orders granting or denying a request for regulation review. This action will enhance the Board's case management functions.

EFFECTIVE DATE: August 23, 1991.

FOR FURTHER INFORMATION CONTACT: Duward Sumner (202) 653–8892.

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 1204(a) and 1204(f), the Board is authorized to review rules or regulations issued by the Office of Personnel Management (OPM). The Board may review OPM rules or regulations on its own motion, on the filing of a complaint by the Special Counsel, or on granting a request for review from any interested person. Under 5 U.S.C. 1204(f), the Board is given sole discretion to grant or deny an interested person's request for regulation review. Because it has sole discretion to grant or deny an interested person's request for regulation review, the Board has determined that it is unnecessary to publish its orders granting or denying such requests in the Federal Register, as currently required by 5 CFR 1203.12(c). Therefore, the Board is deleting § 1203.12(c) from its rules under part 1203. The Board retains the discretion to solicit briefs in a request for regulation review from interested persons when necessary or desirable.

The Board is publishing this rule as a final rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1203

Administrative practice and procedure, Government employees.

Accordingly, the Board amends part 1203 as follows:

PART 1203—[AMENDED]

1. Authority for 5 CFR part 1203 continues to read:

Authority: 5 U.S.C. 1204(a), 1204(f), and 1204(h).

2. Section 1203.12 is amended by removing paragraph (c).

* * * * *

Dated: August 19, 1991.

Robert E. Taylor,

Clerk of the Board.

[FR Doc. 91–20182 Filed 8–22–91; 8:45 am]

BILLING CODE 7400–01–M

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1427

Cotton

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: On May 6, 1991, the Commodity Credit Corporation (CCC) issued a proposed rule with respect to the cotton price support program which is conducted by the CCC in accordance with The Agricultural Act of 1949, as amended (the 1949 Act). This rule is necessary to amend the regulations at 7 CFR part 1427 and implement the changes made by the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Act). Generally, this rule amends the manner in which producers may participate in the CCC price support program for cotton and the terms and conditions of the CCC price support program for cotton for 1991 and subsequent year's crops.

EFFECTIVE DATE: August 23, 1991. The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of August 23, 1991.

FOR FURTHER INFORMATION CONTACT: Philip Sharp, Program Specialist, Cotton, Grain, and Rice Price Support Division (GGRD), Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture (USDA), P.O. Box 2415, Washington, DC 20013, telephone (202) 447–7988.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under United States Department of Agriculture (USDA) procedures established in accordance with Executive Order 12291 and Secretary's Memorandum No. 1512–1 and it has been determined to be "non-major" because these program provisions will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local governments, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovations, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The title and number of the federal assistance program, as found in the catalogue of Federal Domestic Assistance, to which this final rule applies is Commodity Loans and Purchases, 10.051.

It has been determined that the Regulatory Flexibility Act is not applicable because the Commodity Credit Corporation (CCC) is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rule making with respect to the subject matter of these determinations.

It has been determined by environmental evaluations for the cotton price support program that this program will have no significant impact on the quality of the human environment.

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, and 48 FR 29115 (June 24, 1983).

Public reporting burden for the information collections contained in this regulation with respect to the price support program for cotton is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Accept for Form CCC-605 the information collection has previously been cleared by OMB and assigned number 0560–0074. A request for expedited clearance of Form CCC–605 (attachment 1) will be submitted to OMB. A proposed rule was published in the **Federal Register** on May 6, 1991, at 56 FR 20554 which would amend regulations found at 7 CFR part 1427 with respect to the price support program for cotton which is conducted by CCC. The proposed rule provided a 30-day public comment period which ended June 5, 1991.

Discussion of Comments

Six respondents commented on CCC's proposal to provide that a producer shall not be considered to have divested beneficial interest in a commodity if the producer executes an option to purchase contract with a buyer, with or without an advance payment by the buyer, with respect to cotton under loan, if the option to purchase contract provides that title, risk of loss, and beneficial interest in the cotton remains with the producer until the buyer exercises the option to purchase, and if such option to purchase expires in the event CCC claims title to the cotton. This proposal, in effect, eliminates equity trading among cotton buyers on Form CCC-813. All commenters declared that equity trading, which has been facilitated by the use of CCC-813, moves cotton into commercial channels, maximizes producer marketing opportunities, and serve to minimize CCC's cost exposure. Two of the commenters understand the concern about protecting CCC's security interest; however, both stated that the elimination of CCC-813 would severely disrupt a significant portion of the U.S. cotton trading system. In addition, both

commenters believed that CCC-813 could be retained with the addition of a provision specifying that CCC's collateral interest is not subordinated to the holder of the CCC-813 until the purchaser redeems the cotton from the loan. CCC must ensure that the statutory provisions authorizing the cotton price support program are accomplished and that CCC must have a perfected interest in the cotton pledged as collateral for loan. In the past, equity trading on cotton pledged as collateral for loan made CCC vulnerable to that equity interest. For these reasons CCC has determined that equity trading through the use of CCC-813 adversely affects CCC's interest in the commodity. Further, such activity is not consistent with the nonrecourse nature of the price support loans which CCC is required by statute to make available to producers. However, CCC is aware of the necessity to allow the free and open trading of cotton. Accordingly, CCC has determined to allow producers to designate an agent for the purpose of redeeming all or a portion of the loan collateral by execution of a CCC Form 605. The designation of agent does not relieve the producer from the terms and conditions of the security agreement in that the producer is ultimately responsible for the repayment of the loan indebtedness. In addition, an agent so designated may, in turn, designate a subsequent agent for the purpose of redeeming all or a portion of the loan collateral by endorsement on CCC-605 by both parties. In addition, if the producer designates an agent to redeem loan collateral the producer may also designate that agent to extend such loan if CCC authorizes loan extensions. The agent so designated may also designate a subsequent agent for loan extensions by endorsement on Form CCC-605. CCC has determined that allowing the producer to designate an agent on CCC-605 will in no way impede the free marketing and trading of cotton. As additional protection to the agent, the agent may enter into a separate agreement with the producer to restrict the authority of either the agent or producer to redeem loan collateral. However, such agreements are executed solely between the agent and the producer and CCC shall have not been a party to such an agreement. According, §§ 1427.5, 1427.7, and 1427.19 is amended to provide for procedures designating an agent for the redemption of CCC Price Support loan collateral and for the extension of CCC such loans.

There was one respondent to CCC's proposal to allow persons with an interest in storing, processing, or merchandising any commodity to act as an agent for a producer if that person is delegated authority which is restricted specifically to repaying outstanding loan amounts plus interest and charges, and the delegation is on file at the county office. This respondent agreed with CCC's proposal. CCC has determined that this provision of the proposed rule is adopted without change.

There was one comment about CCC's proposal to provide that a producer may repay an upland cotton loan at a level that is the lesser of the loan level and charges, plus accrued interest or the higher of the loan multiplied by 70 percent of the adjusted world price. The commenter agreed with the proposal. CCC has determined to adopt this provision of the proposed rule without change.

There was one comment about CCC's proposal to provide that loan deficiency payments be available for the quantity of upland cotton that is eligible to be pledged as collateral for a price support loan. The commenter agreed with the proposal. CCC has determined to adopt this provision of the proposed rule without change.

One respondent commented that provisions permitting the issuance of marketing certificates when the adjusted world price is less that 70 percent of the loan rate were not addressed in the proposed rule and assumed that subsequent regulations would include such provisions.

Provisions permitting the issuance of marketing certificates were issued as a separate proposed rule on June 18, 1991.

One respondent urged CCC to continue efforts in instituting an electronic transfer system to replace the use of paper warehouse receipts so that the U.S. cotton industry can operate in a more efficient and economical manner. CCC is continuing to review this issue.

It has also been determined that all other provisions of the proposed rule should be adopted as the final rule with certain technical and grammatical corrections.

List of Subjects in 7 CFR Part 1427

Cotton Incorporation by reference, Loan programs/agriculture, Price support programs, Warehouses.

According, 7 CFR part 1427 is amended by revising Subpart—Cotton Loan Program Regulations (§§ 1427.1—1427.26) and Subpart—Seed Cotton Loan Program Regulations (§§ 1427.160—1427.175) as follows:

PART 1427—COTTON

The authority citation for part 1427 continues to read as follows:

Authority: 7 U.S.C. 1421, 1423, 1444, and 1444–2; 15 U.S.C. 714b and 714c.

Subpart—Cotton Loan Program Regulations

Sec.

* * * * *

Subpart—Seed Cotton Loan Program Regulations

* * * * *

Subpart—Cotton Loan Program Regulations

§ 1427.1 Applicability.

(a) The regulations of this subpart are applicable to the 1991 and subsequent crops of upland cotton and extra long staple (ELS) cotton. These regulations set forth the terms and conditions under which price support loans and, for upland cotton, loan deficiency payments shall be made available by the Commodity Credit Corporation ("CCC").

Additional terms and conditions are set forth in the note and security agreement and loan deficiency payment application which must be executed by a producer in order to receive such price support loans and loan deficiency payments.

(b) The following are available in State and county Agricultural Stabilization and Conservation Service ("ASCS") offices ("State and county offices," respectively):

(1) Price support rates,

(2) For upland cotton, the schedules of premiums and discounts for:

(i) Grade and staple,

(ii) Micronaire, and

(iii) Strength.

(3) For ELS cotton, the schedules of:

(i) Loan rates, and

(ii) Discounts for micronaire.

(4) Loan service and related fees, and

(5) Forms which are used in administering the price support and loan deficiency payment programs for a crop of cotton. The forms for use in connection with the programs in this part shall be prescribed by CCC.

(c) Price support loans and loan deficiency payments shall not be available with respect to any commodity produced on land owned or otherwise in the possession of the United States if such land is occupied without the consent of the United States.

§ 1427.2 Administration.

(a) The price support and loan deficiency payment programs which are applicable to a crop of cotton shall be administered under the general supervision of the Executive Vice President, CCC, or a designee, or Administrator, ASCS, and shall be carried out in the field by State and county Agricultural Stabilization and Conservation committees ("State and county committees," respectively).

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations of this part.

(c) The State committee shall take any action required by these regulations which has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, an action taken by such county committee which is not in accordance with the regulations of this part; or

(2) Require a county committee to withhold taking any action which is not in accordance with the regulations of this part.

(d) No provision or delegation herein to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, or the Administrator, ASCS, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by the State or county committee.

(e) The Deputy Administrator, State and County Operations, ASCS, may authorize State or county committees to waive or modify deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not affect adversely the operation of the price support program.

(f) A representative of CCC may execute price support loans and loan deficiency payment applications and related documents only under the terms and conditions determined and announced by CCC. Any such document which is not executed in accordance with such terms and conditions, including any purported execution prior to the date authorized by CCC, shall be null and void.

§ 1427.3 Definitions.

The definitions set forth in this section shall be applicable for all purposes of program administration. The terms defined in part 719 of this title and 1413 of this chapter shall also be applicable.

Authorized loan servicing agent (LSA) means a legal entity that enters into a written agreement with CCC to act as a loan servicing agent for CCC in making and servicing Form A cotton loans. The authorized LSA may perform, on behalf of CCC, only those services which are specifically prescribed by CCC including but not limited to the following:

(1) Preparing and executing loan documents;

(2) Disbursing loan proceeds;

(3) Handling the extension of loans as authorized by CCC;

(4) Accepting cotton loan repayments;

(5) Handling documents involved with forfeiture of cotton loan collateral to CCC; and

(6) Providing loan and accounting data to CCC for statistical purposes.

Charges means all fees, costs, and expenses incurred in insuring, carrying, handling, storing, conditioning, and marketing the cotton tendered to CCC for price support. Charges also include any other expenses incurred by CCC in protecting CCC's or the producer's interest in such cotton.

Cotton means, as defined in part 1413 of this chapter, upland cotton and ELS cotton as applicable, produced in the United States.

Financial institution means:

(1) A bank in the United States which accepts demand deposits; and

(2) an association organized pursuant to Federal or State law and supervised by Federal or State banking authorities.

Form A loans means a loan executed on Form CCC—Cotton A, Cotton Producer's Note and Security Agreement.

Form G loans means a cotton loan to an approved marketing cooperative on eligible cotton delivered to a cooperative by eligible members of the cooperative executed on Form CCC—Cotton G, Cotton Cooperative Loan Agreement.

Lint cotton means cotton which has passed through the ginning process.

Loan clerk means a person approved by CCC to assist producers in preparing Form A loan documents.

Seed cotton means cotton which has not passed through the ginning process.

Servicing agent bank means the bank designated as the financial institution for a cooperative marketing association approved in accordance with part 1425 of this chapter, which has been approved by CCC.

§ 1427.4 Eligible producer.

(a) An eligible producer of a crop of cotton shall be a person (i.e., an individual, partnership, association, corporation, estate, trust, State or political subdivision or agency thereof, or other legal entity) which:

(1) Produces such a crop of cotton as a landowner, landlord, tenant, or sharecropper;

(2) Meets the requirements of this part; and

(3) Meets the requirements of parts 12 and 718 of this title, and 1413 of this chapter.

(b) A receiver or trustee of an insolvent or bankrupt debtor's estate, and executor or an administrator of a deceased person's estate, a guardian of an estate of a ward or an incompetent person, and trustees of a trust estate shall be considered to represent the insolvent or bankrupt debtor, the deceased person, the ward or incompetent, and the beneficiaries of a trust, respectively, and the production of the receiver, executor, administrator, guardian, or trustee shall be considered to be the production of the person or estate represented by the executor or administrator. Loan and loan deficiency payment documents executed by any such person will be accepted by CCC only if they are legally valid and such person has the authority to sign the applicable documents.

(c) A minor who is otherwise an eligible producer shall be eligible to receive price support and loan

deficiency payments only if the minor meets one of the following requirements:

(1) The right of majority has been conferred on the minor by court proceedings or by statute;

(2) A guardian has been appointed to manage the minor's property and the applicable price support documents are signed by the guardian;

(3) Any note and security agreement signed by the minor is cosigned by a person determined by the county committee to be financially responsible; or

(4) A bond is furnished under which a surety guarantees to protect CCC from any loss incurred for which the minor would be liable had the minor been an adult.

(d) Two or more producers may obtain a single joint loan with respect to cotton which is stored in an approved warehouse if the warehouse receipt which is pledged as collateral for the loan is issued jointly to such producers. The cotton in a bale may have been produced by two or more eligible producers on one or more farms if the bale is not a repacked bale.

(e) Loans may be made to a warehouseman who, in the capacity of a producer, tenders to CCC warehouse receipts issued by such warehouseman on cotton produced by such warehouseman only in those States where the issuance and pledge of such warehouse receipts are valid under State law.

(f) A cooperative marketing association which has been approved in accordance with part 1425 of this chapter may obtain price support on the eligible production of such cotton or loan deficiency payments with respect to such cotton on behalf of the members of the cooperative who are eligible to receive price support loans or loan deficiency payments with respect to a crop of cotton. For purposes of this subpart, the term "producer" includes an approved cooperative marketing association.

(g) A producer shall not delegate to any person, or the person's representative, who has any interest in storing, processing, or merchandising any commodity which is otherwise eligible for price support or a loan deficiency payment under a program to which this section is applicable, authority to exercise on the behalf of the producer any of the producer's rights or privileges under such program, including the authority to execute any note and security agreement or other price support document, unless the person (or the person's representative) to whom authority is delegated, is serving in the capacity of a farm manager for the producer or unless the authority delegated is restricted specifically for the purpose of repaying the loan amount and charges plus interest or, for the purpose of extending the loan or, for the purpose of obtaining loan deficiency payments, and such delegation is filed through the execution of Form ASCS-211, Power of Attorney, or other form as approved by CCC, with the county office and accepted by CCC.

§ 1427.5 General eligibility requirements

(a) In order to receive price support for a crop of cotton, a producer must execute a note and security agreement or loan deficiency payment application on or before May 31 of the year following the year in which such crop is normally harvested. Price Support loans at a national average support rate of 50.77 cents per pound for the 1991 crop of upland cotton and 82.99 cents per pound for the 1991 crop of extra loan staple cotton are available to producers as determined and announced by CCC. A Form A loan must be signed by the producer or the producer's agent and mailed or delivered to the county office or an authorized LSA within 15 days after the producer signs the Form A loan and within the period of loan availability.

(1) A producer, except for a cooperative, must request price support and loan deficiency payments:

(i) At the county office which, in accordance with part 719 of this title, is responsible for administering programs for the farm on which the cotton was produced, or

(ii) Form an authorized LSA.

(2) An authorized agent which has an agreement with CCC and which is designated by the producer to obtain a loan or loan deficiency payment on behalf of such producers may obtain such loans through a central county office designated by CCC.

(3) An approved cooperative marketing association must request loans and loan deficiency payments:

(i) At a servicing agent bank approved by CCC, or

(ii) At the county office for the county in which the principal office of the cooperative is located unless the State committee designates some other county office as the office where such association must request price support.

(b)(1) Cotton must be tendered to CCC by an eligible producer and must:

(i) Be in existence and in good condition at the time of disbursement of loan or loan defficiency payment proceeds;

(ii) For ELS cotton, be a grade and staple length specified in the schedule of loan rates for ELS cotton.

(iii) For upland cotton, be a grade, staple length, micronaire, and strength specified in:

(A) The schedule of premiums and discounts for grade and staple,

(B) The schedule of strength premiums and discounts, and

(C) The schedule of micronaire premiums and discounts.

(iv) Be represented by a warehouse receipt meeting the requirements of § 1427.11;

(v) Not be false-packed, water-packed, mixed-packed, reginned, or repacked and:

(A) Upland cotton must not:

(*1*) Have been reduced more than two grades because of preparation; and

(*2*) Have a strength reading of 18 grams per tex, rounded to whole grams, or below.

(B) ELS cotton must:

(*1*) Have been ginned on a roller gin,

(*2*) Must have been produced in a county designated as suitable for the production of such cotton,

(*3*) Must not have a micronaire reading of 2.6 or less, and

(*4*) Must not have been reduced in grade for any reason;

(vi) Not be compressed to universal density where side pressure has been applied or to high density at a warehouse;

(vii) Not have been sold, nor any sales option on such cotton granted, to a buyer under a contract which provides that the buyer may direct the producer to pledge the cotton to CCC as collateral for a price support loan or to obtain a loan deficiency payment; and

(viii) Not have been previously sold and repurchased; or pledged as collateral for a CCC price support loan and redeemed except as provided in § 1427.172(b) (3) or (4).

(ix) For upland cotton, have been graded by Agricultural Marketing Service (AMS) using a High Volume Instrument (HVI).

(2) Each bale of cotton must:

(i) Weigh not less than 325 pounds net weight;

(ii) If compressed to standard or higher density either at warehouse or at a gin, have not less than eight bands;

(iii) Be packaged in materials which meet specifications adopted and published by the Joint Cotton Industry Bale Packaging Committee (JCIBPC), sponsored by the National Cotton Council of America, for bale coverings and bale ties which are identified and approved by the JCIBPC as experimental packaging materials in the June 1991 Specifications for Cotton Bale Packaging Materials. Heads of bales must be completely covered.

(A) Copies of the June 1991 Specifications for Cotton Bale Packaging Materials published by the JCIBPC which are incorporated by reference are available upon request at the county office and at the following address: Joint Cotton Industry Bale Packaging Committee, National Cotton Council of America, P.O. Box 12285, Memphis, Tennessee 38112. Copies may be inspected at the South Agriculture Building, room 3624, 14th and Independence Ave. SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, or at the Office of the Federal Register, 1100 L Street, NW., room 8401, Washington, DC.

(B) Information with respect to experimental packaging material may be obtained from JCIBPC.

(C) This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51;

(iv) Be ginned by a ginner:

(A) Who has entered the tare weight of the bale (bagging and ties used to wrap the bale) on the gin bale tag, and

(B) Who has entered into CCC–809, Cooperating Ginners' Bagging and Bale Ties Certification and Agreement, or certified that the bale is wrapped with bagging and bale ties meeting the requirements of paragraph (b)(2)(iii) of this section.

(c)(1) To be eligible to receive price support, a producer must have the beneficial interest in the cotton which is tendered to CCC for a loan or loan deficiency payment. The producer must always have had the beneficial interest in the cotton unless, before the cotton was harvested, the producer and a former producer whom the producer tendering the cotton to CCC has succeeded had such an interest in the cotton. Cotton obtained by gift or purchase shall not be eligible to be tendered to CCC for price support. Heirs who succeed to the beneficial interest of a deceased producer or who assume the decedent's obligations under an existing loan shall be eligible to receive price support whether succession to the cotton occurs before or after harvest as long as the heir otherwise complies with the provisions of this part.

