as well as reviewing the totality of the circumstances in a given case.[15] While reviewing the totality of the circumstances, DHS may impute the employer with constructive knowledge if the employer: fails to complete or improperly completes Form I-9; has information that the person is unauthorized to work; acts with reckless and wanton disregard; and/or deliberately fails to investigate suspicious circumstances. It is important to keep in mind that "knowledge" for purposes of IRCA cannot be inferred solely on the basis of an individual's accent or foreign appearance.[16] E.g., "well the employee looks foreign and can barely speak English, so they probably are illegal."

INDEPENDENT CONTRACTORS AND SUB-CONTRACTORS

Companies can learn some lessons regarding constructive knowledge and independent contractors from the infamous "Wal-Mart" case.[17] Although a Form I-9 does not have to be completed for independent contractors and subcontractors, employers can be held liable for employing contractors and sub-contractors if the employer has knowledge of undocumented workers.[18]

The Wal-Mart case involved a large amount of employees who were employed by Wal-Mart's independent contractors and were not apparently authorized to work in the U.S. and Wal-Mart was raided.[19] Wal-Mart never con-

ceded or admitted any liability but instead negotiated a settlement wherein Wal-Mart paid $11 million to the government. In addition, Wal-Mart hired a full-time in house immigration attorney who was placed in charge of compliance. This is a business expense that one can immediately see as being more cost efficient than paying out $11 million. The 12 corporations and executives who actually employed the unauthorized workers pleaded guilty to criminal charges and agreed to pay an additional $4 million.[20]

In the Oklahoma Taxpayer and Citizen Act, any entity who contracts with an individual independent contractor must request the contractor's employment authorization. If the contractor cannot provide authorization, the entity must withhold Oklahoma income taxes at the top marginal rate.[21] As referenced above, this act has been temporarily enjoined and litigation is ongoing.[22]

THE NO-MATCH LETTER — THE SKY IS LOOKING GRIM

A no-match letter is a notice from the SSA of a discrepancy between wage reporting and SSA information on file. A no-match letter is not a notice that an employee is not authorized to work nor is it a statement about an employee's immigration status or an implication that incorrect information was intentionally provided. The SSA notifies employees and employers of the mismatch because the employee will not receive credit for the social security earnings until the mismatch is resolved.[23] Oftentimes, a no-match letter is simply the result of an employee's procrastination in changing their name with the SSA after a marriage, divorce or legal name change.

Currently, an employer is required to respond to the no-match letters in a "timely" manner and notify the SSA of any necessary corrections.[24] Because of the apparent lack of clarity, the DHS promulgated a new regulation detailing what reasonable steps should be taken by an employer when a no-match letter has been received. The DHS adopted the "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" rule in August 2007 and was to be implemented in September 2007. The underlying idea of the regulation is that an employer who takes "reasonable steps" is under a "safe harbor" from potential liability. Reasonable steps include correcting the mismatch and verifying the correction with the SSA and/or DHS within a specified time period.[25] The concern employers have is that the new no-match letter will result in unlawful/unfair discrimination and create unnecessary, and even unconstitutional burdens on the employers.[26] This rule has been temporarily enjoined by the court in *American Federation of Labor, et al. v. Chertoff*.[27] The DHS has attempted to address the courts concerns by issuing a "Supplement Final Rule."[28] Currently, there has been no resolution and the temporary injunction remains on the original rule.[29]

THE AUDIT AND INSPECTION — THERE IS A STORM A BREWING

In the past, ICE would typically audit an employer's Form I-9s because it was focusing on a particular industry or because it had received information about unauthorized workers.[30] Paper violations are the most common problem found in an audit and are seen across the board on Form I-9s for U.S. citizens and foreign nationals alike. Paper violations can consist of simply not completing the Form I-9 correctly, or failing to document the re-verification of work authorization.[31] ICE may use the opportunity of an audit to gather information about the premises, the employees, and the practices and polices of the company for a possible future raid.[32]

AN ICE RAID — THE EYE OF THE STORM

ICE will typically obtain information which may reveal large numbers of unauthorized workers employed at a company. ICE will use this information to secure a search warrant to perform a raid and arrest and interrogate employees. Arrests will be made of anyone

who cannot prove legal status on the spot — including U.S. citizens.[33] The investigation will typically continue for months and even years and in some cases there will be a second raid.[34] Legal representation is necessary throughout this entire process. In many cases, criminal, civil and immigration attorneys are required to represent the company, the executives, the supervisors and the employees that are involved in the matter.[35]