(2) A producer shall not be considered to have divested the beneficial interest in the commodity if the producer retains control of the commodity, including the right to make all decisions regarding the tender of the cotton to CCC for price support, and:

(i) Executes an option to purchase whether or not an advance payment is made by the potential buyer with respect to such cotton if the option to purchase contains the following provision:

"Notwithstanding any other provision of this option to purchase, title; risk of loss; and beneficial interest in the commodity, as specified in 7 CFR part 1427, shall remain with the producer until the buyer exercises this option to purchase the commodity. This option to purchase shall expire, notwithstanding any action or inaction by either the producer or the buyer, at the earlier of: (1) The maturity of any Commodity Credit Corporation price support loan which is secured by such commodity; (2) the date the Commodity Credit Corporation claims title to such commodity; or (3) such other date as provided in this option." or

(ii) Enters into a contract to sell the cotton if the producer retains title, risk of loss, and beneficial interest in the commodity and the purchaser does not pay to the producer any advance payment amount or any incentive payment amount to enter into such contract except as provided in part 1425 of this chapter.

(iii) Executes CCC Form 605, Designation of Agent—Upland Cotton. Such Designation:

(A) Allows the producer to authorize an agent or subsequent agent to redeem all or a portion of the cotton pledged as collateral for a loan. The form will identify the warehouse receipts for which the authorization is given.

(B) Allows the producer to also authorize an agent or subsequent agent to extend the loan when extensions of upland cotton loans are authorized by CCC.

(C) Expires upon maturity of the loan.

(D) Allows agents so designated by the producer to designate a subsequent agent by endorsement of the form by both parties.

(E) Must be presented at the time the loan is repaid or the loan is extended at the county office where the loan originated if the agent or subsequent agent exercises any authority granted by the producer.

(3) If price support is made available to producers through an approved marketing cooperative in accordance with part 1425 of this chapter, the beneficial interest in the cotton must always have been in the producer-member who delivered the cotton to the cooperative or its member cooperative, except as otherwise provided in this subsection. Cotton delivered to such a cooperative shall not be eligible to receive price support if the producer-member who delivered the cotton does not retain the right to share in the proceeds from the marketing of the cotton as provided in part 1425 of this chapter.

(d) If the person tendering cotton for a loan is a landowner, landlord, tenant, or sharecropper, such cotton must represent such person's separate share of the crop and must not have been acquired by such person directly or indirectly from a landowner, landlord, tenant, or sharecropper or have been received in payment of fixed or standing rent.

(e) Each bale of upland cotton sampled by the warehouseman upon initial receipt which has not been sampled by the ginner must not show more than one sample hole on each side of the bale. If more than one sample is desired when the bale is received by the warehouseman, the sample shall be cut across the width of the bale, broken in half or split lengthwise, and otherwise drawn in accordance with AMS dimension and weight requirements. This requirement will not prohibit sampling of the cotton at a later date if authorized by the producer.

(f) The quantity of cotton for which a loan deficiency payment has been made is not eligible to be pledged for a price support loan.

§ 1427.6 Disbursement of price support loans.

(a) Disbursement of loans to individual producers may be made by:

(1) County offices,

(2) Authorized LSA's, or by

(3) Central county offices designated by CCC to provide centralized service to a person or firm which has been designated as a producer's agent and which has entered into a written agreement with CCC.

(b) Loan proceeds may be disbursed by approved servicing agent banks to approved cooperative marketing associations.

(c) The loan and loan deficiency payment documents shall not be presented for disbursement unless the commodity covered by the mortgage or pledge of security is eligible, in existence, in approved storage, and in good condition. If the commodity was not either an eligible commodity, in existence and in good condition at the time of disbursement, the total amount disbursed under the loan, and charges plus interest shall be refunded promptly.

§ 1427.7 Maturity of loans.

(a) Form A cotton loans and Form G loans to cotton cooperative marketing associations, mature on demand by CCC and no later than the last day of the 10th calendar month from the first day of the month in which the loan or loan advance is disbursed, except that

(1) Upland cotton loans may, at the producer's request or at the request of the agent or subsequent agent authorized on CCC Form 605, be extended for an additional eight months during the 10th month of the initial loan provided the average spot market price for the base quality of cotton as determined by CCC during the ninth month of the loan did not exceed 130 percent of the average spot market price for such base quality of cotton for the preceding 36 months.

(2) If authorized by CCC, ELS cotton loans may, at the producer's request, be extended for an additional eight months during the tenth month of the initial loan.

(3) CCC may, by public announcement, extend the time for repayment of the loan indebtedness or carry the loan in a past due status.

(4) CCC may at any time accelerate the loan maturity date by providing the producer notice of such acceleration at least 15 days in advance of the accelerated maturity date.

(b) If a producer's upland cotton price support loan is extended for 8 months in accordance with paragraph (a)(2) of this section and the loan collateral is:

(1) Thereafter forfeited to CCC, the producer shall pay to CCC:

(i) All storage costs associated with the storage of the forfeited cotton, beginning with the first month of such extension; and

(ii) A handling fee of $1.00 per bale.

(2) Thereafter redeemed by repayment to CCC, the producer shall pay to CCC an amount which shall include interest that has accrued with respect to such collateral, beginning with the first month of such extension.

(c) If the loan is not repaid by the maturity date of the loan, title to the cotton shall vest in CCC the day after such maturity date and CCC shall have no obligation to pay for any market value which such cotton may have in excess of the amount of the loan, plus interest and charges.

§ 1427.8 Amount of loan.

(a) The quantity of cotton which may be pledged as collateral for a loan shall be the net weight of the eligible cotton as shown on the warehouse receipt issued by an approved warehouse, except that in the case of a bale which has a net weight of more than 600 pounds, the weight to be used in determining the amount of the loan on the bale shall be 600 pounds. Cotton pledged as collateral for loans on the basis of reweights will not be accepted by CCC.

(b) The amount of the loan for each bale will be determined by multiplying the net weight of the bale, as determined under paragraph (a) of this section, by the applicable loan rate and subtracting:

(1) Any unpaid warehouse receiving charges,

(2) Any warehouse storage charges in excess of 60 days as of the date of tender to CCC, as provided in § 1427.11(g), and

(3) Any unpaid charge for furnishing new bale ties as prescribed in § 1427.11(g).

(c) CCC will not increase the amount of the loan made with respect to any bale of cotton as a result of a redetermination of the quantity or quality of the bale after it is tendered to CCC, except that if it is established to the satisfaction of CCC that a bona fide error was made with respect to the weight of the bale or the classification for the bale as specified on the AMS Form A–1, such error may be corrected.

§ 1427.9 Classification of cotton.

References made to "classification" in this subpart shall include micronaire, and for upland cotton, strength, readings. All cotton tendered for loan must be classed by an AMS Cotton Classing Office ("Cotton Classing Office") and tendered on the basis of such classification.

(a) An AMS Cotton Classification Memorandum Form 1 ("AMS Form 1") showing the classification of a bale must be based upon a representative sample drawn from the bale in accordance with instructions to samplers drawing samples under the Smith-Doxey program.

(b) If the producer's cotton has not been sampled for an AMS Form 1 classification, the warehouse shall sample such cotton and forward the samples to the Cotton Classing Office serving the district in which the cotton is located. Such warehouse must be licensed by AMS to draw samples for submission to the Cotton Classing Office.

(c) If a sample has been submitted for classification, another sample shall not be drawn and forwarded to a Cotton Classing Office except for a review classification. Review classifications are recorded on AMS Form 1, Review Memorandum ("AMS Form 1 Review").

(d) Where review classification is not involved, if through error or otherwise, two or more samples from the same bale are submitted for classification, the loan rate shall be based on the classification having the lower loan value.

(e) The classification on AMS Form 1 or AMS Form 1 Review must be dated not more than 15 days prior to the date the warehouse receipt was issued; however, State committees may, in arid regions, extend this period to not to exceed 30 days prior to the date the warehouse receipt was issued upon determining that such extension will not result in reduction in the grade of the cotton during the extension period, otherwise a new sample must be drawn and a review classification based on the new sample will be required.

(f) If an AMS Form 1 Review classification is obtained, the loan value of the cotton represented thereby will be based on such review classification.

§ 1427.10 Approved storage.

(a) Except as provided in accordance with § 1427.16, eligible cotton may be pledged as collateral for loans only if stored at warehouses approved by CCC.

(1) Persons desiring approval of their facilities should communicate with the Kansas City Commodity Office, P.O. Box 419205, Kansas City, Missouri 64141–6205.

(2) The names of approved warehouses may be obtained from the Kansas City Commodity Office or from State or county offices.

(b) When the operator of a warehouse receives notice from CCC that a loan has been made by CCC on a bale of cotton, the operator shall, if such cotton is not stored within the warehouse, promptly place such cotton within such warehouse.

(c) Storage charges paid by a producer to CCC as security for a loan will not be refunded by CCC. If cotton is redeemed from the loan, the person removing the cotton from storage shall pay all unpaid warehouse charges at the established tariff rate.

(d) The approved storage requirements provided in this section may be waived by CCC if the producer requests a loan deficiency payment pursuant to the loan deficiency payment provisions contained in § 1427.23.

§ 1427.11 Warehouse receipt and insurance.

(a) Producers may obtain loans on eligible cotton represented by warehouse receipts only if the warehouse receipts:

(1) Are negotiable machine cardtype warehouse receipts,

(2) Are issued by CCC approved warehouses,

(3) Provide for delivery of the cotton to bearer or are properly assigned by endorsement in blank, so as to vest title in the holder of the receipt, and

(4) Otherwise are acceptable to CCC.

(b) The warehouse receipt must:

(1) Contain the tag number (warehouse receipt number),

(2) Show that the cotton is covered by fire insurance, and

(3) Be dated on or prior to the date the producer signs the note and security agreement.

(c) If a bale is stored at the origin warehouse (the warehouse to which the bale was first delivered for storage after ginning), the warehouse receipt must contain the gin bale number. If a bale has been moved from the origin warehouse, the warehouse receipt shall, in lieu of the gin bale number, contain the tag number and identification of the origin warehouse.

(d) Open yard endorsement, if any, on the warehouse receipt must have been rescinded with the legend "open yard disclaimer deleted" with appropriate signature of the authorized representative of the warehouse.

(e) Block warehouse receipts will be accepted when authorized by CCC only under the following conditions:

(1) The owner of the warehouse issuing the block warehouse receipt shall also own the cotton represented by the block warehouse receipt, and

(2) The warehouse shall not be licensed under the U.S. Warehouse Act.

(f) Each receipt must set out in its written or printed terms the tare and the net weight of the bale represented thereby. (1) The net weight shown on the warehouse receipt shall be the difference between the gross weight as determined by the warehouse at the warehouse site and the tare weight, except that the warehouse receipt may show the net weight established at a gin:

(i) In case the gin is in the immediate vicinity of the warehouse and is operated under common ownership with such warehouse or in any other case in which the showing of gin weights on the warehouse receipts is approved by CCC, and

(ii) If the showing of gin weights on the warehouse receipts is permitted by the licensing authority for the warehouse.

(2) The tare shown on the receipt shall be the tare furnished to the warehouse by the ginner or entered by the ginner on the gin bale tag. A warehouse receipt reflecting an alteration in tare or net weight will not be accepted by CCC unless it bears, on the face of the receipt, the following legend or similar wording approved by CCC, duly executed by the warehouse or an authorized representative of the warehouse:

Corrected (tare or net) weight
(Name of warehouse)
By (Signature)
Date

(3) Alterations in other inserted data on the receipt must be initialed by an authorized representative of the warehouse.

(g) If warehouse storage charges have been paid, the receipt must be stamped or otherwise noted to show that date through which the storage charges have been paid. (1) For receipts showing accrued storage charges in excess of 60 days as of the date of tender to CCC, the loan amount will be reduced for each month of unpaid storage or fraction thereof in excess of 60 days by the monthly storage charge specified in the storage agreement between the warehouse and CCC.

(2) If warehouse receiving charges have been paid or waived, the receipt must be stamped or otherwise noted to show such fact.

(3) If the receipt does not show that receiving charges have been paid or waived, CCC shall reduce the loan amount the amount of the receiving charges specified in the storage agreement between the warehouse and CCC. However, except for bales stored in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, if receiving charges due on the bale include a charge, if any, for a new set of ties for compressing flat bales tied with ties which cannot be reused, the warehouse receipt must show such receiving charges and state: "Receiving charges due include charge for new set of ties, or similar notation, and CCC shall reduce the loan amount by the amount of the receiving charges shown on the warehouse receipt (this will be the amount payable by CCC if it pays for receiving, notwithstanding the provisions of the storage agreement)".

(4) In any case where the loan amount is reduced by unpaid storage or receiving charges, such charges will be paid to the warehouse by CCC after loan maturity if the cotton is not redeemed from the loan, or as soon as practicable after the cotton is ordered shipped by CCC or destroyed by fire while in loan status. Except for bales stored in the States of Alabama, Florida, Georgia, North Carolina, South Carolina, or Virginia, if the bale is stored at a warehouse which does not have compress facilities or arrangements, and if the bale ties are not suitable for reuse when the bale is compressed, the warehouse receipt must show this fact, and the loan amount will be reduced by the charge which will be assessed by the nearest compress in line of transit for furnishing new bale ties.

(h) If the bale was received by rail, the receipt must be stamped or otherwise noted to show such fact.

(i) The warehouse receipt must show the compression status of the bale, i.e., flat, modified flat, standard, gin standard, gin universal, or warehouse universal density. If the compression charge has been paid, or if the warehouse claims no lien for such compression, the receipt must be stamped or otherwise noted to show such fact.

§ 1427.12 Liens.

If there are any liens or encumbrances on the commodity, waivers that fully protect the interest of CCC must be obtained even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the commodity after the loan is approved.

§ 1427.13 Fees, charges and interest.

(a) A producer shall pay a nonrefundable loan service fee to CCC or, if applicable, to an authorized LSA, at a rate determined by CCC. Any such fee shall be in addition to any loan clerk fee paid to a loan clerk in accordance with paragraph (b) of this section. The amount of such fees is available in State and county offices and are shown on the note and security agreement.

(b) Loan clerks may only charge fees for the preparation of loan documents at the rate determined by CCC. (1) Such fees may be deducted from the loan proceeds instead of the fees being paid in cash.

(2) The amount of such fees is available in State and county offices and are shown on the note and security agreement.

(c) Interest which accrues with respect to a loan shall be determined in accordance with part 1405 of this chapter. All or a portion of such interest may be waived with respect to a quantity of cotton which has been redeemed in accordance with § 1427.19 at a level which is less than the principal amount of the loan plus charges and interest.

(d) For each crop of upland cotton, the producer, as defined in the Cotton Research and Promotion Act (7 U.S.C. 2101), shall remit to CCC an assessment which shall be transmitted by CCC to the Cotton Board and shall be deducted from the:

(1) Loan proceeds for a crop of cotton and shall be at a rate equal to one dollar per bale plus up to one percent of the loan amount, and

(2) Loan deficiency payment proceeds for a crop of cotton and shall be at a rate equal to up to one percent of the loan deficiency payment amount.

§ 1427.14 Offsets.

(a) If any installment on any loan made by CCC on farm-storage facilities or drying equipment is due and payable such amount due to CCC shall be offset from loan proceeds made available to the producer in accordance with this part, after deduction of clerk fees, service charges, research and promotion fees.

(b) If the producer is indebted to CCC or to any other agency of the United States and such indebtedness is listed on the county claim control record, amounts due the producer under regulations in this subpart, after deduction of amounts payable under paragraph (a) of this section shall be applied to such indebtedness as provided in part 3 of this title and part 1403 of this chapter.

§ 1427.15 Special procedure where note amount advanced.

(a) This special procedure is provided to assist persons or firms, which, in the course of their regular business of handling cotton for producers, have made advances to eligible producers on eligible cotton to be placed under loan and desire to obtain credit at a financial institution for the amounts advanced. A financial institution which has made advances to eligible producers on eligible cotton may also obtain reimbursement for the amounts advanced under this procedure.

(b) This special procedure shall apply only:

(1) To loan documents covering cotton on which a person or firm has advanced to the producers, including payments to prior lienholders and other creditors, the note amounts shown on the Form A loan, except for:

(i) Authorized loan clerk fees.

(ii) The research and promotion fee collected for transmission to the Cotton Board, and

(iii) CCC loan service charges, and

(2) If such person or firm is entitled to reimbursement from the proceeds of the loans for the amounts advanced and has been authorized by the producer to deliver the loan documents to a county office for disbursement of the loans.

(c)(1) Each Form A loan and related documents shall be mailed or delivered to the appropriate county office and shall show the entire proceeds of the loans, except for CCC loan service charges, for disbursement to:

(i) The financial institution which is to allow credit to the person or firm which made the loan advances or to such financial institution and such person or firm as joint payees, or

(ii) The financial institution which made the loan advances to the producers.

(2) When received in a county office (or postmarked, if mailed) warehouse receipts and loan documents must reflect not more than 60 days accrued storage, or the loan amount must be reduced by the excess storage as specified in § 1427.11.

(3) The documents shall be accompanied by Form CCC–825, Transmittal Schedule of Form A Cotton Loans, in original and two copies, numbered serially for each county office by the financial institution. The Form CCC–825 shall show the amounts invested by the financial institution in the loans, which shall be the amounts of the notes minus the amounts of CCC loan service charges shown on the notes.

(4) Upon receipt of the loan documents and Form CCC–825, the county office will stamp one copy of the Form CCC–825 to indicate receipt of the documents and return this copy to the financial institution.

(d) County offices will review the loan documents prior to disbursement and will return to the financial institution any documents determined not to be acceptable because of errors or illegibility. County offices will disburse the loans for which loan documents are acceptable by issuance of one check to the payee indicated on the Form A and will mail the check to the address shown for such payee on the Form A loan with a copy of Form CCC–825. The Form CCC–825 will show the date of disbursement by a county office and amount of interest earned by the financial institution.

(e) The financial institution shall be deemed to have invested funds in the loans as of the date loan documents acceptable to CCC were delivered to a county office or, if received by mail, the date of mailing as indicated by postmark or the date of receipt in a county office if no postmark date is shown. Patron postage meter date stamp will not be recognized as a postmark date.

(f) Interest will be computed on the total amount invested by the financial institution in the loan represented by accepted loan documents from and including the date of investment of funds by the financial institution to, but not including, the date of disbursement by a county office.

(1) Interest will be paid at the rate in effect for CCC loans as provided in part 1405 of this chapter.

(2) Interest earned by the financial institution in the investment in loans disbursed during a month will be paid by county offices after the end of the month.

§ 1427.16 Reconcentration of cotton.

(a) Loans on cotton to be reconcentrated shall be available only on cotton received at CCC approved warehouses in areas where there is a shortage of storage space and the local warehouse certifies such fact to CCC. A producer who desires to obtain a loan on cotton to be reconcentrated under the provisions of this paragraph shall request such reconcentration and present the same documents as required for a regular loan.

(1) The Forms CCC-Cotton A-1, Schedule of Pledged Cotton (Form CCC-Cotton A-1), and warehouse receipts covering such cotton to be reconcentrated must show the reconcentration order number furnished by the county office or authorized LSA under which the cotton will be shipped.

(2) The county office or authorized LSA shall arrange for reconcentration of the cotton under the direction of the Kansas City Commodity Office.

(3) Any fees, cost, or expenses incident to such actions shall be charges against the cotton.

(4) After the cotton is reconcentrated, the Kansas City Commodity Office shall obtain new warehouse receipts, allocate to individual bales shipping and other charges incurred against the cotton, and return new warehouse receipts and reconcentration charges applicable to each bale to the county office or authorized LSA. Such reconcentration charges shall be added to bale loan amounts and must be repaid for bales redeemed from loan.

(b) CCC may under certain conditions, before loan maturity, compress, store, insure, or reinsure the cotton against any risk, or otherwise handle or deal with the cotton as it may deem necessary or appropriate for the purpose of protecting the interest therein of the producer or CCC.

(1) CCC may also move the cotton from one storage point to another with the written consent of the producer or borrower and upon the request of the local warehouse and certification that there is congestion and lack of storage facilities in the area: Provided, however, that if CCC determines such loan cotton is improperly warehoused and subject to damage, or if any of the terms of the loan agreement are violated, or if carrying charges are substantially in excess of the average of carrying charges available elsewhere and the local warehouse, after notice, declines to reduce such charges, such written consent need not be obtained.

(2) The county office or authorized LSA shall arrange for reconcentration of the cotton under the direction of the Kansas City Commodity Office.

(3) Any fees, costs, or expenses incident to such actions shall be charges against the cotton.

(4) After the cotton is reconcentrated, the Kansas City Commodity Office shall obtain new warehouse receipts, allocate to individual bales, shipping and other charges incurred against the cotton, and return new warehouse receipts and reconcentration charges applicable to each bale to the county office or authorized LSA. Such reconcentration charges shall be added to bale loan amounts and must be repaid for bales redeemed from loan.

§ 1427.17 Custodial offices.

Forms A and CCC-Cotton A–1, collateral warehouse receipts, cotton classification memoranda, and related documents will be maintained in custody of the local county office, authorized LSA, central county office, or any financial institution defined in § 1427.2 and approved by CCC, whichever disbursed the loan evidenced by such documents.

§ 1427.18 Liability of the producer.

(a)(1) If a producer makes any fraudulent representation in obtaining a loan or loan deficiency payment or in maintaining, or settling a loan or disposes of or moves the loan collateral without the approval of CCC, such loan shall be payable upon demand by CCC. The producer shall be liable for:

(i) The amount of the loan or loan deficiency payment;

(ii) Any additional amounts paid by CCC with respect to the loan or loan deficiency payment;

(iii) All other costs which CCC would not have incurred but for the fraudulent representation or the unauthorized disposition or movement of the loan collateral;

(iv) Applicable interest on such amounts, and

(v) With regard to amounts due for a loan, the payment of such amounts may not be satisfied by the forfeiture of loan collateral to CCC of cotton with a settlement value that is less than the total of such amounts or by repayment of such loan at the lower loan repayment rate as prescribed in § 1427.19.

(2)(i) Notwithstanding any provision of the note and security agreement, if a producer has made any such fraudulent representation or if the producer has disposed of, or moved, the loan collateral without prior written approval from CCC, the value of such collateral delivered to or acquired by CCC shall be determined by CCC, and shall be the lower of:

(A) The market value of the commodity at the close of the market on the final date for repayment; or

(B) The loan settlement value of the commodity.

(ii) Notwithstanding the provisions of paragraphs (a)(2) of this section, if CCC sells the loan collateral in order to determine the market value of the cotton, the value of the cotton shall be the lower of:

(A) The sales price of the cotton less any costs incurred by CCC in completing the sale; or

(B) The loan settlement value of the cotton.

(b) If the amount disbursed under a loan, or in settlement thereof, or loan deficiency payment exceeds the amount authorized by this part, the producer shall be liable for repayment of such excess, plus interest. In addition, the commodity pledged as collateral for such loan shall not be released to the producer until such excess is repaid.

(c) If the amount collected from the producer in satisfaction of the loan or loan deficiency payment is less than the amount required in accordance with this part, the producer shall be personally liable for repayment of the amount of such deficiency plus applicable interest.

(d) If more than one producer executes a note and security agreement or loan deficiency payment application with CCC, each such producer shall be jointly and severally liable for the violation of the terms and conditions of the note and security agreement and the regulations set forth in this part. Each such producer shall also remain liable for repayment of the entire loan amount until the loan is fully repaid without regard to such producer's claimed share in the cotton pledged as collateral for the loan. In addition, such producer may not amend the note and security agreement with respect to the producer's claimed share in such cotton, or loan proceeds, after execution of the note and security agreement by CCC.

§ 1427.19 Repayment of support price loans.

(a) Warehouse receipts will not be released except as provided in this section.

(b) A producer or agent or subsequent agent authorized on CCC Form 605, may redeem one or more bales of cotton pledged as collateral for a loan by payment to CCC of an amount applicable to the bales of cotton being redeemed determined in accordance with this section. CCC, upon proper payment for the amount due, shall release the warehouse receipts and, if requested, the classification memoranda applicable to such cotton. The producer may also request that the warehouse receipts and classification memoranda be forwarded to a bank for payment, in which case:

(1) The amount of the loan, interest, and charges must be paid to the bank within 5 business days after the documents are received by the bank, and

(2) All charges assessed by the bank to which the receipts are sent must be paid by the producer.

(c) A producer or agent or subsequent agent authorized on CCC Form 605, may repay the loan amount for one or more bales of cotton pledged as collateral for a loan:

(1) For upland cotton, at a level that is the lesser of:

(i) The loan level and charges, plus interest determined for such bales; or

(ii) The higher of:

(A) The loan level determined for such bales multiplied by 70 percent for the 1991 and subsequent years crops; or

(B) The adjusted world price, as determined by CCC in accordance with § 1427.25, in effect on the day the repayment is received by the county office or authorized LSA that disbursed the loan.

(2) For ELS cotton, by repaying the loan amount and charges, plus interest determined for such bales.

(d) CCC shall determine and publicly announce the adjusted world price for each crop of upland cotton on a weekly basis.

(e) The difference between the loan level, excluding charges and interest, and the loan repayment level is the market gain. The total amount of any market gain realized by a person is subject to part 1497 of this chapter.

(f) Notwithstanding any other provision in this part, if an upland cotton loan has been extended in accordance with § 1427.7(a)(2), and is repaid in accordance with paragraph (c)(1) of this section, the repayment amount shall include interest that has accrued on the cotton under loan in accordance with § 1427.7(b)(2).

(g) Repayment of loans will not be accepted after CCC acquires title to the cotton in accordance with § 1427.7.

§ 1427.20 Handling payments and collections not exceeding $9.99.

To avoid administrative costs of making small payments and handling small accounts, amounts of $9.99 or less will be paid to the producer only upon the producer's request. Deficiencies of $9.99 or less, including interest, may be

disregarded unless demand for payment is made by CCC.

§ 1427.21 Settlement.

(a) The settlement of loans shall be made by CCC on the basis of the quality and quantity of the cotton delivered to CCC by the producer or acquired by CCC.

(b) Settlements made by CCC with respect to eligible cotton which are acquired by CCC which are stored in an approved warehouse shall be made on the basis of the entries set forth on the applicable warehouse receipt and other accompanying documents.

(c) If a producer does not pay to CCC the total amount due in accordance with a loan, CCC shall take title to the cotton in accordance with § 1427.7(c).

§ 1427.22 Death, incompetency, or disappearance.

In the case of death, incompetency, or disappearance of any producer who is entitled to the payment of any proceeds in settlement of a loan or loan deficiency payment, payment shall, upon proper application to the county office which disbursed the loan or loan deficiency payment, be made to the person or persons who would be entitled to such producer's payment as provided in the regulations entitled Payment Due Persons Who Have Died, Disappeared, or Have Been Declared Incompetent, part 707 of this title.

§ 1427.23 Cotton loan deficiency payments.

(a) Producers may obtain loan deficiency payments for 1991 and subsequent crops of upland cotton in accordance with this section.

(b) In order to be eligible to receive such loan deficiency payments, the producer of such commodity must:

(1) Comply with all of the program requirements to be eligible to obtain loans in accordance with this part;

(2) Agree to forego obtaining such loans; and

(3) Otherwise comply with all program requirements.

(c) The loan deficiency payment applicable to a crop of cotton shall be computed by multiplying the loan payment rate, as determined in accordance with paragraph (c) of this section by the quantity of the crop the producer is eligible to pledge as collateral for a price support loan.

(d) The loan deficiency payment rate for a crop of upland cotton shall be the amount by which the level of price support loan determined for a bale of such crop exceeds the amount at which CCC has announced that producers may repay the price support loan for such bale.

(e) The total amount of any loan deficiency payments that a person may receive is subject to part 1497 of this chapter.

§ 1427.24 Recourse loans.

CCC may make recourse loans available to eligible producers. Repayment or settlement of such recourse loans shall be in accordance with the terms and conditions set forth by CCC when the availability of such recourse loans is announced.

§ 1417.25 Determination of the prevailing world market price and the adjusted world price for upland cotton.

(a) The prevailing world market price for upland cotton shall be determined by CCC as follows:

(1) During the period when only one daily price quotation is available for each growth quoted for Middling one and three-thirty-second inch (M 1 3/32 inch) cotton C.I.F. (cost, insurance, and freight) northern Europe, the prevailing world market price for upland cotton shall be based upon the average of the quotations for the preceding Friday through Thursday for the five lowest-priced growths of the growths quoted for M 1 3/32 inch cotton C.I.F. northern Europe.

(2) During the period when both a price quotation for cotton for shipment no later than August/September of the current calendar year ("current shipment price") and a price quotation for cotton for shipment no earlier than October/November of the current calendar year ("forward shipment price") are available for growths quoted for M 1 3/32 inch cotton C.I.F. northern Europe, the prevailing world market price for upland cotton shall be based upon the following: Beginning with the first week covering the period Friday through Thursday which includes April 15 or, if both the average of the current shipment prices for the preceding Friday through Thursday for the five lowest-priced growths of the growths quoted for M 1 3/32 inch cotton C.I.F. northern Europe ("Northern Europe current price") and the average of the forward shipment prices for the preceding Friday through Thursday for the five lowest-priced growths of the growths quoted for M 1 3/32 inch cotton C.I.F. northern Europe ("Northern Europe forward price") are not available during that period, beginning with the first week covering the period Friday through Thursday after the week which includes April 15 in which both the Northern Europe current price and the Northern Europe forward price are available, the prevailing world market price for upland cotton shall be based upon the result calculated by the following procedure:

(i) *Weeks 1 and 2:* (2 × Northern Europe current price) + Northern Europe forward price/3.

(ii) *Weeks 3 and 4:* Northern Europe current price + Northern Europe forward price/2.

(iii) *Weeks 5 and 6:* Northern Europe current price + (2 × Northern Europe forward price)/3.

(iv) *Week 7 through July 31:* Northern Europe forward price.

(3) The prevailing world market price for upland cotton as determined in accordance with paragraphs (a)(1) or (a)(2) of this section shall hereinafter be referred to as the "Northern Europe price."

(4) If quotes are not available for one or more days in the five-day period, the available quotes during the period will be used. If no quotes are available during the Friday through Thursday period, the prevailing world market price shall be based upon the best available world price information, as determined by CCC.

(b) The prevailing world market price for upland cotton, adjusted in accordance with paragraph (c) of this section ("adjusted world price"), shall be applicable to the 1991 through 1995 crops of upland cotton.

(c) The adjusted world price for upland cotton shall equal the Northern Europe price as determined in accordance with paragraph (a) of this section, adjusted as follows:

(1) The Northern Europe price shall be adjusted to average designated U.S. spot market location by deducting the average difference in the immediately preceding 52-week period between:

(i)(A) The average of price quotations for the U.S. Memphis territory and the California/Arizona territory as quoted each Thursday for M 1 3/32 inch cotton C.I.F. northern Europe during the period when only one daily price quotation for such growths is available, or

(B) The average of the current shipment prices for U.S. Memphis territory and the California/Arizona territory as quoted each Thursday for M 1 3/32 inch cotton C.I.F. northern Europe during the period when both current shipment prices and forward shipment prices for such growths are available; and

(ii) The average price of M 1 3/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton as quoted each Thursday in the designated U.S. spot markets.

(2) The price determined in accordance with paragraph (c)(1) of this section shall be adjusted to reflect the

price of Strict Low Middling (SLM) 1 1/16 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton ("U.S. base quality") by deducting the difference, as announced by CCC, between the applicable loan rate for a crop of upland cotton for M 1 3/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton and the loan rate for a crop of upland cotton of the U.S. base quality.

(3) The price determined in accordance with paragraph (c)(2) of this section shall be adjusted to average U.S. location by deducting the difference between the average loan rate for a crop of upland cotton of the U.S. base quality in the designated U.S. spot markets and the corresponding crop year national average loan rate for a crop of upland cotton of the U.S. base quality, as announced by CCC.

(4)(i) If it is determined that the prevailing world market price, as adjusted in accordance with paragraph (c)(1) through (c)(3) of this section, is less than 115 percent of the current crop year loan level for SLM 1 1/16 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton, and that the Friday through Thursday average price quotation for the lowest-priced U.S. growth as quoted for M 1 3/32 inch cotton C.I.F. northern Europe is greater than the Northern Europe price, such price may be adjusted on the basis of some or all of the following data, as available:

(A) The U.S. share of world exports;

(B) The current level of cotton export sales and/or cotton export shipments; and

(C) Other data determined by CCC to be relevant in establishing an accurate prevailing world market price determination adjusted to United States quality and location.

(ii) The adjustment may not exceed the difference between the Friday through Thursday average price for the lowest-priced U.S. growth as quoted for M 1 3/32 inch cotton C.I.F. northern Europe and the Northern Europe price.

(d) In determining the average difference in the 52-week period as provided in paragraph (c)(1) of this section:

(1) If the difference between the average price quotations for the U.S. Memphis territory and the California/Arizona territory as quoted for M 1 3/32 inch cotton C.I.F. northern Europe and the average price of M 1 3/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton as quoted each Thursday in the designated U.S. spot markets for any week is:

(i) More than 115 percent of the estimated actual cost associated with transporting U.S. cotton to northern Europe, then 115 percent of such actual cost shall be substituted in lieu thereof for such week.

(ii) Less than 85 percent of the estimated actual cost associated with transporting U.S. cotton to northern Europe, then 85 percent of such actual cost shall be substituted in lieu thereof for such week.

(2) If a Thursday price quotation for either the U.S. Memphis territory or the California/Arizona territory as quoted for M 1 3/32 inch cotton C.I.F. northern Europe is not available for any week, CCC:

(i) May use the available northern Europe quotation to determine the difference between the average price quotations for the U.S. Memphis territory and the California/Arizona territory as quoted for M 1 3/32 inch cotton C.I.F. northern Europe and the average price of M 1 3/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton as quoted each Thursday in the designated U.S. spot markets for that week, or

(ii) May not take that week into consideration.

(3) If Thursday price quotations for any week are not available for either,

(i) both the Memphis territory and the California/Arizona territory as quoted for M 1 3/32 inch cotton C.I.F. northern Europe, or

(ii) the average price of M 1 3/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton as quoted in the designated U.S. spot markets, that week will not be taken into consideration.

(e) The adjusted world price for upland cotton, as determined in accordance with paragraph (c) of this section and the amount of the additional adjustment, as determined in accordance with paragraph (f) of this section, shall be determined weekly by CCC and shall be announced as soon as possible after 4 p.m. Eastern time each Thursday, beginning July 25, 1991, and continuing through the last Thursday of July 1996. In the event that Thursday is a nonworkday, the determination will be announced the next workday.

(f)(1) The adjusted world price, as determined in accordance with paragraph (c) of this section, shall be subject to further adjustments as provided in this subsection with respect to any grade of upland cotton with a staple length of 1 1/32 inch or shorter and the following grades of upland cotton with a staple length of 1 1/16 inch or longer:

(i) *White Grades*—Strict Good Ordinary Plus, Strict Good Ordinary, Good Ordinary Plus and Good Ordinary;

(ii) *Light Spotted Grades*—Low Middling and Strict Good Ordinary;

(iii) *Spotted Grades*—Middling, Strict Low Middling, Low Middling, and Strict Good Ordinary;

(iv) *Tinged Grades*—Strict Middling, Middling, Strict Low Middling and Low Middling;

(v) *Yellow Stained Grades*—Strict Middling and Middling;

(vi) *Light Gray Grades*—Strict Low Middling;

(vii) Gray Grades—Middling and Strict Low Middling. Grade and staple length must be determined in accordance with § 1427.9. If no such official classification is presented, the adjustment shall not be made.

(2) The adjustment for upland cotton provided for by paragraph (f)(1) of this section shall be determined by deducting from the adjusted world price:

(i) The difference between the Northern Europe price, and

(A) During the period when only one daily price quotation for each growth quoted for "coarse count" cotton C.I.F. northern Europe is available the average of the quotations for the corresponding Friday through Thursday for the three lowest-priced growths of the growths quoted for "coarse count" cotton C.I.F. northern Europe.

(B) During the period when both current shipment prices and forward shipment prices are available for the growths quoted for "coarse count" cotton C.I.F. northern Europe, the result calculated by the following procedure: Beginning with the first week covering the period Friday through Thursday which includes April 15 or, if both the average of the current shipment prices for the preceding Friday through Thursday for the three lowest-priced growths of the growths quoted for "coarse count" cotton C.I.F. northern Europe ("Northern Europe coarse count current price") and the average of the forward shipment prices for the preceding Friday through Thursday for the three lowest-priced growths of the growths quoted for "coarse count" cotton C.I.F. northern Europe ("Northern Europe coarse count forward price") are not available during that period, beginning with the first week covering the period Friday through Thursday after the week which includes April 15 in which both the Northern Europe coarse count current price and the Northern Europe coarse count forward price are available:

(*1*) *Weeks 1 and 2:* (2 x Northern Europe coarse count current price) +

Northern Europe coarse count forward price/3.

(2) *Weeks 3 and 4:* Northern Europe coarse count current price + Northern Europe coarse count forward price/2.

(3) *Weeks 5 and 6:* Northern Europe coarse count current price + (2 x Northern Europe coarse count forward price)/3.

(4) *Week 7 through July 31:* The Northern Europe coarse count forward price, minus:

(ii) The difference between the applicable loan rate for a crop of upland cotton for M 1 3/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton and the loan rate for a crop of upland cotton for SLM 1 1/32 inch (micronaire 3.5 through 3.6 and 4.3 through 4.9, strength 24 through 25 grams per tex) cotton.

(iii) The result of the calculation as determined in accordance with this paragraph (f)(2) shall hereinafter be referred to as the "Northern Europe coarse count price."

(3) With respect to the determination of the Northern Europe coarse count price in accordance with paragraph (f)(2)(i) of this section:

(i) If no quotes are available for one or more days of the five-day period, the available quotes will be used.

(ii) If quotes for three growths are not available for any day in the five-day period, that day will not be taken into consideration; and

(iii) If quotes for three growths are not available for at least three days in the five-day period, that week will not be taken into consideration, in which case the adjustment determined in accordance with paragraph (f)(2) of this section for the latest available week will continue to be applicable.

(g) If the 6-week transition periods from using current shipment prices to using forward shipment prices in the determination of the Northern Europe price in accordance with paragraph (a)(2) of this section, and the Northern Europe coarse count price in accordance with paragraph (f)(2)(i)(B) of this section do not begin at the same time, CCC shall use either current shipment prices, forward shipment prices, or any combination thereof, to determine the Northern Europe price and/or the Northern Europe coarse count price used in the determination of the adjustment for upland cotton provided for by paragraph (f)(1) of this section and determined in accordance with paragraph (f)(2) of this section, in order to prevent distortions in such adjustment.

(h) The adjusted world price, determined in accordance with paragraph (c) of this section, shall be subject to further adjustments, as determined by CCC based upon the Schedule of Premiums and Discounts and the location differentials applicable to each warehouse location as announced in accordance with the upland cotton price support loan program for a crop of upland cotton.

§ 1427.26 Paperwork Reduction Act assigned numbers.

The information collection requirements contained in these regulations will be submitted to the Office of Management and Budget in accordance with 44 U.S.C. chapter 35 and an OMB number will be assigned.

Subpart—Seed Cotton Loan Program Regulations.

§ 1427.160 General Statement.

(a) The regulations in this subpart are applicable to the 1991 and subsequent crops of upland and extra long staple (ELS) seed cotton. Such loans will be available through March 31 of the year following the calendar year in which such crop is normally harvested. This is the loan availability period. CCC may change the loan availability period to conform to State or locally imposed quarantines. Additional terms and conditions are set forth in the note and security agreement which must be executed by a producer in order to receive such loans.

(b) Price support rates and the forms which are used in administering the program for a crop of upland and ELS cotton are available in State and county Agricultural Stabilization and Conservation Service ("ASCS") offices ("State and county offices", respectively). Price support rates shall be based upon the location at which the loan collateral is stored.

(c) A producer must, unless otherwise authorized by CCC, request price support at the county office which, in accordance with part 719 of this title, is responsible for administering programs for the farm on which the cotton was produced. An approved cooperative marketing association must, unless otherwise authorized by CCC, request price support at a servicing agent bank approved by CCC. All note and security agreements and related documents necessary for the administration of the price support programs shall be determined by CCC and are available at State and county offices.

(d) price support loans shall not be available with respect to any commodity produced on land owned or otherwise in the possession of the United States if such land is occupied without the consent of the United States.

§ 1427.161 Administration.

Section 1427.2 of this part shall be applicable to this subpart.

§ 1427.162 Definitions.

Section 1427.3 of this part shall be applicable to this subpart.

§ 1427.163 Disbursement of loans.

(a) A producer or the producer's agent shall request a loan at the county office for the county which, in accordance with part 719 of this title, is responsible for administering programs for the farm on which the cotton was produced, which will assist the producer in completing the loan documents, except that approved cooperatives designated by producers to obtain loans in their behalf may obtain loans through a central county office designated by the State committee.

(b) Disbursement of each loan will be made by the county office of the county which is responsible for administering programs for the farm on which the cotton was produced except that approved cooperatives designated by producers to obtain loans in their behalf may obtain disbursement of loans at a central county office designated by the State committee. Service charges shall be deducted from the loan proceeds. The producer or the producer's agent shall not present the loan documents for disbursement unless the cotton is in existence and in good condition. If the cotton is not in existence and in good condition at the time of disbursement, the producer or the agent shall immediately return the check issued in payment of the loan or, if the check has been negotiated, shall promptly return the proceeds.