Civil Penalties can range from $110 to $1,100 for *each* failure to properly complete and maintain a Form I-9 for each employee, a paper violation. Penalties can include up to $16,000 for *each* unauthorized worker the employer *knowingly* hired or continued to employ, as well as the seizure and forfeiture of assets.[36] More recently, employees have been filing civil class action suits under the Racketeer Influenced and Corrupt Organizations Act (RICO)…and many have won.[37] These lawsuits are filed by a class of current and/or former employees that claim that the employer's practice of hiring, and sometimes harboring, undocumented workers and encouraging them to enter the United States illegally, artificially suppresses the employee's wages. The employees do not need to be authorized to work in order to have standing to sue under RICO.[38]

Criminal Penalties can range from a $3,000 fine for each violation and six months in prison all the way up to a $250,000 fine for each undocumented worker and 20 years in prison. Criminal charges may include Harboring, Identity Theft, Fraud, Trafficking, Money Laundering and Conspiracy and Document Fraud. It is apparent that criminal indictments are the future of worksite enforcement.[39]

"Harboring" means any conduct that tends to substantially facilitate an unauthorized person to remain in the U.S. illegally. An employer can be convicted of the felony of harboring unauthorized workers if the employer takes any action in reckless disregard of the undocumented status, such as ordering them to obtain false documents, altering records, obstructing inspections, or taking other actions that facilitate the unauthorized employment.[40] Any person who within any 12-month period hires 10 or more individuals with actual knowledge that they are unauthorized workers is guilty of felony harboring.[41] DHS continues to push the envelope by trying to expand the scope of "harboring" activities.

Money laundering charges are brought against employers where money earned/saved from knowingly employing unauthorized workers is put back into the company and the company continues to have a policy of employing unauthorized workers. This practice cannot only result in criminal charges but can also lead to the seizure and forfeiture of assets.

THE AFTERMATH — WHAT CAN AN EMPLOYER DO?

If not done so already, an employer should retain immigration counsel to develop and initiate a program for corporate immigration compliance and perform an internal audit. This can be helpful in future negotiations with the U.S. Attorney and ICE. The best defense is a good offense. Employer awareness and proactive compliance initiatives are among the most important things an employer can do in order to prepare for, or offset, the possible damage created by an ICE storm.

1. http://www.ice.gov/pi/news/factsheets/worksite_cases.htm, http://www.washingtonpost.com/wp-dyn/content/article/2006/04/15/AR2006041501049.html Julie Myers resigned from ICE on November 5, 2008, a day after the Presidential election. http://www.dhs.gov/xnews/releases/pr_1225920873224.shtm
2. Immigration and Nationality Act (INA) §§ 274A-274B; 8 U.S.C. § 1324a-1324b, *Hoffman Plastic Compounds, Inc., v. National Labor Relations Board*, 535 U.S. 137, 147 (2002).
3. INA §§ 274A-274B; 8 U.S.C. § 1324a-1324b.
4. http://www.ice.gov/pi/news/factsheets/worksite.htm, http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm, http://www.ice.gov/doclib/about/ice07ar_final.pdf
5. http://www.ice.gov/pi/news/factsheets/worksite.htm
6. http://www.ice.gov/pi/news/factsheets/worksite.htm
7. http://www.ice.gov/doclib/about/ice07ar_final.pdf
8. 8 U.S.C. § 1324a(h)(2)
9. 25 Okla. Stat. § 1313(B)&(C) and 68 Okla. Stat. § 2385.32
10. http://www.uschamber.com/assets/nclc/henrypreliminjunction.pdf
11. http://www.swiftraid.org/, http://www.usatoday.com/money/industries/food/2006-12-12-immigration-swift_x.htm (Swift & Co. Inc. had been investigated previously and sued over not complying with I-9 requirements, thereafter they were members of the Basic Pilot Program to verify work authorization of employees. The subsequent raids on Swift found false documents to be the issue)
12. INA §§ 274A-274B, 8 U.S.C. §§ 1324a-1324b.
13. INA §§ 274A-274B, 8 U.S.C. §§ 1324a-1324b.