§ 1427.164 Eligible producer.

Section 1427.4 of this part shall be applicable to this subpart.

§ 1427.165 Eligible seed cotton.

(a) Cotton pledged as collateral for a loan must be tendered to CCC by an eligible producer and must be:

(1) In existence and in good condition at the time of disbursement of loan proceeds;

(2) Stored in identity preserved lots in approved storage meeting requirements of § 1427.171; and

(3) Insured at the full loan value against loss or damage by fire.

(4) Not have been sold, nor any sales option on such cotton granted, to a buyer under a contract which provides that the buyer may direct the producer to pledge the cotton to CCC as collateral for a price support loan; and

(5) Not have been previously sold and repurchased; or pledged as collateral for a CCC price support loan and redeemed.

(b) The quality of cotton which may be pledged as collateral for a loan shall be the estimated quality of lint cotton in each lot of seed cotton as determined by the county office, except that if a control sample of the lot of cotton is classed by an Agricultural Marketing Service (AMS), Cotton Classing Office, the quality for the lot shall be the quality shown on the AMS Form 1 or Form 3 classification card issued for the control sample.

(c) To be eligible for price support, the beneficial interest in the commodity must be in the producer who is pledging the commodity as collateral for a loan as provided in § 1427.5(c).

§ 1427.166 Insurance.

The cotton must be insured at the full loan value against loss or damage by fire.

§ 1427.167 Liens.

If there are any liens or encumbrances on the commodity, waivers that fully protect the interest of CCC must be obtained even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the commodity after the loan is approved.

§ 1427.168 Offsets.

(a) If any installment on any loan made by CCC on farm-storage facilities or drying equipment is due and payable such amount due to CCC shall be offset from loan proceeds made available to the producer in accordance with this part, after deduction of clerk fees, service charges, research and promotion fees.

(b) If the producer is indebted to CCC or any other agency of the United States and such indebtedness is listed on the county claim control record, amounts due the producer under regulations in this subpart, after deduction of amounts payable under paragraph (a) of this section shall be applied to such indebtedness as provided in part 3 of this title and part 1403 of this chapter.

§ 1427.169 Fees, charges and interest.

(a) A producer shall pay a nonrefundable loan service fee to CCC at a rate determined by CCC.

(b) Interest which accrues with respect to a loan shall be determined in accordance with part 1405 of this chapter.

§ 1427.170 Quantity for loan.

(a) The quantity of lint cotton in each lot of seed cotton tendered for loan shall be determined by the county office by multiplying the weight or estimated weight of seed cotton by the lint turnout factor determined in accordance with paragraph (b) of this section.

(b) The lint turnout factor for any lot of seed cotton shall be the percentage determined by the county committee representative during the initial inspection of the lot. If a control portion of the lot is weighed and ginned, the turnout factor determined for the portion of cotton ginned will be used for the lot. If a control portion is not weighed and ginned, the lint turnout factor shall not exceed 32 percent for machine picked cotton and 22 percent for machine stripped cotton unless acceptable proof is furnished showing that the lint turnout factor is greater.

(c) Loans shall not be made on more than a percentage established by the county committee of the quantity of lint cotton determined as provided in this section. If the seed cotton is weighed, the percentage to be used shall not be more than 95 percent. If the quantity is determined by measurement, the percentage to be used shall not be more than 90 percent. The percentage to be used in determining the maximum quantity for any loan may be reduced below such percentages by the county committee when determined necessary to protect the interests of CCC on the basic of one or more of the following risk factors:

(1) Condition or suitability of the storage site or structure,

(2) Condition of the cotton,

(3) Location of the storage site or structure, and

(4) Other factors peculiar to individual farms or producers which related to the preservation or safety of the loan collateral. Loans may be made on a lower percentage basis at the producer's request.

§ 1427.171 Appoved storage

Approved storage shall consist of storage located on or off the producer's farm (excluding public or commercial warehouses) which is determined by a county committee representative to afford adequate protection against loss or damage and which is located within a reasonable distance, as determined by CCC, of an approved gin. If the cotton is stored off the producer's farm, the producer must furnish satisfactory evidence that the producer has the authority to store the cotton on such property and that the owner of such property has no lien for such storage against the cotton. The producer must provide satisfactory evidence that the producer and any person having an interest in the cotton including CCC, have the right to enter the premises to inspect and examine the cotton and shall permit a reasonable time to such persons to remove the cotton from the premises.

§ 1427.172 Settlement

(a) A producer may, at any time prior to maturity of the loan, obtain release of all or any part of the loan cotton by paying to CCC the amount of the loan, plus interest and charges.

(b)(1) A producer or the producer's agent shall not remove from storage any cotton which is pledged as collateral for a loan until prior written approval has been received from the county committee for removal of such cotton. If a producer or the producer's agent obtains such approval, they may remove such cotton from storage, sell the seed cotton, have it ginned, and sell the lint cotton and cottonseed obtained therefrom. The ginner shall inform the county office in writing immediately after the cotton removed from storage has been ginned and furnish the county office the loan number, producer's name, and applicable gin bale numbers. If the seed cotton is removed from storage, the loan interest and charges thereon must be satisfied not later than the earlier of:

(i) The date established by the county committee;

(ii) 5 days of the date of the producer received the AMS classification in accordance with § 1427.9 (and the warehouse receipt, if the cotton is delivered to a warehouse), representing such cotton; or

(iii) The loan maturity date.

(2) If the seed cotton or lint cotton is sold, the loan, interest, and charges must be satisfied immediately.

(3) A producer, except a cooperative, may obtain a warehouse stored loan in accordance with this part, on the lint cotton, but the loan, interest, and charges on the seed cotton must be satisfied out of the proceeds of the warehouse stored loan.

(4) An approved cooperative must repay the seed cotton loan, interest, and charges before pledging the cotton for a warehouse stored loan. If approved cooperatives authorized by producers to obtain loans in their behalf remove seed cotton from storage prior to obtaining approval to move such cotton, such removal shall constitute conversion of such cotton unless:

(i) The cooperative notifies the county office in writing the following morning by mail or otherwise that such cotton has been moved and is on the gin yard;

(ii) Furnished CCC an irrevocable letter of credit if requested; and

(iii) Repays the loan, plus interest and charges within the time specified by the county committee.

(5) Any removal from storage shall not be deemed to constitute a release of CCC's security interest in the cotton or to release the producer or approved cooperative from liability for the loan, interest, and charges if full payment of such amount is not received by the county office.

(c) If, either before or after maturity, the producer discovers that the cotton is going out of condition or is in danger of going out of condition, the producer shall immediately so notify the county office and confirm such notice in writing. If the county committee determines that the cotton is going out of condition or is in danger of going out of condition, the county committee will call for repayment of the loan, plus interest and charges on or before a specified date. If the producer does not repay the loan or have the cotton ginned and obtain a warehouse-stored loan on the lint cotton produced therefrom within the period as specified by the county committee, the cotton shall be considered abandoned.

(d) If the producer has control of the storage site and if the producer subsequently loses control of the storage site or there is danger of flood or damage to the cotton or storage structure making continued storage of the cotton unsafe, the producer shall immediately either repay the loan or move the cotton to the nearest approved gin for ginning and shall, at the same time, inform the county office. If the producer does not do so, the cotton shall be considered abandoned.

§ 1427.173 Foreclosure.

Any seed cotton pledged as collateral for a loan which is abandoned or which has not been ginned and pledged as collateral for a warehouse-stored loan in accordance with this part by the loan maturity date may be removed from storage by CCC and ginned and the resulting lint cotton warehoused for the account of CCC. The lint cotton and cottonseed may be sold, at such time, in such manner, and upon such terms as CCC may determine at public or private sale. CCC may become the purchaser of the whole or any part of such cotton and cottonseed. If the proceeds are less than the amount due on the loan (including interest, ginning charges, and any other charges incurred by CCC), the producer shall be liable for such difference and there shall be no obligation on the part of CCC to pay for any proceeds which may be in excess of the loan amount including interest and other charges.

§ 1427.174 Maturity of loans.

Seed cotton loans mature on demand by CCC but no later than May 31 following the calender year in which such crop is normally harvested.

§ 1427.175 Restrictions in use of agents.

A producer shall not delegate to any person, or the person's representative, who has any interest in storing, processing, or merchandising any commodity which is otherwise eligible for price support or a loan deficiency payment under a program to which this section is applicable, authority to exercise on the behalf of the producer any of the producer's rights or privileges under such program, including the authority to execute any note and security agreement or other price support document, unless the person (or the person's representative) to whom authority is delegated, is serving in the capacity of a farm manager for the producer or unless the authority delegated is restricted specifically for the purpose of repaying the loan amount and charges plus interest or, for the purpose of extending the loan or, for the purpose of obtaining loan deficiency payments, and such delegation is filed through the execution of Form ASCS–211, Power of Attorney, or other form as approved by CCC, with the county office and accepted by CCC.

Note: The following Attachment 1 will not appear in the Code of Federal Regulations.

Signed this August 15, 1991, in Washington, DC.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

BILLING CODE 3410-05-M

ATTACHMENT 1

CCC-605

(07-31-91)

Form Approved - OMB No. 0560-0074

USDA-CCC

DESIGNATION OF AGENT - UPLAND COTTON

The producer must complete Items 1-6.

PART A - LOAN AND AGENT DATA

1. PRODUCER'S NAME AND ADDRESS	2. AGENT'S NAME AND ADDRESS	3. COUNTY OFFICE HOLDING WAREHOUSE RECEIPTS
4. Maturity Date	5. Loan Number	6. Crop Year

PART B - DESIGNATION OF AGENT FOR LOAN REDEMPTION

THE UNDERSIGNED PRODUCER(S) ("PRODUCER") hereby authorizes the undersigned agent or subsequent agent transferred by endorsement on the reverse side of this form, to redeem all or a portion of the cotton pledged as collateral for the loan identified in Part A. The Producer agrees that no other Form CCC-605 has been or will be executed with respect to such cotton. If this form covers all the warehouse receipts pledged as security for the loan as described in Part A, mark "all" in Item 7. If this form is for only some of the warehouse receipts pledged as security for the loan, mark "see CCC-605-1 or attached list" and enter the bale receipt number(s) in numerical order on Form CCC-605-1 or other list properly dated and signed by the producer. Attach CCC-605-1 or other list to this form.

7. LOAN QUANTITY APPLICABLE TO THIS AGREEMENT:	8. NUMBER OF BALES
ALL ☐ See CCC-605-1 or attached list ☐	

Title to the cotton shall, without a sale thereof, immediately vest in CCC upon maturity of the loan. CCC shall have no obligation to pay for any market value which the cotton may have in excess of the amount of the loan. CCC may sell, transfer and deliver the cotton or documents evidencing title thereto at such time, in such manner, and upon such terms and conditions as CCC may determine, without demand, advertisement, or notice of the time and place of sale. CCC does not guarantee that the cotton subject to this agreement will be permitted to be redeemed at a level lower than the original loan level if the producer has exceeded statutory payment limitation amounts. Unless the producer's name and address are shown exactly as they appear on the Note and Security Agreement for the loan identified in Part A, this document is void.

9 A. SIGNATURE OF PRODUCER	DATE	9 C. SIGNATURE OF PRODUCER	DATE
9 B. SIGNATURE OF PRODUCER	DATE	10. SIGNATURE OF AGENT	DATE

PART C - DESIGNATION OF AGENT FOR LOAN EXTENSION

With respect to the loan identified above, if the Producer has executed Part B of this form, the undersigned Producer does also hereby appoint the agent identified in Item 2 as the Agent to act on behalf of the undersigned Producer to extend the loan identified above when extensions are authorized by CCC. Such Agent is authorized to appoint another person to act as said Agent for the undersigned Producer. The designation of such other person shall be transferred by endorsement on the reverse side of this form.

11 A. SIGNATURE OF PRODUCER	DATE
11 B. SIGNATURE OF PRODUCER	
11 C. SIGNATURE OF PRODUCER	

REMARKS

NOTE

These statements are made in accordance with the Privacy Act of 1974 (5 U.S.C. 552a). The authority for requesting the information to be supplied on this form is the Agricultural Act of 1949, as amended, and the Commodity Credit Corporation Charter Act, as amended. Furnishing the data is voluntary; however, without it assistance cannot be provided. The information will be used to determine who may repay or extend cotton price support loans. This information may be furnished to any agency responsible for enforcing the provisions of the upland cotton program.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0560-0074), Washington, D.C. 20503.

This program or activity will be conducted on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

[FR Doc. 91-19963 Filed 8-22-91; 8:45 am]

BILLING CODE 3410-05-C

Farmers Home Administration

7 CFR Parts 1944 and 1951

RIN 0575-AA87

Section 502 Rural Housing Loan Policies, Procedures and Authorizations; Borrower Supervision, Servicing, and Collection of Single Family Housing Loan Accounts

AGENCY: Farmers Home Administration, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: The Farmers Home Administration (FmHA) is amending its regulations to include a deferred payment mortgage option in the Rural Housing loan making program. The intended effect is to make home ownership affordable for a greater number of very low-income families. This action is being taken to implement the requirements of the Cranston-Gonzalez National Affordable Housing Act. This Act authorized, subject to funding approval in appropriations Acts, a Deferred Mortgage Demonstration program for fiscal years 1991 and 1992. The Act also mandated that this program be implemented within 120 days of the date of enactment of the Act.

DATES: This action is effective on August 23, 1991. Comments must be received on or before October 22, 1991.

ADDRESSES: Submit written comments to the Office of the Chief, Regulation Analysis and Control Branch, Farmers Home Administration, U.S. Department of Agriculture, room 6348, South Agriculture Building, 14th and Independence SW., Washington, DC 20250. All written comments will be available for public inspection during regular working hours at the above address. The reporting and recordkeeping requirements contained in this regulation have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980. Public reporting burden for this collection of information is estimated to vary from 10 minutes to 2 hours per response, with an average of 1.4 hours per response including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, room, 404-W, Washington, DC 20250; and to the Office of Management and Budget, Attention: Desk Officer for the Farmers Home Administration, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ray McCracken, Senior Loan Specialist, Farmers Home Administration, USDA, room 5334-S, South Agriculture Building, 14th and Independence Avenue SW., Washington, DC 20250, Telephone (202) 382-1474.

SUPPLEMENTARY INFORMATION: This action has been reviewed under USDA procedures established in Departmental Regulation 1512-1 which implements Executive Order 12291, and has been determined to be nonmajor because there is no substantial change from practices under existing rules that would have an annual effect on the economy of $100 million or more. There is no major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies or geographical regions, or significant adverse effects on competition, employment, productivity, innovation, or in the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Discussion

It is the policy of the Department to publish notice of proposed rulemaking with a comment period before rules are issued even though 5 U.S.C. 553 exempts rules relating to public property, loan, grants, benefits, or contracts. However, exemptions are permitted where an Agency finds, for good cause, that compliance would be impracticable, unnecessary or contrary to the public interest. This rulemaking package is issued to implement portions of Cranston-Gonzalez National Affordable Housing Act, Public Law 101-625, which required implementation within 120 days of enactment. Because of this short time frame, this rulemaking document is issued as an interim final rule.

Section 534 of the Housing Act of 1949 requires that all rules and regulations issued pursuant to that Act must be published for public comment. The one exception is for a rule or regulation issued on an emergency basis. This action is not published for proposed rule making since it involves an emergency situation because there is not enough time to go through the proposed rulemaking process and still be able to establish a deferred payment mortgage option that would function in this fiscal year as intended by the Cranston-Gonzalez National Affordable Housing Act. By implementing the regulations as an interim final rule, it will permit FmHA to assist the maximum number of very low-income families needing deferred payment assistance. The time period FmHA will have to evaluate the program will also increase. Comments will be accepted for a 60-day period after this interim rule. FmHA will consider such comments before issuing a final rule.

The Cranston-Gonzalez National Affordable Housing Act, Public Law 101-625, provides for a program, subject to approval in appropriation Acts, whereby not more than 10 percent of the Section 502 rural Housing funds will be used to carry out a deferred mortgage program. This program will be used for applicants, who are otherwise eligible for the Section 502 program, but lack repayment to afford the mortgage payments when amortized at 1 percent for a 38 year period. The amount deferred will not exceed 25 percent of the mortgage payment due at 1 percent interest. Deferred mortgage payments will be converted to repayment status as soon as the borrower has the repayment ability. Any amount that remains unpaid at the time of termination of the mortgage is subject to recapture.

FmHA grants interest credit on loans to low- and very low-income borrowers to assist them in obtaining and retaining decent, safe, and sanitary Housing. This interest is subject to recapture when the loans are paid. The deferred payment mortgage option is being added to the interest credit program to make Housing more affordable for very low-income families. Many of the features of interest credit are applicable to the deferred payment mortgage option including the requirement that the deferred amounts are subject to recapture. Under the interest credit program, the borrower's payment is the greater of: the difference between 20 percent of the borrower's adjusted annual income plus taxes and insurance, or the difference between the annual installment due on the promissory note and the loan amortized at an interest rate of 1 percent. The deferred mortgage option is available to those borrowers that would be required under the interest credit program to pay in excess of 20 percent of their adjusted family income after they have received maximum interest credit.

The term of the deferred mortgage payment loan is 38 years, or 30 years for a manufactured home. This term was chosen to provide borrowers an extended repayment period with lowest possible amortized payments. Borrowers under the deferred mortgage program may be eligible for deferred payments up to 15 years after the effective date of the initial interest agreement. This was

done to provide borrowers a reasonable time period to improve their income, yet have sufficient time to pay the loan by the end of amortization period. During the 15 years maximum period for deferral the portion of the payment to be deferred will consist primarily of interest, but may include principal. No interest will accrue on the deferred interest. Any deferred principal will accrue interest at a 1 percent rate.

Instructions are included for servicing accounts with deferrals, handling the deferred portion after various servicing actions have been used, and collecting the deferred portion of the payments when the borrower is eligible for repayment. Borrowers with deferred mortgage payments are eligible for all servicing actions.

Regulatory Flexibility Act

La Verne Ausman, Administrator of Farmers Home Administration, has determined that this action will not have a significant economic impact on a substantial number of small entities because the regulatory changes affect FmHA processing of section 502 loans and individual applicant eligibility for the program.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." It is the determination of FmHA that this proposed action does not constitute a major Federal Action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Public Law 91–190, an Environmental Impact Statement is not required.

Programs Affected

This program is listed in the catalog of Federal Domestic Assistance under 10.410, Low Income Housing Loans.

Intergovernmental Consultation

For the reason set forth in the final rule and related Notice to 7 CFR part 3015, subpart V, 48 FR 29115, June 24, 1983, this program/activity is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

List of Subjects

7 CFR Part 1944

Home improvement, Loan programs—Housing and community development, Low and moderate income housing—Rental, Mobile Homes, Mortgages, Rural Housing, Subsidies.

7 CFR Part 1951

Accounting, Housing, Loan programs—Housing and community development, Low and moderate income housing, Reporting and recordkeeping requirements, Rural areas.

Therefore, chapter XVIII, title 7, Code of Federal Regulations is amended as follows:

PART 1944—HOUSING

1. The authority citation for part 1944 continues to read as follows:

Authority: 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 7 CFR 2.70.

Subpart A—Section 502 Rural Housing Loan Policies, Procedures, and Authorizations

2. Section 1944.35 is added to read as follows:

§ 1944.35 Deferred mortgage payments.

(a) *General.* It is the policy of FmHA to defer up to 25 percent of the payment, calculated at 1 percent interest rate, due on loans to qualified borrowers, to assist them in obtaining decent, safe, and sanitary dwellings and related facilities. Only principal and interest can be deferred. When FmHA contracts out servicing, all actions assigned to the County Supervisor may be performed by the contractor, except approval or cancellation of deferrals.

(b) *Approval authority.* FmHA officials authorized to approve section 502 loans are also authorized to approve the deferral.

(c) *Eligibility.* In order to qualify for deferred mortgage payments under this section, the following conditions must exist:

(1) The borrower's adjusted family income, at the time of initial loan approval, does not exceed the applicable very low-income limits in exhibit C of this subpart.

(2) The term of the loan is 38 years, or 30 years for manufactured housing units,

(3) The borrower's payment at 1 percent interest, plus real estate taxes and insurance, exceeds 20 percent of the adjusted family income by more than $5 per month, and

(4) Deferral under this section is granted at the time of initial loan closing, and for renewal

(5) Annually, the borrower received deferment assistance and it is within 15 years of the effective date of the initial interest credit agreement.

(d) *Amount and terms of deferral.* (1) No more than 25 percent of the amount of the payment due at 1 percent interest shall be deferred.

(2) The deferral amount is determined as follows:

(i) The borrower will be granted the maximum interest credit allowable under § 1944.34 of this subpart.

(ii) That portion of the principal and interest payment, amortized at 1 percent, plus real estate taxes and homeowner's insurance premiums (or escrow amounts for taxes and homeowner's insurance premiums due during the current year, where applicable), in excess of 20 percent of the borrower's adjusted family income may be deferred, up to 25 percent of the monthly payment calculated at 1 percent interest rate.

(iii) Only regularly scheduled principal and interest payments, and real estate taxes and insurance bills due for the current year will be included when calculating the amount of payment to be deferred. Protective advances, additional payment agreements, and other payment agreements will not be considered.

(3) Deferrals will be effective for a 12 month period. The effective date shall coincide with the anniversary date of an interest credit agreement processed. Deferred payments may be continued for up to 15 years after the effective date of the initial interest credit agreement.

(4) Interest deferred will not accrue interest. Any principal deferred will accrue interest at a 1 percent rate. Interest payments deferred under this section cannot be converted to principal through reamortization or other servicing action.

(e) *Review process.* The borrower's income will be reviewed annually to determine if the borrower is eligible for continued payment deferral and interest credit benefits. The review for both benefits shall be performed at the same time. Deferrals will be effective for a 12 month period.

(1) *Annual review.* The annual review will be scheduled to take place during the interest credit review period as defined in § 1944.34 of this subpart.

(2) *Reviews outside of the regular review period.* It is not the responsibility of the FmHA to monitor changes in the borrower's income. If a borrower whose payments are being deferred experiences a change in income that qualifies under § 1944.34(i)(3) of this subpart for a change in interest credit, the amount of deferral may also be changed.

(3) *Responsibilities of the borrower.* The borrower is responsible for providing FmHA with the following before a deferral can be approved:

(i) Income verification, considered satisfactory by FmHA,

(ii) The information needed to complete the deferral section of Form FmHA 1944–6 and signing the form, and

(iii) An interview to review the deferral information, either in person or by telephone.

(4) *Responsibilities of the FmHA.* (i) The Finance Office will indicate on the interest credit renewal report sent to the County Office, which borrowers currently have payment deferrals which must be reviewed and that have one year of eligibility remaining.

(ii) If a borrower fails to respond to the interest credit or deferral renewal letter, a second notice will be sent by certified mail, return receipt requested. The returned receipt will be kept in the casefile.

(iii) An FmHA employee or contractor will determine the borrower's payment and document the calculations on a form designated by FmHA.

(iv) Accept the borrower's reported real estate tax and property insurance expenses, unless uncharacteristic for the area, or the payment is being escrowed. Payment deferrals will not be delayed solely because of the borrower's failure to provide paid receipts for these expenses.

(f) *Cancellation of deferral.* Deferrals may be canceled for any of the conditions outlined in § 1944.34(k) of this subpart. The same effective dates of cancellations will be used and appeal rights will be granted in accordance with paragraph (h) of this section. Deferred payments may be continued for up to 15 years after the effective date of the initial interest credit agreement. After this time period, the borrower is no longer eligible for deferred payments.

(g) *Notification of deferral requirements.* (1) The applicant will be notified, through the mortgage subsidy paragraph of Form FmHA 1944–6, that the mortgage payment deferral is subject to repayment and/or recapture.

(2) For all loans receiving payment deferral, until the mortgage forms are revised, the following additional covenant will be inserted above the signature line on the mortgage and be initialed at loan closing by all parties signing the mortgage:

This instrument also secures the recapture of any deferred principal and interest which may be granted to the borrower(s) pursuant to § 502(g) of the Housing Act of 1949, as amended.

(h) *Appeal/review rights.* Because the deferral regulations are based on the objective application of formulas, deferral calculations are not appealable, however, a review may be requested. Borrowers who request and are denied mortgage payment deferral, or whose deferral amount has been reduced, cancelled, or not renewed based on contested income calculations, will be notified of their appeal rights as required by Subpart B of Part 1900 of this chapter. If a decision is not appealable, such as decisions based on verified income or clear and objective statutory or regulatory requirements, the applicant or borrower will receive review rights in accordance with subpart B of part 1900 of this chapter.

2a. Section 1944.50 is removed and reserved to read as follows:

§ 1944.50 [Reserved]

PART 1951—SERVICING AND COLLECTIONS

3. The authority citation for part 1951 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 7 CFR 2.70.

Subpart G—Borrower Supervision, Servicing, and Collection of Single Family Housing Loan Accounts

4. Section 1951.309 is amended by revising introductory text in paragraph (b)(1), paragraphs (b)(1)(v) and (b)(3), and adding paragraph (b)(1)(vi) to read as follows:

§ 1951.309 Receiving and applying payments.

* * * * *

(b) *Application of payment*—(1) *Regular payments.* Regular payments are all payments other than extra payments and refunds and include the items in paragraphs (b)(1) (i) through (vi) of this section. All direct payments are considered regular payments. Regular payments will be applied by FmHA in the following order of priority:

* * * * *

(v) Scheduled repayment of deferred mortgage payments, if applicable.

(vi) Principal on the note account.

* * * * *

(3) *Extra payments and refunds.* Payments derived from cash proceeds of real property insurance, the sale or refinancing of real estate not mortgaged to the Government, or similar transactions are considered extra payments. Refunds are the return of unused loan or grant funds. Extra payments and refunds will be credited to the borrower's note account(s) as of the date of Form FmHA 451–2, "Schedule of Remittance," and will be applied as prescribed in paragraphs (b)(1)(iv), (v) and (vi) of this section. Extra payments and refunds do not relieve borrowers from making their next scheduled payment.

* * * * *

5. Section 1951.313 is amended by revising the introductory text of paragraphs (g) and revising paragraph (i) to read as follows:

§ 1951.313 Moratoriums.

* * * * *

(g) *Action at the end of the moratorium period.* At the end of the moratorium period, FmHA will verify the borrower's annual income and obtain a current budget to determine the borrower's repayment ability. The borrower will be advised by letter of the action taken, the reasons for the action, and the new repayment schedule. Loans with a portion of the payment deferred under § 1944.35 of subpart A of part 1944 of this chapter will be handled in accordance with this paragraph and § 1951.330 of this subpart.

* * * * *

(i) *Interest accrual.* Interest will accrue during the moratorium at the rate shown on the promissory note as modified by any Interest Credit Agreement in effect. Interest credit will be granted and renewed throughout the period a moratorium is in effect for borrowers eligible for interest credit as authorized in subpart A of part 1944 of this chapter. Interest on the principal portion of deferred mortgage payments will accrue at the rate of 1 percent.

* * * * *

6. The introductory text of § 1951.314 is amended by adding a new last sentence to read as follows:

§ 1951.314 Reamortizations.

* * * loans with a portion of the payments deferred under § 1944.35 of subpart A of part 1944 of this chapter may be reamortized in accordance with § 1951.330 of this subpart.

* * * * *

7. Section 1951.330 is added to read as follows:

§ 1951.330 Servicing loans with deferred mortgage payments.

This section describes servicing of loans with a portion of the payments deferred under § 1944.35 of subpart A of part 1944 of this chapter.

(a) *General servicing.* (1) Borrowers who have loans with deferred payments are eligible for all servicing actions.

(2) Borrowers who have loans with deferred payments whose accounts become delinquent will be serviced in accordance with § 1951.312(e) of this subpart.

(3) Interest deferred will not accrue interest. Any principal deferred will accrue interest at a 1 percent rate.

(b) *Repayment of deferred mortgage payments.* (1) When 20 percent of the borrower's adjusted family income exceeds the full note rate payment, plus taxes and insurance premium, the borrower is required to begin repaying the deferred portion of the payments.

(2) The amount of payment will be calculated by subtracting the full note rate payment, real estate taxes and insurance premiums from twenty percent of the adjusted family income.

(3) The borrower will execute a new form designated by FmHA based on the amount calculated in paragraph (b)(2) of this section.

(4) The borrower's household income will continue to be verified annually, and a new form designated by FmHA executed annually, at the time of review. If the borrower experiences a change in household income, changes may be made in the repayment of deferred payments in accordance with the guidelines provided in § 1944.34 of subpart A of part 1944 of this chapter.

(5) The borrower will continue to pay the deferred installment, based on 20 percent of the adjusted household income, until the deferred payments are paid in full, or the mortgage is terminated and the total deferment is recaptured.

(c) *Reamortization.* Loans with a portion of the payments deferred under § 1944.35 of subpart A of part 1944 of this chapter may be reamortized under the conditions set forth in § § 1951.313 and 1951.314 of this subpart. However, the deferred portion of the interest payments will not be converted to principal and capitalized.

(d) *Recapture.* If the borrower sells or otherwise transfers title of the property to another party before the total amount deferred is repaid, deferred mortgage payments not already repaid are included in total subsidy granted, and recapture will be calculated in accordance with subpart I of this part.

Dated: June 14, 1991.

Jonathan I. Kislak,

Acting Under Secretary, Small Community and Rural Development.

[FR Doc. 91-20128 Filed 8-22-91; 8:45 am]

BILLING CODE 3410-07-M

DEPARTMENT OF JUSTICE

8 CFR Parts 103 and 274a

[INS No. 1259R-90]

RIN 1115-AB73

Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule amends 8 CFR parts 103 and 274a by providing technical as well as substantive amendments to the rules governing employer sanctions and employment authorization. This rule is necessary to incorporate changes caused by new legislation and case decisions, as well as the experience gained in implementing the employer sanctions program during the first four years. The rule gives further guidance to the public through expanded definitions, clarification of certain requirements of the employment verification system, and revision of documentary procedures used to verify the identity and employment eligibility of new employees.

EFFECTIVE DATE: November 21, 1991.

FOR FURTHER INFORMATION CONTACT: Michael J. Creppy, Deputy General Counsel, Immigration and Naturalization Service, 425 Eye Street, NW., room 7048, Washington, DC 20536, telephone (202) 514-3195.

SUPPLEMENTARY INFORMATION: Part 274a, which was published as a final rule in the **Federal Register** on May 1, 1987, at 52 FR 16216, with an effective date of June 1, 1987, was necessitated by the Immigration Reform and Control Act of 1986, Public Law 99-603 (hereinafter "IRCA"), which amended the Immigration and Nationality Act (hereinafter "the Act") by adding provisions relating to the control of employment of aliens in the United States. These provisions make it unlawful for a person or entity to knowingly hire, recruit or refer for a fee, for employment in the United States aliens who are not authorized to work in the United States. Since implementation on June 1, 1987, of part 274a of title 8 of the Code of Federal Regulations, the U.S. Immigration and Naturalization Service (hereinafter "INS" or "the Service") received numerous comments and proposals on the regulations recommending certain amendments and revisions to clarify the language in that final rule and in a related section of title 8 Code of Federal Regulations. As a result, the INS published an interim final rule with request for comments on June 25, 1990, (hereinafter "interim final rule"). Although the comment period ended on July 25, 1990, the INS considered comments that were received after this date. What follows is a section-by-section analysis of the final revisions to the interim final rule and a discussion of comments concerning the sections to which they apply.

1. General Comments

Some general comments were critical of the regulation being published in interim final form. Three commenters stated that it was improper for the Service to publish interim regulations and make them effective on the date of publication. Concern was expressed that post-promulgation comments would not be seriously considered by the agency. However, the scope and specificity of this Supplementary Information section reflect the care and deliberation that the Service has given to each and every comment submitted, including those received after the comment deadline. The comments next noted that since there was no statutory deadline by which the Service was obligated to effectuate the changes, these regulations need not have been published in interim final form. To the contrary, the standardized application for employment authorization (Form I-765), the fee associated with this document, and the standardized Employment Authorization Document (EAD) (Form I-688B) were already in effect, and the regulations were required to be amended in order to support their existence. The commenters also stated that the changes will exacerbate the employer confusion that was cited in the third GAO report (GAO/GGD-90-62, March 29, 1990). The INS is cognizant that employer understanding of the employer sanctions statute and regulations is crucial to achieving the Service's stated goal of voluntary compliance. To that end, the INS has published this final rule after careful consideration of all comments.

More specifically, one commenter stated that the rules should not be effective until the Interagency Task Force can review them. The Service is unable to locate any legal support for the proposition that any task force should review the regulations promulgated by this agency. Another commenter stated that since the regulations have a significant impact on a substantial number of small entities, a regulatory flexibility analysis should have been done. The service disagrees that this final rule will have a significant

impact on a substantial number of small entities. This final rule merely provides technical and procedural changes to the employer sanctions provisions that have been in effect since June 1, 1987. The Service notes that 5 U.S.C. 603 requires an initial regulatory flexibility analysis. This analysis was done at the time that part 274a was originally proposed. 5 U.S.C. 604 also requires a final regulatory flexibility analysis that includes a succinct statement of the need for, and the objectives of, the rule, a summary of the public comments and the agency's analysis thereof, and a description of the significant alternatives. In any event, since 5 U.S.C. 605(a) allows this analysis to be done in conjunction with, or as part of, any other analysis required by law, this Supplementary Information section would satisfy this requirement.

One commenter suggested that the Office of Management and Budget (OMB) should have approved the information collection requirements of the interim final rule. OMB did approve the information collection requirements when the regulations governing the employment verification system were originally promulgated. The changes made by the interim final rule and those made by this final rule do not materially alter the information collection requirements as originally set forth in the May 1, 1987, regulations. The rule still requires employers to verify the identity and employment eligibility of all employees by completion of the Form I–9. However, only those recruiters and referrers for a fee who are agricultural associations, agricultural employers or farm labor contractors need to complete the Form I–9 for individuals recruited or referred for a fee. The same information is required to be collected, and the amount of time to complete the form is unchanged. In addition, OMB has separately approved the collection of information on Form I–765 until August 1993.

Two commenters noted that although published on June 25, 1990, the rule was dated by the Commissioner on March 16, 1990. This passage of time is attributable to the intense internal scrutiny that the rule received before publication. This internal review continued beyond the date of signature and even beyond March 29, 1990, the date of the third GAO report, and April 24, 1990, the date the INS submitted a request for an extension of the current Form I–9 to OMB. One commenter suggested that the interim final rule was published in June to undercut the ability of small businesses to comment "because early summer is the most popular vacation time." Without expressing a view on what is the most popular vacation time, the Service rejects the notion that the publication of the interim final rule was timed so as to deny any opportunity for public comment.

One commenter cited to the lack of publicity associated with the changes effectuated by the interim final rule, and stated that "[p]ublication only in the **Federal Register** is no way to inform millions of small businesses." This commenter ignored long-standing precedent that the public is held to be on notice of all material published in the **Federal Register.** In addition, the Service recognizes that increased public education, through a revised Handbook for Employers (Form M–274) or some other informational brochure, will assist employers in understanding the changes made by this final rule. The dissemination of the revised Form M–274 will be timed to coincide with the effective date of this final rule.

Finally, during review of the public comments to the interim rule, the Immigration Act of 1990, Public Law 101–649 (November 29, 1990) (hereinafter "the Immigration Act of 1990") was enacted. This law, *inter alia,* eliminated the employment verification requirements for all recruiters and referrers for a fee except agricultural employers, agricultural associations and farm labor contractors, and gave access to Forms I–9 to the Office of Special Counsel for Immigration-Related Unfair Employment Practices. This final rule merely mirrors these two statutory changes.

2. Reopening or Reconsideration

Section 103.5 paragraph (a) was amended in the interim final rule to make it clear that motions to reopen are not applicable to employer sanctions cases commenced under section 274A of the Act. Contrary to the views of one commenter, the Service believes the plain language of the statute dictated this change. Section 274A(e)(3)(A) of the Act states that the absence of a timely request for hearing (defined at 8 CFR 274a.9(d) as a written request received by the designated Service office within thirty days) "the Attorney General's imposition of the order *shall* constitute a final and unappealable order." (Emphasis added). One commenter stated that "the taking of summary judgment 30 days after the NIF [Notice of Intent to Fine] is akin to a default judgment taken in civil court for failure to answer a lawsuit in time." A Final Order (Form I–764) is issued in the absence of a timely request for hearing. The Service rejects the idea that this process is in any way akin to summary judgment, which, under the Federal Rules of Civil Procedure, is entered only after the pleadings filed by both sides indicate that there is no genuine issue of material fact to be tried. The Service also disagrees that issuance of a Final Order is analogous to a default judgment. Issuance of a Final Order occurs much earlier in the process. Unlike a civil cause of action, the Service, as the complainant, issues the charging document (NIF). Congress determined that in the absence of a timely, written request for hearing, the Service *shall* issue a final, unappealable order. Although one commenter suggested that "[d]eadlines must be allowed to be extended for reasonable cause," failure to timely request a hearing mandates the issuance of a final, unappealable order. Finally, one commenter correctly points out that 8 CFR 103.5(a) was amended May 21, 1990, [55 FR 20770] with an effective date of June 20, 1990. Therefore, this final rule reproduces the amendment effective June 20, 1990, and also incorporates the amendment intended by the publication of the interim final rule on June 25, 1990.

3. Definition of "Hire"

Section 274a.1 paragraph (c) defines the term "hire." The interim final rule was intended to ensure that the term incorporated the use of labor through contract. Resort to the legislative history is instructive on this point.

> The Committee does not intend to impose a continuing verification obligation on employers. However, if an employer has knowledge that an alien's employment becomes unauthorized due to a change in nonimmigrant status, or that the alien has fallen out of a status for which work permission is authorized, sanctions would apply.
>
> H.R. Rep. No. 682, Part 1, 99th Cong., 2d Sess. 57 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5661.
>
> Some sanctions laws of foreign countries have proved to be ineffective because of loopholes which enable the use of subcontractors to avoid liability [sic]. The Committee intends to prevent any such loophole in the instant legislation. To accomplish this objective, the bill specifically provides that an employer "who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of enactment * * * to obtain the labor of an alien in the United States knowing that the alien is an unauthorized (undocumented) alien" shall be considered to have hired the alien for employment.
>
> *Id.* at 62, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5666. These passages make it clear that the coverage

of the fictitious hire set forth at section 274A(a)(4) of the Act is to be broadly construed. A contract that pre-dated IRCA could still form the basis of an unlawful hire if it was renegotiated or extended after November 6, 1986. This is unlike a true employer-employee scenario, in which an employer may lawfully continue to employ any individual, including an unauthorized alien, who has been continuously employed since prior to the enactment of IRCA.

One commenter expressed uncertainty about the Service's emphasis on the word "use." The Service intends to make it clear the operative term in the statute is use of the contract, a term that is significantly broader than entry into a contract. The commenter suggested that the "use" of a contract "to obtain" the labor of an unauthorized alien means that an employer who gains knowledge of the unauthorized status of an independent contractor (or that contractor's employees) after entering into the contract is not liable for knowingly hiring an unauthorized alien. However, such an interpretation would encourage individuals entering into a contract for labor or services to intentionally avoid learning of the employment eligibility of the contractor or the contractor's employees. In addition, the statute clearly indicates that a violation may occur after entry into the contract, since it speaks of renegotiation and extension of preexisting contracts. The commenter also suggested that the regulation is *ultra vires* since the use of labor through contract [section 274A(a)(4) of the Act] is only a knowing hire violation [section 274A(a)(1)(A) of the Act] and not a knowingly continue to employ violation [section 274A(a)(2) of the Act]. The commenter's premise supporting the argument that this rule is *ultra vires* is incorrect. The employment scenario described in section 274A(a)(4) of the Act is not, in fact, an employer-employee relationship. Congress legislatively converted that scenario into a "hire" for employer sanctions purposes to close a potential loophole in the law. The reference to section 274A(a)(1)(A) of the Act merely reflects that this "fictitious hire" created by operation of section 274A(a)(4) of the Act is a violation of the prohibition against knowingly hiring, and not knowingly continuing to employ, an unauthorized alien.

4. Definition of "Employment"

Section 274a.1 paragraph (h) defines the term "employment." One commenter suggested that the interim final rule "unjustifiably expands the extraterritorial reach of the statute and impermissibly burdens international commerce." Specifically, the commenter stated that this section "would presumably require Form I–9 completion even if the only services or labor rendered by the ship or aircraft personnel occurred in international waters or airspace, and personnel were seeking entry in B–1 or B–2 rather than D status." The Service intended to clarify what is defined as employment in the United States, since only that type of employment is covered by the employer sanctions provisions. For employer sanctions to apply, the vessel must have: (1) Arrived in the United States and (2) been inspected. Arrival occurs when the vessel crosses into the territorial waters, defined for employer sanctions purposes as up to three miles from the coastline. The Service agrees with the commenter that "the vessel's arrival and inspection [serves] as the triggering act invoking IRCA." In addition, the labor or services performed on the vessel or aircraft must be performed in the United States. It is also the intention of the Service to make it clear that D-crewman functions performed by D-visa holders do not constitute "employment." This interpretation is required since D-visa holders are not, by the terms of their nonimmigrant status, authorized to work in the United States.