14. http://www.uscis.gov/files/form/I-9.pdf

15. 8 C.F.R. § 274a(l)(1)

16. 8 C.F.R. § 274a(l)(1); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 884-887 (1975)

17. http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/

18. 8 C.F.R. 274a(l)(1)

19. http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/, *Wal-Mart Raids by U.S. Aimed At Illegal Aliens*, New York Times, October 24, 2003, http://www.michigandaily.com/content/immigrants-arrested-wal-mart-raid

20. http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/

21. 25 Okla. Stat.§ 1313(B)&(C) and 68 Okla. Stat. § 2385.32

22. http://www.uschamber.com/assets/nclc/henrypreliminjunction.pdf

23. http://www.ssa.gov/legislation/nomatch2.htm

24. http://www.ssa.gov/legislation/nomatch2.htm

25. 8 C.F.R. §274a.1, 72 Fed. Reg. 45611 (August15, 2007) ("Safe Harbor Rule")

26. *American Federation of Labor, et al. v. Chertoff*, 552 F.Supp.2d 999 (N.D. Cal. 2007)

27. U.S. District Court Judge Charles Breyer of the Northern District of California issued a preliminary injunction in October 2007 which remains in effect today. (*AFL-CIO v Chertoff*, NDCal, No 3:07-cv-04472-CRB)

28. 73 Fed. Reg. 63843 (October 28, 2008)

29. *AFL-CIO v. Chertoff*, NDCal, No 3:07-cv-04472-CRB

30. http://www.ice.gov/doclib/about/ice07ar_final.pdf, http://findarticles.com/p/articles/mi_m0ZQQ/is_10_56/ai_n30928420

31. http://www.ice.gov/pi/news/factsheets/worksite_cases.htm

32. http://www.ice.gov/pi/news/factsheets/worksite_cases.htm

33. http://www.globalresearch.ca/index.php?context=va&aid=9792, http://www.coxwashington.com/reporters/content/reporters/stories/2008/02/14/CITIZEN_RAIDS14_COX.html, http://www.usatoday.com/news/nation/2008-06-24-Immigration-raids_N.htm

34. http://www.ice.gov/pi/news/factsheets/anatomy_case.htm, http://www.foxnews.com/story/0,2933,236044,00.html

35. http://www.ice.gov/pi/news/newsreleases/articles/080417dallas.htm, http://www.ice.gov/pi/news/factsheets/pilgrimspride-factsheet.htm

36. INA §§ 274A, 274B; 8 U.S.C. §§ 1324a, 1324b; 28 CFR 68.52; 8 C.F.R. § 274a.10; 8 CFR § 270.3

37. 18 USC §§ 1961-1968, *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002), *Williams v. Mohawk Industries Inc.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, 2007 U.S. LEXIS 2798 (Feb. 26, 2007), *Zavala, et al., v. Wal-Mart Stores Inc.*, Civil Action No. 03-Civ.-5309 (JAG) (D.N.J.)

38. Homicz, *Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act*, 38 Suffolk U.L. Rev. 621, 624 (2005), *Trollinger v. Tyson Foods Inc.*, 370 F.3d 602 (6th Cir. 2004)

39. INA § 274A; 8 U.S.C. § 1324a; 8 C.F.R. § 274a.10; 18 USCS § 371. Paul Cuadros, The New Tactics of Immigration Enforcement, Time Magazine, Aug. 7, 2006, at http://www.time.com/time/nation/article/0,8599,1223600,00.html

40. INA 274(a)(3); INA § 274(a)(1)(B), *U.S. v. Kim*, F.3d ---, 1999 WL 803256 (2nd Cir. Oct. 8, 1999)

41. INA § 274(a)(3); *Vega-Murillo v. U.S.*, 247 F.2d 735 (9th Cir. 1957), cert. denied 357 U.S. 910

42. http://www.ice.gov/pi/nr/0811/081103boston.htm, http://www.ice.gov/pi/nr/0810/081030cedarrapids.htm, http://www.washingtonpost.com/wp-dyn/content/article/2006/04/15/AR2006041501049.html

43. http://www.ice.gov/pi/news/insideice/articles/InsideICE_032805_Web2.htm

ABOUT THE AUTHOR

Melissa M. Chase was awarded a baccalaureate degree from the University of Central Florida in criminal justice in 1995 and a Juris Doctorate from Regent University School of Law in 2000. Ms. Chase is an immigration attorney at Szabo, Zelnick & Erickson, P.C., in Northern Virg., where she mainly represents corporate clients. Ms. Chase is a member of the OBA as well as the American Immigration Lawyers Association.