5. Independent Contractor

Section 274a.1 paragraph (j) sets forth factors to determine whether an employment relationship is one of an employer-employee or an independent contractor. The interim final rule added two factors (the opportunity for profit and loss, and investment in the facilities for work) to the list. One commenter suggested that there is no rationale for these additions, and that the additions are ambiguous. The Service rejects these suggestions. The issue of whether an individual is an employee or an independent contractor is a question of fact. No one factor is controlling. These additional factors are based upon established case law. If the worker stands to lose money that he or she has invested in the venture, or has expended funds in the normal operating costs of the business (e.g., for tools and materials), especially where there is a substantial risk of loss or substantial amounts of money are involved, these factors indicate that the worker may be an independent contractor. *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1982); *Wolfe* v. *United States*, 570 F.2d 278, 281 (8th Cir. 1978); *Morish* v. *United States*, 555 F.2d 794, 799 (Ct. Cl. 1977); *McCormick* v. *United States*, 531 F.2d 554, 559 (Ct. Cl. 1976); *Air Terminal Cab, Inc.* v. *United States*, 478 F.2d 575, 578 (8th Cir. 1973). The Service rejects the commenter's ambiguity assertion. The "opportunity for profit and loss" is tied to the "labor or services provided." The commenter suggested that every business arrangement fits this definition, stating that if the contractor "provides quality, timely and reliable services, [he or she] has the 'opportunity' for future profit because the purchaser of the contract services will be a repeat customer." This assumption is purely speculative and leads to a conclusion that is not supported by a plain reading of the regulation. Similarly, "facilities" for work is to be given its customary definition, so as to include the physical plant, material, tools, equipment, etc.

6. Pattern or Practice Violation(s)

Section 274a.1(k) relates to criminal pattern or practice charges. Eight commenters suggested that the modification made by the interim final rule, namely changing the conjunction "and" to "or," was an error. These commenters point out that the prior version which utilized "and" comported with the legislative history. H.R. Rep. No. 682, part 1, 99th Cong., 2d Sess. 59, reprinted in 1986 U.S. Code Cong. & Admin. News 5649, 5663. Furthermore, the conjunction "or" would seem to permit regular or repeated activity to constitute a pattern or practice violation without the requisite intent. Conversely, an intentional act, without proof that it was done regularly or repeatedly, would also constitute a criminal violation. The Service agrees with the commenters and the wording is restored to read "regular, repeated and intentional activities."

7. Definition of "Knowing"

Section 274a.1 paragraph (l) defines the term "knowing." One commenter suggested that including constructive knowledge is beyond the scope of the statute. This same commenter "would prepare a definition of 'knowing' drawn from standard jury charges on 'conscious avoidance' in the criminal area by which a person could be charged with knowledge if he acts in deliberate disregard of an alien's lack of employment authorization and with a conscious purpose to avoid learning the truth unless he actually believed the alien was authorized see, e.g., A.L.I. Model Penal Code p. 202(7)." First and foremost, section 274A of the Act is primarily a civil statute, and employer sanctions proceedings before administrative law judges (ALJs) are civil proceedings. Additionally, the commenter would provide that if the employer actually believed that the

alien was work authorized, then liability would not attach. The Service rejects the commenter's suggestion that an employer must merely believe that the alien is authorized for employment to avoid employer sanctions liability. Such an interpretation is patently invalid, since the employer's belief must at least be "reasonable" to conform with the mandate of the statute. An employer's belief would not be reasonable if there are facts and circumstances present that would put a reasonable person on notice that the individual was not authorized for employment.

One commenter suggested that it was "appropriate to reevaluate the standard enunciated in *USA* v. *Mester Manufacturing*, 879 F.2d 561, 567 (9th Cir. 1989) in light of the GAO Report's conclusions." Nevertheless, the commenter stated that including constructive knowledge will increase discrimination. The commenter cited to the criminal provisions of section 274(a)(1)(B) and (C) for the proposition that when other than actual knowledge was intended by Congress, it used language such as "in reckless disregard." The definition of constructive knowledge set forth in *Mester* is the knowing standard, albeit sustained by a different type of proof. A second commenter expressed concern that knowledge of an employee's unauthorized status may be imputed to the employer merely because the employee appears "foreign." The Service rejects this concept. It is clear that employment authorization is totally separate and distinct from a person's physical appearance. It would be unreasonable for the Service to even consider physical appearance in attempting to prove that an employer had knowledge that an individual is an unauthorized alien. Language to this effect has been added to the final rule.

Another commenter stated that the Service should not define "knowing" in the regulations, but should allow the definition to be worked out through case decisions. This definition, however, has support even in pre-IRCA case law relating to analogous civil statutes. *Counterman* v. *United States Dept. of Labor*, 776 F.2d 1247, 1248 (5th Cir. 1985) (affirming ALJ decision that if farm labor contractor had maintained proper records, he would have known that 42 workers were undocumented, and thereby violated Farm Labor Contractor Registration Act). The Service further believes that the need for guidance in this area outweighs any potential confusion caused as case law develops in this area.

One commenter opined that the regulatory definition was vague and ambiguous. "The employer is not being asked to make a judgment about a factual condition, but about a *legal conclusion* [emphasis original]. Employers are not, nor expected to be, immigration experts." The Service agrees that employers need not be immigration experts. In fact, Congress specifically mandated that an employer may rely on a document that "reasonably appears on its face to be genuine." Section 274A(b)(1)(A) of the Act. A second commenter added that the constructive knowledge standard "effectively rejects" this "good faith" defense. The Service fails to see how the knowledge standard set forth in the interim final rule requires an employer to make a legal conclusion or obviates the good faith defense. The interim final rule merely reflects that knowledge of an employee's unauthorized status may be acquired directly or through notice of certain facts that would lead a person, through the exercise of reasonable care, to know of the unauthorized status. Certain non-exclusive examples of constructive knowledge have been added to this final rule for guidance. The reasonableness standard should allay the concerns of one commenter that rumor and hearsay in the workplace could lead to a violation. If the employer accepts documents that reasonably appear on their face to be genuine and are sufficient for purposes of section 274A(b) of the Act, and complies with all other requirements of the employment verification system, then he or she will indeed have raised a good faith defense to a charge of knowingly hiring an unauthorized alien in violation of section 274A(a)(1)(A) of the Act.

The Service deems it impermissible to deviate from the "knowing" standard set forth in the statute and retains the definition of knowing, with certain clarifying language, as set forth in the interim final rule.

8. Photocopies Forms I–9

Section 274a.2 paragraph (a) was amended by the interim final rule to require that if Forms I–9 are photocopied, then both sides must be reproduced. Three commenters stated that it is inappropriate to require employers to photocopy both sides of the Form I–9. The Service promulgated this change in order to ensure that the instructions contained on the reverse side of the Form I–9 are available to both the employer and employee at the time the form is completed. One commenter suggested adding the phrase "or otherwise make available to all employees completing Form I–9 the instructions contained thereon" to the end of this section. The Service anticipates that the Form I–9 will be revised. In anticipation of this revision, both sides of the form must continue to be reproduced. However, if the instructions appear separately after the form is revised, then the Service accepts the commenter's suggested rationale.

Section 521 of the Immigration Act of 1990 generally eliminates the verification requirements for recruiters and referrers for a fee. However, agricultural employers, agricultural associations and farm labor contractors continue to be bound by the verification requirements. This section is modified to merely mirror the statutory change.

9. Responsibility To Ensure That Section 1 of Form I–9 Is Completed

Section 274a.2 paragraphs (b)(1)(i) and (b)(1)(i)(A) reflect that it is the employer's responsibility to ensure that the employee completes section 1 of the Form I–9. One commenter stated that the revision makes employers "liable for new paperwork violations from errors in the information provided by the employee . * * *" The Service disagrees with this interpretation. No new liability is created by operation of this section. Since the passage of IRCA, employers are, and always have been, mandated to comply with all the requirements of the employment verification system, which includes ensuring that the employee properly completes section 1 of the Form I–9. See *United States* v. *Master Mfg. Co.*, OCAHO Case No. 87100001 (Morse, J., July 12, 1988), *aff'd.*, 879 F.2d 561 (9th Cir. 1989); *United States* v. *Big Bear Mkt.*, OCAHO Case No. 88100038 (Morse, J., April 12, 1989), *Aff'd sub. nom. Big Bear Super Market* v. *INS*, 913 F.2d 754 (9th Cir. 1990). The Service also rejects the commenter's notion that ensuring that an employee properly completes section 1 of the Form I–9 requires employers to ask individuals who present their green card or temporary resident card (List A documents) to *also* present their social security card or other employment eligibility documentation (List C documents). With respect to Section 1 of the Form there is no requirement that the employee present *any* documents whatsoever. The employee must fill in the information data, attest to employment eligibility by checking the appropriate box, and sign and date the certification. Documents are only required to be presented when completing section 2 of the Form I–9. There is simply no room to interpret this paragraph as requiring an alien in

possession of a valid List A document to present a social security card or any other work authorization document.

One commenter agreed that the interim final rule clarifies the employer's responsibility, but stated that section 1 requires the collection of unnecessary data such as address, date of birth, and social security number. Section 274A(b)(1)(A) of the Act gave the Attorney General the authority to establish an employment eligibility verification form. The Form I–9 was so designated (8 CFR 274a.2(a)). The purpose of the form is to ensure that only employment-eligible individuals are hired for employment in the United States. The employment verification system is based upon the presentation of documents. Recognizing the possibility of attempts to circumvent the law, and in anticipation of the presence of fraudulent documents, the Form I–9 was drafted to contain other indicators that allow the Service to monitor compliance. The employee's address, date of birth, and social security number are just such indicators. These entries allow the Service to conduct post-inspection records checks to ferret out unauthorized aliens using counterfeit and fraudulent documents. Although the employer may not be subject to penalties for hiring such an individual because of invocation of the good faith defense, the Service is charged with many facets of immigration compliance and enforcement. Cognizant of the importance of secure documents to the success of employer sanctions, the Service must actively and aggressively investigate fraud in the employment verification system. The information contained on the Form I–9 is critical to this effort.

The same commenter also stated that section 1 of the Form I–9 should be translated into foreign languages. The commenter stated that the translator portion of the current Form I–9 is not an acceptable substitute in that it "subjects the employer to accusations by the worker that the information was misinterpreted or that the employer directed him to record inaccurate data." The Service rejects this suggestion. To adopt this suggestion would require the Service to translate the Form I–9 into *all* languages. This in turn would require the employer to retain a stock of Forms I–9 in every language. Thus, the Preparer/Translator section of the current Form I–9 is a more practical and efficient solution to the problem presented.

10. Individuals Hire for a Duration of Less Than 3 Business Days

Section 274a.2 paragraph (b)(1)(iii) requires an employer who hires an individual for a duration of less than 3 business days to complete both sections 1 and 2 of the Form I–9 at the time of hire. Four commenters opposed this regulation, generally citing an increased burden on the employer. One of these commenters suggested that the requirement to complete a Form I–9 should attach *after* a firm offer of employment has been extended but *before* the actual commencement of work, thereby balancing the need for complete verification before the individual commences employment with reducing the possibility of discriminatory hiring practices. The Service feels that the current language strikes an even better balance, in that verification is required only at the time of hire. The time of hire necessarily includes not only a firm offer of employment but acceptance of that offer by the employee and the actual commencement of employment.

Contrary to one commenter's assertion, day laborers ("casual labor") are not exempt from the Form I–9 requirements unless they provide domestic service in a private home on a sporadic, irregular or intermittent basis. 8 CFR 274a.1(h).

Two commenters opposed this paragraph, stating that it removes the ability of an employee to present receipts in lieu of original documents if the hire is for a duration of less than 3 business days. Under the prior regulations, an employee in such a situation never had the ability to present receipts in lieu of original documents. One of the two commenters stated that this requirement was mentioned in the supplementary information section to the interim final rule but not in the rule itself. To the contrary, the regulation clearly states that "[a] receipt for the application of such documentation . . . may not be accepted by the employer." The second of the two commenters noted the potential hardship to United States citizens who have lost their documents. However, closing the loophole on day hires necessitates such a change. Since the employment verification system allows individuals to present any specified document or combination of documents, United States citizens would have a number of equally acceptable documents to obtain and present.

Two commenters contended that the interim final rule will work an undue hardship on employers who depend on "day hires." Specifically, one commenter cites to a scenario in which the employer hires workers for a 5-day job, but due to adverse weather conditions, the workers are not needed after the first day. The commenter assumes that the employer would be in violation of the interim final rule. The mere fact that the employer intended to hire the individual for 3 or more days triggers the 3-business-day rule for completion of section 2 of the Form I–9, even though section 1 must be completed at the time of hire. The regulations sufficiently set forth alternatives for employers in this situation, such as the use of agents, central clearinghouses, or multi-employer associations.

For these reasons, the language of the interim final rule is retained. Similarly, the language of the interim final rule with respect to paragraph (b)(1)(iv) relating to recruiters and referrers for a fee is also retained.

11. Noting Document Identification Numbers and Expiration Dates on the Form I–9

Section 274a.2 paragraph (b)(1)(v) requires an employer to note document identification numbers and expiration dates in section 2 of the Form I–9. Three commenters suggested that the regulation be more specific as to which document identification number and expiration date should be noted (e.g., the passport or the attached employment authorization document). The Service concurs with this recommendation and the interim final rule is amended to reflect that when an acceptable List A document is comprised of multiple documents, the identification number and expiration date of *each* document must be noted. Until the Form I–9 is revised, employers should place both document identification numbers and expiration dates in the space currently provided.

12. Acceptable Documents for Form I–9 Purposes

Section 274a.2 paragraph (b)(1)(v)(A) requires that documents presented to satisfy the requirements of the employment verification system must "relate to the individual." One commenter stated that "[w]hile IRCA only requires that employees' documents appear to be genuine, the regulations additionally require the documents 'relate to the individual' [sic]." However, it is obvious that an employee who presents someone else's documents (even though the document itself is valid and unaltered) is not presenting a document "that is sufficient to meet the requirements of the [employment verification system]."

Section 274A(b)(1)(A) of the Act. Although the commenter pointed to a potential problem associated with the use of hyphenated surnames, that problem is easily overcome by the employer if the document reasonably appears to be genuine and to relate to the employee in all other respects. The Form I–9 provides for both the birth name and last name to be placed in section 1. Thus, the language of the interim final rule is retained.

13. U.S. and Foreign Passports

Section 274a.2 paragraph (b)(1)(v)(A)(1) was revised in the interim final rule to add clarifying language that both expired and unexpired U.S. passports are acceptable List A documents. One commenter supported this change. This final rule retains this language. The commenter suggested that expired foreign passports with attached employment authorization also be acceptable List A documents. However, a valid, unexpired foreign passport is generally required for admission to the United States. See sections 211(a) and 212(a)(20) of the Act. The Service has jurisdiction over and may place limitations on an alien's ability to obtain employment authorization. A U.S. passport evidences U.S. citizenship, which allows the individual the unfettered right to be employed. This right continues regardless of whether the document evidencing this status is expired. The Service has determined that these differences justify distinguishing the two scenarios. Another commenter correctly noted that some nonimmigrants with a foreign passport with attached Form I–94 may have limited work authorization. This is true when the individual is only authorized for employment with a particular employer (e.g., H–1s, L–1s). However, the regulation covers this scenario when it states "so long as * * * the proposed employment is not in conflict with any restrictions or limitations identified on the Form I–94." 8 CFR 274a.2(b)(1)(v)(A)(4)(ii).

14. List A Documents

Section 274a.2 paragraphs (b)(1)(v)(A)(6), (7), (8), (9) and (10) added clarifying language that only unexpired Temporary Resident Cards (Forms I–688), Employment Authorization Cards (Forms I–688A), reentry permits (Forms I–327), Refugee Travel documents (Forms I–571), and INS Employment Authorization Documents with photographs (Forms I–688B) are acceptable List A documents. One commenter suggested that the INS should note that the validity of some of these cards has been extended by the addition of a sticker to the card. The Service agrees with the need to educate the business community of this fact. A second commenter expressed concern that the presence of an expiration date on an employment eligibility document may cause some employers to reject that job applicant. The commenters suggested that some general language be included in the regulation explaining that the mere existence of a future expiration date does not automatically mean that the individual will not receive a new or continuing grant of employment authorization beyond that date, and that an employer's refusal to hire an individual solely because he or she has work authorization with an expiration date may constitute employment discrimination under section 274B of the Act. The Service's commitment to reducing employment discrimination is unwavering. Nevertheless, the Service has determined that regulatory clarification on this subject is unwarranted, and that the perceived problems can be better addressed through other means such as a revised Handbook for Employers (Form M–274). The revised publication will contain the following information:

> Future expiration dates are frequently contained in the employment authorization documents of aliens, including, among others, temporary residents, conditional permanent residents, refugees, and asylees. The existence of a future expiration date does not preclude continuous employment authorization, does not mean that subsequent employment authorization will not be forthcoming, and should not be considered in determining whether the alien is qualified for a particular position.
>
> Employers are advised that consideration of a future employment authorization expiration date in determining whether an alien is qualified for a particular job may constitute employment discrimination prohibited by the antidiscrimination provision of section 274B of the Act.

With respect to the INS Employment Authorization Document (Form I–766), one commenter noted that although it has been added as a List A document (see 55 FR 2710 (January 26, 1990)), it has not been added to 8 CFR 274a.2(b)(1)(v)(A)(10). The Service is not currently issuing the Form I–766. It is anticipated that the Form I–766 will replace the Form I–688B in the future. At that time, the Service will add a reference to the Form I–766 to the regulations.

15. Voter's Registration Cards

Section 274a.2 paragraph (b)(1)(v)(B) was amended in the interim final rule to eliminate the voter's registration card as an acceptable List B identity document. Three commenters discussed this change. The first stated that the removal of this document was "arbitrary and capricious, because there is no evidence of fraud related to that document." The voter's registration card was not removed because it was not fraud-resistant. Rather, it was deleted because it lacks the proper indicia of identity, such as a photograph or other personal identifying information, that would qualify it as an acceptable List B document. However, based on comments submitted that indicate that some individuals' sole identity document is their voter's registration card, the voter's registration card will be reinstated as an acceptable List B document. The numbering of the subparagraphs will be revised to reinsert the reference to the Voter's registration card in its original position. The second commenter expressed general concern over changes to the lists of acceptable documents that may be used in completing Forms I–9. However, two documents (reentry permits (Form I–327) and INS Employment Authorization Documents (Form I–688B)) were "upgraded" from List C to List A, thereby allowing an alien in possession of one of these documents to present it without having to produce an identity document from List B.

To avoid ambiguity between paragraphs (b)(1)(v)(B)(1)(*i*) and (b)(1)(v)(B)(1)(*v*) and to make this section internally consistent, the limitations placed on drivers' licenses are hereby made applicable to identification documents.

16. List C Documents

Section 274a.2 paragraph (b)(1)(v)(C) was reorganized and revised in the interim final rule by removing unexpired reentry permits (Forms I–327), unexpired refugee travel documents (Forms I–571) and "employment authorization documents issued by the INS" (paragraphs (b)(1)(v)(C)(*2*) (*3*) and (*7*)), as acceptable employment authorization documents. Two commenters stated that an employment authorization document issued by the Service should not be eliminated as an acceptable List C employment authorization document since all aliens with employment authorization will not have List A documents. The Service concurs with these comments. The commenters also noted that although paragraph 18 of the supplementary information to the interim final rule stated that the language of § 274a.2(b)(1)(v)(C)(7) listing an "employment authorization document issued by the INS" as an acceptable List C document is removed, the language was still found at

§ 274a.2(b)(1)(v)(C)(8) of the interim final rule itself. Another commenter stated that the section should read "*unexpired* employment authorization document issued by the Immigration and Naturalization Service (emphasis added)."

The language in § 274a.2(b)(1)(v)(C)(8), that an employment authorization document issued by the Service is an acceptable List C document, is retained, with the word "unexpired" added before the word "employment." It was not intended that the language be removed from § 274a.2(b)(1)(v)(C)(7), but merely moved to § 274a.2(b)(1)(v)(C)(8). This final rule reflects that intent.

17. Preliminary Completion of Section 2 of the Form I–9—Acceptance of Receipts for Replacement Documents

Section 274a.2 paragraph (b)(1)(vi) was revised in the interim final rule as it relates to the length of time a receipt for a replacement document will suffice for Form I–9 purposes before the actual document is obtained. Two commenters said the 21-day rule should be modified to provide a reasonable period of time for the issuance of replacement documentation. They suggested that the regulations be modified so that employers can accept a receipt for approved documentation subject to a good faith requirement that the employee attest under penalty of perjury at 60-day intervals that an application for a replacement document remains pending.

The Service notes that the current regulation pertains to 21 business days, not merely 21 days. The purpose of the clarifying language was simply to make it clear that this section relates to the submission of an application for a replacement document and not to an application for a grant of work authorization. In other words, this provision pertains solely to a situation where the individual is already work authorized and is merely requesting an initial or replacement document evidencing this authorization. An employer will be able to distinguish this situation since the employee will have to indicate the source of his or her work authorization (and expiration date, if any) in order to complete section 1 of the Form I–9. It should be noted that this rationale is not applicable to identity documents.

Another commenter stated that since INS has 60 days to respond to a request for employment authorization pursuant to § 274a.13(d) or to a request for a replacement document, the period of time that an alien has to obtain a replacement document should be amended from 21 days to at least 60 days. § 274a.13(d) is amended to afford the Service 90 days to adjudicate an application for employment authorization. Although no specified time limit exists in which the Service must issue a replacement document to an alien, the Service accepts the underlying rationale and the period of time for which a receipt for a replacement document is valid is changed from 21 business days to 90 calendar days.

18. Reverification

Section 274a.2 paragraph (b)(1)(vii) was revised in the interim final rule by adding a requirement that the employer complete and maintain a new Form I–9 when the employment authorization document expires.

A number of commenters objected to the requirement of completing a new Form I–9 when an individual's employment authorization expires or when the employer is advised by the Service that a document presented by the employee is insufficient to establish employment eligibility. The objection to this provision was based largely on the view that completing a new Form I–9 within 3 business days would be a burden on the employer, especially when the employer has a large workforce. The commenters expressed their belief that reverifying on the original Form I–9 would be more cost efficient and cost effective than completing a new Form I–9 every time a worker obtains an extension of employment authorization. The Service accepts the comment and employers will be allowed to reverify on the Form I–9, in lieu of completing a new Form I–9, when the employee's work authorization expires. Reverification must occur not later than the date that work authorization expires. If an employee has temporary work authorization, then he or she should apply for a new grant of work authorization at least 90 days before the expiration date. Pursuant to § 274a.13(d), if the Service fails to adjudicate the application for employment authorization within 90 days, the employee is automatically authorized for employment for a period not to exceed 240 days.

Several other comments were received. Some commenters stated that there should be further clarification concerning the provision that expiration of a Form I–551 does not necessarily mean employment authorization has expired. The Service accepts this comment and § 274a.12 paragraph (a)(1) is amended accordingly. One commenter thought any revision to the Form I–9 should include space for reverification. The Service will take this comment into consideration when the Form I–9 is revised. Until then, the employee and employer should line through any superseded information and initial and date the updated information. One commenter thought the Service should clarify the scope of the rule, i.e., whether the rule is intended to have prospective effect. This rule applies to any and all Forms I–9 completed after the effective date of this final rule.

Finally, section 535 of the Immigration Act of 1990 amends section 274B(a) of the Act so that requiring more or different documents or refusing to accept certain documents may be an unfair immigration-related employment practice. The Service believes that this provision of law should be afforded maximum opportunity to operate in its intended fashion and unencumbered by pre-existing regulations. Therefore, the Service is, at the present time, retreating from the requirement that an employer complete and maintain a new Form I–9 when the employer is advised in writing by the Service that a document presented is insufficient to establish employment eligibility. This final rule reflects this change.

19. Employment Situations Not Deemed to Constitute a New Hire

Section 274a.2 paragraph (b)(1)(viii) was reorganized and revised in the interim final rule by adding nine (9) factors which are to be considered in determining whether an individual has a reasonable expectation of employment. The "reasonable expectation of employment at all times" language was initially added to the rule to address the Service's concern that continuing employment after a temporary interruption could become a loophole in the Act, especially in industries such as agriculture where employment is typically short-term and there may be no firm expectation of recall. The interim final rule made it clear that absent such an expectation, employers cannot evade the employer sanctions requirements simply because they are in a seasonal industry or because some individuals happen to be rehired.

Two commenters stated that the amended language regarding continuing employment only creates further confusion rather than clarification. They questioned whether an employer must demonstrate that an individual satisfies not only the factors under paragraph (b)(1)(viii)(A) but also the situations described in paragraph (b)(1)(viii)(B). Another commenter agreed, stating that the factors listed in subparagraph (A) only make sense if they are understood

to be applicable in situations not already described in subparagraph (B). The commenter notes that to do otherwise would create internal conflicts between these subparagraphs.

As a preliminary matter, paragraph (b)(1)(viii)(A) of the interim final rule, which sets forth factors evidencing a reasonable expectation of employment, has been amended and redesignated as paragraph (b)(1)(viii)(B). Similarly, paragraph (b)(1)(viii)(B) of the interim final rule, which sets forth situations of continuing employment, has been amended and redesignated as paragraph (b)(1)(viii)(A). The analysis to be used to determine if the employer must complete a new Form I–9 or update a previously executed Form I–9 involves a determination of whether employment is continuing (the situations described in paragraph (b)(1)(viii)(A) are the sole types of employment that are considered to be "continuing") and, if the employment is continuing, whether the individual has a reasonable expectation of employment at all times (representative factors to assist in this second determination are located at paragraph (b)(1)(viii)(B)). The paragraph references in this supplementary information section relate to the paragraphs as they have been renumbered in this final rule.

If an individual is continuing in his or her employment and has a reasonable expectation of employment at all times, the continued employment of that individual under one of the situations described in paragraph (b)(1)(viii)(A) will not constitute a new hire. The situations described in paragraph (b)(1)(viii)(A) define when employment is continuing. The factors listed in paragraph (b)(1)(viii)(B) assist in determining whether the individual has a reasonable expectation of employment at all times. The list of situations in paragraph (A) is exclusive, but the list of factors in paragraph (B) is illustrative only. Only if the individual is involved in a continuing employment situation is the determination relating to the reasonable expectation of employment made. If the individual is not continuing in his or her employment, then re-employment of that individual will constitute a new hire requiring the employer to complete a new Form I–9 or to update a previously executed Form I–9 as appropriate.

In order to eliminate any confusion about the relationship between paragraphs (b)(1)(viii)(A) and (b)(1)(viii)(B), the comments regarding clarification of these sections will be accepted. To that end, the paragraphs are reorganized and new language is inserted to distinguish between the (b)(1)(viii)(A) situations when an individual is continuing in his or her employment and the (b)(1)(viii)(B) factors that can be used in determining if the individual has a reasonable expectation of employment at all times.

20. Employment Situations Not Deemed To Constitute a New Hire—Reasonable Expectations

Section 274a.2 paragraph (b)(1)(viii)(B) [formerly (b)(1)(viii)(A)] received one comment. The commenter suggested that employers in states which have employment-at-will statutes are reluctant to give employees a reasonable expectation of continued employment for fear such guarantees will negatively affect the employer's position in a wrongful discharge suit. The commenter stated that the revised definition, which mandates that the employer prove at all times that the individual expected to resume employment and that the individual's expectation is reasonable, may be contrary to the employer's stated hiring policies.

The language in this section will be retained. The requirement that an employer prove at all times that the individual expected to resume employment and that the individual's expectation is reasonable was always a part of this section and applies only when an employer is claiming that the re-employment of an individual does not constitute a new hire. Thus, if employment authorization has not expired, the employer is not obligated to comply with the employment verification requirements. If the employer concludes that meeting this requirement is contrary to the business' hiring policies or may negatively affect the employer's position in a wrongful discharge suit, such a conclusion will only affect the employer's ability to prove that an individual has a reasonable expectation of employment at all times. An employer's responsibility is to comply with the employment verification requirements in those situations which constitute a new hire.

Section 274a.2 paragraph (b)(1)(viii)(B)(*1*) [formerly (b)(1)(viii)(A)(*1*)] was commented on by two commenters who stated that it was confusing and irrelevant to introduce the concept of "sporadic, irregular, or intermittent" employment in this paragraph since that same language is used to describe casual laborers in § 274a.1(h). They noted that the interim final rule on continuing employment only applies to employees, and that casual laborers are not bound by the identity and employment eligibility verification requirements of IRCA.

One commenter suggested that although agricultural employment is sporadic, irregular and intermittent, this does not mean that these employees have been terminated or that there is no longer a continuing employment relationship.

The commenters' statement about casual labor is inaccurate. Section 274a.1(h) is limited to domestic service in a private home that is sporadic, irregular or intermittent. However, to avoid confusion, the comments concerning the use of the language "sporadic, irregular, or intermittent" will be accepted and this clause will be deleted from this paragraph. Whether an individual worked on a regular and substantial basis is certainly a factor in determining whether the individual has a reasonable expectation of employment at all times.

The comment concerning agricultural workers is addressed in the supplementary information relating to § 274a.2 (b)(1)(viii)(A)(*3*).

Section 274a.2 paragraph (b)(1)(viii)(B)(*4*) [formerly (b)(1)(viii)(A)(*4*)] was commented on by two commenters who objected to the use of the term "replacement worker" as a factor regarding the reasonable expectation of employment at all times. This factor states that an individual might have a reasonable expectation of employment at all times if the former position held by the individual in question has not been taken by a replacement worker. The commenters stated that the term "replacement worker" is a term of art in labor law; it applies to a worker hired by an employer to take the place of a striking employee. They maintained that this provision is incompatible with existing law which holds that striking workers whose positions have been taken by replacement workers retain their status as employees. The commenters noted that for a striking employee to lose his classification as continuing in his or her employment when his or her position has been taken by a replacement worker is inconsistent with the rights of those workers to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. They also stated that this provision conflicts with § 274a.2(b)(1)(viii)(A)(*4*) [formerly § 274a.2(b)(1)(viii)(B)(*4*)] which describes one who is on strike or who is involved in a labor dispute as an individual who is continuing in his or her employment.

These commenters also argued that even in contexts other than strikes and labor disputes, considering the hiring of a replacement worker as a factor showing that an individual is not a continuing employee is questionable and misleading. They gave the example of a worker who takes maternity leave for 6 months upon the birth or adoption of a child and who may be replaced by a worker so that operations can continue in her absence.

These comments will be accepted. The provision will be changed to read: "The former position held by the employee in question has not been taken permanently by another worker." This change will eliminate the use of the term "replacement worker," thereby avoiding any conflict with existing case law and any confusion with § 274a.2(b)(1)(viii)(A)(4).

Section 274a.2 paragraph formerly designated as (b)(1)(viii)(A)(5) in the interim rule [and now deleted] related to an individual who had not sought or obtained regular and substantial employment with another employer. That paragraph received comments by two commenters who suggested that this factor is irrelevant to the issue of whether an individual has a reasonable expectation of employment at all times and should be deleted. Three other commenters suggested that this factor conflicts with existing law as well as with the provisions of the interim final rule relating to reinstatement. That paragraph, (viii)(A)(5) [formerly (viii)(B)(5)], states that continuing employment can include a situation in which an individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, reinstatement or settlement. The commenters pointed out that under Federal labor law, an individual who is unlawfully discharged is legally obliged to seek employment to mitigate his damages. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 197 (1941).

Implementation of this regulation was not intended to bar wrongfully terminated employees from establishing that they are continuing in their employment if they have sought or obtained regular employment in the interim. However, if an individual has taken another job with a new employer with no intention of returning to the prior employer, such action establishes that he or she does not have a reasonable expectation of employment at all times with the prior employer. Nevertheless, in order to avoid potential conflict or confusion, this factor will be deleted and the remaining factors will be renumbered accordingly.

Section 274a.2 paragraph (b)(1)(viii)(B)(5) [formerly (b)(1)(viii)(A)(6)] relates to benefits sought or obtained by the individual. Two commenters suggested that this factor is irrelevant to the issue of whether an individual has a reasonable expectation of employment at all times. Three commenters described the language in this section as vague and in need of clarification. The commenters suggested that specific examples of the types of benefits to which the rule is referring would eliminate any potential confusion.

The comments concerning clarification of the rule will be accepted and the following language will be added at the end of this paragraph: "Such benefits include, but are not limited to, severance and retirement benefits."

The comments concerning irrelevancy will be rejected. The fact that an individual has accepted benefits inconsistent with an expectation of resuming employment, such as benefits associated with retirement or severance of his or her position, is significant to the issue of whether the individual has a reasonable expectation of employment at all times.

Section 274a.2 paragraph (b)(1)(viii)(B)(6) [formerly (b)(1)(viii)(A)(7)] relates to the financial condition of the employer. One commenter believed that this factor is irrelevant to the issue of whether an individual has a reasonable expectation of employment at all times. Two commenters expressed concern over the use of the word "claimant" and questioned whether this word referred to the employer or the employee. They suggested that if it refers to the employee, the interim final rule was objectionable as an unwarranted and unauthorized invasion of privacy. If it refers to the employer, then the commenters stated that the section should use the word "employer" instead of "claimant."

Three commenters objected to the use of the word "likelihood" in the interim final rule. They noted that the use of this term suggests that a different, and perhaps more stringent, standard applies than that found in § 274a.2(b)(1)(viii)(B) [formerly § 274a.2(b)(1)(viii)(A)] which uses the term "reasonable expectation." One commenter stated that even employers operating as debtors-in-possession under Chapter 11 of the Bankruptcy Code may continue to conduct their affairs and carry on the normal course of their business operations without interruption, including reinstating workers after a temporary break in their employment, for any of the reasons specified in subparagraph (A) of this section. The commenter stated that requiring proof of a "likelihood" of an employee's resumption of employment is unreasonable and will lead to an unduly burdensome inquiry into the precise financial circumstances of the employer.

The comments concerning irrelevancy will be rejected. The financial condition of an employer bears greatly on the "reasonable expectation" of employment for the individual, e.g., if employers are anticipating having to close their businesses or layoff employees.

The term "claimant" was used to reflect that in the absence of establishing that the individual is continuing in his or her employment and that the individual has a reasonable expectation of employment at all times, no employer-employee relationship exists. Therefore, the Service felt that use of the term "employer" was inappropriate. However, although this rationale is still valid, the Service will utilize the term "employer" in lieu of the term "claimant" to avoid introducing another definition that may result in confusion.

The comments concerning the use of the word "likelihood" will be accepted. In order to avoid any confusion in using the terms "reasonable expectation" of employment and "likelihood" that the employee will resume employment, the word "likelihood" will be deleted and the word "ability" will be inserted.

Section 274a.2 paragraph (b)(1)(viii)(B)(7) [formerly (b)(1)(viii)(A)(8)] relates to communications between the individual in question and the prior employer. One commenter interpreted this section as placing an obligation on the employer to document in writing his or her intent as it relates to the factors listed in paragraph (b)(1)(viii)(B) [formerly paragraph (b)(1)(viii)(A)]. The commenter stated that such a requirement only increases the administrative burden on employers.

The comment will be rejected since this interpretation is inaccurate. The factors listed in paragraph (b)(1)(viii)(B) [formerly paragraph (b)(1)(viii)(A)] are factors which evidence that the individual in question has a reasonable expectation of employment. None of these factors are required *per se* to meet this burden. Therefore, the employer is not unduly burdened to any degree by this factor. Any oral and/or written communication between the employer,

his or her supervisory employees and the individual can be used to show that the individual in question would resume employment in the near future, and therefore, demonstrate a reasonable expectation of employment at all times.

Use of the term "likelihood" was not meant to create a new standard. This language is changed to reflect that if there is an oral or written communication as described herein, and this communication indicates that it is reasonably likely that the individual will resume employment, then that factor is relevant to determine if the individual has a reasonable expectation of employment at all times.

Section 274a.2 paragraph formerly designated as (b)(1)(viii)(A)(9) in the interim final rule [and now deleted] related to employment that is seasonal in nature. Four commenters suggested that this factor be deleted in its entirety. One of these commenters stated that seasonal workers are specifically targeted even though they may meet many of the qualifications set forth in section (viii)(B) [formerly (viii)(A)]. One commenter stated that this factor has generated much confusion, since many industries that are considered seasonal in fact employ workers for substantial portions of the year. Two commenters suggested that this factor be deleted since the factor listed in (B)(1) [formerly (A)(1)], requiring that an employee be employed on a regular and substantial basis, adequately covers this concept. Deleting this factor would eliminate any confusion that could be engendered by various interpretations of the word "seasonal." One of the two commenters stated that temporary interruptions or reductions in business, after which all or most workers previously employed resume employment on a routine basis, are the norm in many industries.

In light of other amendments to this section, and since an individual in a continuing employment situation must also have a reasonable expectation of employment at all times, the Service accepts the comments and the paragraph formerly designated as (b)(1)(viii)(A)(9) in the interim final rule is deleted. In addition, to make it absolutely clear that seasonal employment is a situation in which an individual is continuing in his or her employment, new paragraph (b)(1)(viii)(A)(8) is added. However, as with each enumerated situation in which an individual is continuing in his or her employment, the employer must also establish that the individual has a reasonable expectation of employment at all times. The Service reiterates that this provision, paragraph (b)(1)(viii)(A)(8), does not create a new class of grandfathered employees within the meaning of 8 CFR 274a.7. The legislative history of section 274A of the Act evidences that Congress did not intend that the grandfather provision be interpreted broadly. Therefore, although the Service can properly apply the legislative intent of the employer sanctions provisions to decrease the requirements on employers in these industries in complying with the employment verification requirements, it cannot, consistent with the statute, apply that same intent to expand the applicability of the grandfather provision. Section 274a.7 is amended to reflect this change.

21. Employment Situations Not Deemed To Constitute a New Hire—Continuing Employment

Section 274a.2 paragraph (b)(1)(viii)(A) [formerly (b)(1)(viii)(B)] received some comments. Two commenters pointed out the inconsistency between the provision in this paragraph and the language in paragraph (b)(1)(viii)(B)(4) [formerly (b)(1)(viii)(A)(4)] which provides that an individual would have a reasonable expectation of employment if his or her position has not been taken by a replacement worker. This comment is remedied by a language change to § 274a.2(b)(1)(viii)(B)(4) as previously discussed.

Section 274a.2 paragraph (b)(1)(viii)(A)(7)(ii) [formerly (b)(1)(viii)(B)(7)(ii)] received one comment. The commenter believed that this section is constructed too broadly and provides employers with a loophole by claiming that discrepant Forms I–9 were the work of the former employer. The commenter suggested that this section be amended so that the newly formed entity bears full responsibility for Forms I–9 relating to individuals who are continuing in their employment with that entity. The Service accepts this commenter's rationale but rejects the need to place such a limitation in the regulations. Pursuant to this section, the Service always considers that the newly formed entity accepts full responsibility and liability for any and all Forms I–9 completed by the previous employer.

22. Multi-Employer Associations

Section 274a.2 paragraph (b)(1)(viii)(G)(3) was deleted from the regulations by the interim final rule because it was being misinterpreted. Section 274a.2(b)(1) provided employers with the ability to delegate verification responsibilities through contractual business arrangements. Therefore, paragraph (b)(1)(viii)(G)(3) seemed superfluous. Approximately fourteen comments were received, most of which were from national organizations representing hundreds of employers, expressing significant concerns regarding the deletion of this provision. All commenters stated that the former subparagraph (G)(3) reflected workplace realities in multi-employer bargaining units and urged that if there was difficulty with the interpretation of this subparagraph, then the language should be clarified rather than deleted.

INS carefully scrutinized the public comments relating to this issue and has adopted the commenters' suggestions to replace and clarify the former subparagraph (G)(3). The final rule adds paragraph (b)(1)(viii)(7)(iii) addressing an employer's verification responsibilities in multi-employer situations. It provides that when an employer continues to employ an employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement, the agent/multi-employer association must track the employee's hire and termination dates each time the employee is hired or terminated by an employer in the multi-employer association. The recordation of this information is important in order for an employer in the multi-employer association to comply with the verification requirements and for the Service to know at the time of any inspection what employees are or have been working for a particular employer. It is also important to note that the employee must continue to work in the same bargaining unit under the same collective bargaining agreement. If the employee leaves the bargaining unit or works under a different collective bargaining agreement, then his or her return to the original bargaining unit or employment under the original collective bargaining agreement would constitute a new hire, triggering the appropriate verification procedures.

23. Subpoena Power

Section 274a.2 paragraph (b)(2)(ii) was commented on by approximately five organizations. Four commenters stated that both the old regulations as well as the interim final rule exceed the statutory authority granted by IRCA. They contended that administrative law judges (ALJs) have exclusive subpoena power under IRCA, and that INS officers are not authorized to issue subpoenas in employer sanctions investigations. The Service rejects these comments for the

following reasons. First, the commenters overlooked the fact that authority for Service officers to issue and serve administrative subpoenas to aid in its enforcement of the Act is specifically set forth in section 235(a) of the Act. That section states that the Service has the power to issue subpoenas "in any matter which is material and relevant to the enforcement of the Act." Thirty-four years after enactment of section 235(a) of the Act, Congress enacted IRCA. Since IRCA was made a part of the Act, the INS continued to have, post-IRCA, the authority to issue administrative subpoenas to enforce any provision of the Act, including employer sanctions. Second, the commenters asserted that if Congress intended to grant to the Service the authority to issue subpoenas in section 274A proceedings, it would have specifically stated so in that section of the Act. However, Congress did not need to grant subpoena authority to the Service in section 274A of the Act since it had already granted that authority to the Service under section 235(a) of the Act. In contrast, ALJs had no role in the long history of the Act prior to IRCA. Therefore, with the addition of section 274A of the Act, ALJs needed an express grant of authority in order to fulfill their newly-created duties. In addition, there is simply no support, under either section 235(a) or section 274A of the Act, for the position that Congress intended to remove the Service's subpoena authority under section 235(a) of the Act when it enacted the employer sanctions provisions of section 274A.

One commenter stated that the Service should have considered *In re Ramirez*, Misc. No. TY–89–00023 (E.D. Tex., Mar. 23, 1989), *rev'd and rem'd*, 905 F.2d 97 (5th Cir. 1990), and *United States v. Moore*, Civil Action No. 89–89–A (E.D. Va., Feb. 10, 1989), *vacated*, Civil Action No. 89–89–A (E.D. Va., March 10, 1989). The commenter stated that both of these cases stand for the proposition that ALJs have exclusive subpoena power in the employer sanctions area. The Service considered both of these cases in addition to several other court cases on this issue. First, the *Ramirez* case cited by the commenter was reversed and remanded by the Fifth Circuit. The district court's order in that case was an *ex parte* order entered without the Government being represented. Second, the commenter appears to be unaware that not only was the initial order in the *Moore* case vacated, but also that the court enforced the subpoena under section 235(a) of the Act with respect to required records. The order specifically required the employer to produce Forms I–9, W–4 forms, FICA reports, unemployment compensation records and labor certificates. Further, it should be noted that on September 5, 1990, the Eleventh Circuit specifically upheld INS' subpoena authority under section 235(a) of the Act in its enforcement of section 274A of the Act. *United States* v. *DeBooth*, Case No. 90–5097 (11th Cir., Sept. 5, 1990).

Two commenters narrowly interpreted the reference to INS subpoena power in this subparagraph to mean that it only applies to the procurement of Forms I–9 and can only be utilized after an inspection and an employer's failure to make Forms I–9 available. This interpretation is simply incorrect. The reference to the subpoena authority in this paragraph makes it clear that appropriate Service officers, as set forth in 8 CFR 287.4, can compel an employer to make Forms I–9 available by issuing an administrative subpoena under section 235(a) of the Act. This section in no way limits the Service's authority under section 235(a) of the Act to obtain any other relevant documents, such as business records, in its inspection and/or investigation of a particular employer. In order to clarify this point, the final rule will provide that immigration officers defined in 8 CFR 287.4 may, in addition to being able to compel production of Forms I–9, compel production of any other relevant evidence. This paragraph now states that nothing in the regulation is intended to limit the Service's subpoena power under section 235(a) of the Act.

Section 538 of the Immigration Act of 1990 granted access to Forms I–9 to the Special Counsel for Immigration-Related Unfair Employment Practices. A clause is added to this paragraph to mirror the statute. The same addition is made to paragraphs (b)(2)(ii) and (b)(2)(iii).

24. Photocopying Verification Documents Not Required

Section 274a.2 paragraph (b)(3) was revised in the interim final rule by adding clarifying language to make it absolutely clear that the photocopying of documents by an employer, recruiter or referrer for a fee does not relieve them from the requirement to fully complete section 2 of the Form I–9, nor is it an acceptable substitute for proper completion of the Form I–9 in general. The Service received one comment on this provision. The commenter stated that requiring employers to write the document identification numbers and expiration dates on the Form I–9, when that information is available on photocopies of documents attached to the Form I–9, is arbitrary and capricious and duplicates the burden on employers. The language of this section will be retained. 8 CFR 274a.2(b)(3) provides in pertinent part for the permissive photocopying of documentation. It states an employer "*may, but is not required to*, copy a document presented by an individual solely for the purpose of complying with the verification requirements of this section (emphasis added)." A recent case addressing this issue held that "the language of this regulation is clearly *permissive and supplemental* to the *mandatory* completion of the Form I–9 Employment Eligibility Verification Process (emphasis in original), and *is not intended to serve as an alternate mode of complying with the law* (emphasis added)." *United States* v. *Manos and Assocs., Inc., d.b.a. Bread Basket Restaurant*, OCAHO Case No. 89100130, Feb. 8, 1990, (Order Granting in Part Complainant's Motion for Summary Decision); *see also United States* v. *J.J.L.C. Inc., T/A Richfield Caterers and/or Richfield Regency*, OCAHO Case No. 89100187, Apr. 13, 1990. Thus, this process is not arbitrary or capricious and does not duplicate the burden on employers since their only obligation is to properly complete the Form I–9.

Further, in order to ensure that employers, recruiters and referrers for a fee not violate the antidiscrimination provisions of the Act, cautionary language has been added that states that an employer, recruiter or referrer for a fee should not photocopy the documents only of individuals of certain national origins or citizenship statuses. To do so may violate section 274B of the Act.

25. Rehires

Section 274a.2 paragraphs (c)(1)(i) and (ii), dealing with updating and reverifying the Form I–9 for an employee hired within 3 years of the initial execution of the Form I–9, was commented on by seven commenters. Several commenters complained that requiring a new Form I–9 when the employer determines that the individual's employment authorization has expired, or the Service informs the employer that the employment eligibility document presented is insufficient to establish employment authorization, is unduly burdensome. The Service accepts these arguments.

One commenter suggested that paragraph (c)(1)(ii) requires the employer to see an INS-issued employment authorization document in order to update the Form I–9. A second commenter stated that such a requirement would be reasonable. The Service agrees that such a requirement

is reasonable, but feels constrained by the statutory language that any document or combination of documents that establish identity and current work authorization is sufficient for completing a Form I–9. Section 274A(b)(1)(A) of the Act. This is especially true since section 535 of the Immigration Act of 1990 now makes it a violation of section 274B of the Act to require certain documents or to refuse to accept certain documents. However, the Service further notes that the employer cannot deliberately ignore knowledge, acquired from other sources such as the original Form I–9, that an individual's work authorization has expired. This knowledge may be used to support a charge of knowingly hiring or knowingly continuing to employ an unauthorized alien.

Three commenters stated that paragraph (c)(1)(i) is inconsistent with paragraph (b)(1)(vii). To remedy any confusion, paragraph (c)(1)(i) will reflect that when an employer is seeking to rehire an individual within 3 years of the initial execution of the Form I–9 and the individual's employment authorization has expired, the employer may reverify on the Form I–9 in accordance with paragraph (b)(1)(vii). If review of the Form I–9 reveals that the individual is still eligible to work on the same basis or by the same grant of work authorization as when the Form I–9 was originally completed, until the Form I–9 is revised, the employer should line through the date in the certification block at the bottom of section 2 of the Form I–9, put in the date of the rehire, and initial the change (update).

One commenter suggested that since the current Form I–9 does not contain appropriate space to reverify or update, the reverification and updating procedures should be deleted until the Form I–9 is revised. As previously stated, the current Form I–9 is undergoing revision and will provide appropriate space to reverify and update in its revised form.

Finally, as previously stated, section 535 of the Immigration Act of 1990 amends section 274B(a) of the Act so that requiring more or different documents or refusing to accept certain documents may be an unfair immigration-related employment practice. The Service believes that this provision of law should be afforded maximum opportunity to operate in its intended fashion and unencumbered by pre-existing regulations. Therefore, the Service is, at the present time, retreating from the requirement that an employer complete and maintain a new Form I–9 when the employer is advised in writing by the Service that a document presented is insufficient to establish employment eligibility. This final rule reflects this change.

26. Use of Contract To Obtain the Labor or Services of an Alien

Section 274a.5 was revised in the interim final rule by deleting the word "knowingly" in the first sentence after the word "who" and substituting the exact language of section 274A(a)(4) of the Act in order to clearly state that the prohibited conduct under this provision is the use of a contract to obtain the labor or services of an alien knowing that the alien is unauthorized to work in the United States. One comment was received on this paragraph, and it was supportive of the change implemented by the interim final rule. This final rule mirrors the interim final rule.

27. Pre-enactment (Grandfather) Status

Section 274a.7 paragraph (b) was revised in the interim final rule by adding an additional ground upon which an individual will lose pre-enactment status. That revision set forth that pre-enactment status will be lost when an employee is no longer continuing in his or her employment or does not have a reasonable expectation of employment at all times. One comment suggested that this section be amended to reflect that "continuing employment" is defined in § 274a.2(b)(1)(viii) (A) through (G) (1) and (2). The commenter thought this change would identify the exclusive applicability of § 274a.2(b)(1)(viii)(G)(3) for Form I–9 purposes and would eliminate the potential loophole whereby employers can hire a "grandfathered employee" without incurring an employer sanctions violation. The Service accepts this rationale in part and, with the exception of individuals engaged in seasonal employment and those in multi-employer associations, individuals who were hired prior to November 7, 1986, who are continuing in their employment and have a reasonable expectation of employment at all times are grandfathered employees pursuant to § 274a.7.

Two comments encouraged the inclusion of seasonal workers in § 274a.2(b)(1)(viii) as continuing employees, thereby entitling them to the "grandfathered employee" status referred to in § 274a.7. The Service does not accept the suggestion that seasonal workers are grandfathered employees. The grandfather provision of IRCA is specific, and although the Service can lessen the paperwork requirements applicable to employers, it cannot, consistent with the statute, expand the scope of the grandfather provision through regulation to extend to seasonal work, which is, in actuality, a series of transactional hires.

28. Notice of Intent To Fine

Section 274a.9 paragraph (a) was revised in the interim final rule by deleting superfluous language. No comments were received on this section, and it is reproduced in this final rule without modification.

Section 274a.9 paragraph (c)(1) was revised in the interim final rule by deleting the word "citation" from the caption, and by removing the language in the first sentence "a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of law" and substituting in its place language which indicates that "fact pleading" is not necessary and "notice pleading" is all that the INS is required to provide in order to comply with applicable law and procedure in issuing a Notice of Intent to Fine (NIF). Two commenters stated that the INS should be required to describe in detail in the NIF the nature of the violation so that the employer may have adequate notice and an opportunity to prepare a defense.

Two commenters stated that the Administrative Procedures Act (APA), and not the Federal Rules of Civil Procedure (FRCP), is the governing procedural statute for employer sanctions cases under IRCA. Section 274A(e)(3)(B) of the Act. Under the FRCP, only notice pleading is required. Under the APA, persons entitled to notice of an agency hearing must be informed of "the matters of fact and law asserted." 5 U.S.C. 554(b)(3). One commenter cited to *Mester Mfg. Co., Inc.* v. *INS*, 879 F.2d 561 (9th Cir. 1989) for the premise that the NIF is the pleading which initiates the adjudicatory process, and, therefore, it must apprise the individual or entity of the issues involved.

Section 554(a) of Title 5 of the United States Code pertains to adjudications under the Administrative Procedure Act. It states, in pertinent part:

> This section applies * * * in every case of adjudication required by statute to be determined on the record *after* an opportunity for an agency hearing (emphasis added).

Subsection (b) continues:

> Persons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted.

The Service accepts the position that the NIF should inform the respondent of the facts and law asserted as mandated by the APA. The format of the current

NIF satisfies this standard and this paragraph is amended to conform to this view. Finally, in clarifying this paragraph, the term "citation" is once again removed from the heading and from § 274a.9 paragraph (b) as obsolete, and the reference to "District Counsel or his or her designee or Sector Counsel" in the last sentence of paragraph (c) is replaced with the words "Service Attorney" since there are no longer Service attorneys with the designation of "Sector Counsel."

29. Request for hearing before an ALJ

Section 274a.9 paragraph (d) was revised and reorganized in the interim final rule by removing from this section the procedure for a respondent's failure to request a hearing. This section was also amended to require that a request for a hearing submitted in a foreign language be accompanied by an English translation. The only comment received regarding this section suggested that the last sentence in this section be deleted. The commenter thought that this provision, which permits, but does not require, the respondent to file an answer to the allegations with the INS, was "confusing and prejudicial to the respondent." The commenter believed that this provision implies that the requirement to file an answer to a complaint within 30 days as set forth at 28 CFR 68.8(c) is satisfied by filing a response to the NIF with the INS pursuant to this section.

This provision is included in the section entitled "Request for Hearing Before an Administrative Law Judge" and is not intended to conflict with, or be a substitute for, the regulations in 28 CFR part 68, which outline the procedures and requirements within the Office of the Chief Administrative hearing officer (OCAHO).

However, the reasoning underlying the comment is accepted. This section is amended to reflect that all that is required to initiate the hearing process is a request for hearing by the respondent. That filing may, but is not required to, include a response to the allegations in the NIF. The allegations in response to the NIF are not a substitute for an answer to a complaint served on the respondent by OCAHO pursuant to 28 CFR 68.3. The last sentence will be amended to read: "In the request for a hearing, the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine." Finally, to avoid confusion between ordinary mail and certified mail, which is defined at 8 CFR 103.5a(a)(2)(iv) as personal service, a reference is added to this paragraph to make it clear that 5 days are added for mailing only if the NIF is served by ordinary mail.

30. Criminal Penalties

Section 274a.10 paragraph (a) relates to pattern or practice violations. The only comment received regarding this section suggested that this entire section be deleted since the penalties for violating IRCA are explicitly set forth in section 274A(f) of the Act.

The comment will be rejected. This section as revised by the interim final rule mirrors the language in section 274A(f)(1) of the Act. Its inclusion in the regulations makes for a complete and concise review of the criminal penalties for violations of paragraph (a)(1)(A) or (a)(2) of the Act in the section of regulations which pertains to all penalties, both criminal and civil, which can be imposed for employer sanctions violations.

31. Civil Penalties

Section 274a.10 paragraph (b) was revised in the interim final rule by adding clarifying language in the third sentence by changing the words "single violation" to "single offense" and adding the word "alien" after the word "unauthorized" in the last sentence of this section. In addition, § 274a.10 paragraphs (b)(1)(ii)(A), (B) and (C) were revised in the interim final rule by substituting "offense" for the word "violation." The only comment received regarding this section suggested that this entire section be deleted since the penalties for violating IRCA are explicitly set forth in section 274A(e)(4) of the Act.

The comment will be rejected. The changes to this section make it clear that several violations may constitute a single offense for the purpose of determining the level of the penalties that will be imposed. The inclusion of this section in the regulations makes for a complete and concise review of the civil penalties in the section of regulations which pertains to all penalties, both criminal and civil, which can be imposed for employer sanctions violations.

32. Special Rule

Section 274a.11 was removed by the interim final rule, since the purpose for enactment of this special rule no longer exists. This section was promulgated as a result of the provisions of IRCA that allowed certain qualified aliens who had resided illegally in the United States to legalize their status. These aliens could have applied under the Legalization, Special Agricultural Worker (SAW) or Cuban/Haitian entrant programs. This regulation allowed employers to hire applicants or prospective applicants for legalization, SAW, or Cuban/Haitian entrant status, Until September 1, 1987, without reviewing an employment authorization document, if they stated they were applying for one of these programs. All other verification requirements had to be met. However, as of September 1, 1987, these aliens were required to produce an employment authorization document, and the employer must have completed section 2 of the Form I–9 and certified that the aliens were authorized to work in the United States. Since a person or entity could no longer rely on this provision after September 1, 1987, as a basis for not fully complying with the verification requirements, this provision was removed as being obsolete.

Both of the comments regarding this regulation suggest that this section be reinstated. The commenters stated that the removal of this section is premature because it is still relevant to current determinations of whether an individual was authorized to engage in employment during the period that the special rule was in effect, namely, from November 6, 1986, to September 1, 1987. One example given by the commenters describes the situation in which an individual may only be able to obtain unemployment insurance benefits if he or she can prove authorized employment during that period of time.

These comments will be rejected. Since the purpose of enacting this provision no longer exists, it will remain deleted. However, the removal of this section in no way diminishes its validity prior to the effective date of its removal. Individuals who need to prove authorized employment during the period of November 6, 1986 to September 1,1987, may still do so by relying on the previous regulation which was in effect and controlling during that time period.

33. Work Authorization Inherent in Alien's Status

Section 274a.12 paragraph (a) was amended in the interim final rule to specify that certain aliens in this paragraph [(a)(3)-(11)], although employment authorization is inherent in their status, must apply for evidence of this inherent employment authorization by completing an application for employment authorization (Form I–765) in order to be issued an employment authorization document. The interim final rule also noted that the expiration date on a Form I-551 does not necessarily mean that an individual's employment authorization has expired.

Two commenters suggested that this amendment to the regulations exceeds INS' statutory authority. These commenters stated that aliens covered by this regulation have an absolute right to work in the United States by virtue of their status. The commenters stated that the interim final rule denies such individuals the right to work unless they receive an employment authorization document from the INS, and that the inability of the INS to issue these documents within a reasonable period of time furthers this denial of the right to work. The commenters stated that these aliens would be deprived of opportunities to accept or change employment while awaiting the issuance of an INS employment authorization document. They suggested that if the INS wants to provide a standard employment authorization document for these classes of aliens, it should issue such documentation automatically upon the grant of status or admission of such aliens.

One commenter believed that this regulation imposes new burdens on these authorized workers.

Another commenter suggested that if these authorized aliens must now obtain employment authorization documents in order to work, the INS must respond to such requests promptly. It was suggested that section 274a.2(b)(1)(vi) be amended to allow receipts for applications for employment authorization documents to satisfy the verification requirements for at least 60 days instead of 21 business days.

One commenter suggested that the regulation should clarify that an applicant for an employment authorization document under this section need not demonstrate economic necessity since employment authorization is inherent in one's status.

As previously stated in the Supplemental Information to the interim final rule, published in the Federal Register on June 25, 1990, the filing of the Form I–765 by these classes of aliens will not result in an adjudication of whether employment authorization should be granted because employment authorization is inherent in their status. The application will be used to acquire a document evidencing employment eligibility. Despite the fact that these aliens' right to work is inherent in their status, such a right does not exempt them from having to prove their eligibility to work by presenting documents recognized as sufficient to complete a Form I–9. These classes of aliens have no greater burden imposed upon them than any other alien, or even a United States citizen, in providing proof of employment eligibility. The Service is making every effort to promptly issue employment authorization documents, and is confident that issuance of these documents will be done within a reasonable period of time since no substantive adjudication is required. The Service notes that certain aliens who are eligible for employment authorization at the time of entry (e.g., K-nonimmigrants, N-nonimmigrants, Pacific Islanders, etc.) will be issued Form I–688B at the Port of Entry. The INS has equipped major Ports of Entry with the necessary equipment to issue Form I–688B.

The comment related to the extension of the 21 business day rule is accepted and the change is reflected in § 274a.2 paragraph (b)(1)(vi). The Service will make every effort to ensure that employment authorization documents are issued so as not to interrupt an alien's employment. A receipt for having applied for a replacement work authorization document is acceptable for these aliens for 90 days. The employer, recruiter or referrer for a fee must ensure that section 1 of the Form I–9 is completed by the employee. Section 1 will evidence that the alien is work authorized by the inclusion of the A-number or admission number. Once the actual document is obtained, the employer can fully complete section 2 of the Form I–9 and ensure that the alien updates section 1 to note any expiration date on the work authorization document.

The Service has also added language to paragraph (a) to clarify that the expiration date on Form I–551 reflects only that the card must be renewed, not that the individual's work authorization has expired.

34. Aliens Granted Suspension of Deportation

Section 274a.12 paragraph (a)(9) was amended in the interim final rule to clarify that a person who has received a final determination as to his or her entitlement to suspension of deportation immediately obtains permanent residence status. Section 244 of the Act was amended by IRCA and by § 2(q)(1)(B) of the Immigration Technical Corrections Amendments of 1988 (Pub. L. No. 100–525, 102 Stat. 2614) to eliminate the requirement that grants of suspension be submitted to the Congress for two sessions prior to a final grant of suspension. Therefore, work authorization for aliens granted suspension of deportation is incident to their status as lawful permanent residents under paragraph (a)(1), thereby obviating the need for paragraph (a)(9). The interim final rule is adopted herein without modification.

35. Nonimmigrants: Crewmen

Section 274a.12 paragraph (b)(4) was deleted by the interim final rule to eliminate the ambiguity between § 214.2(d) and this paragraph, so as to clearly reflect that crewmen are not authorized to work in the United States incident to their status. A crewman's labor, required for normal operation and service on board a vessel or aircraft, is not considered to be employment in the United States for purposes of section 274A of the Act. See section 101(a)(15)(D) of the Act. The only comment regarding this section suggested that the language in this section be moved to 8 CFR 214.2(d) instead of being deleted altogether from the regulations. It is the position of the Service that alien crewmen are not authorized to be employed in the United States. Therefore, the provision was properly deleted. However, the Service agrees that the remaining portion of that former section should be moved to 8 CFR 214.2(d).

36. Nonimmigrants: A–3, E, G–5, H, I, J–1, L–1, and FTA

Section 274a.12 paragraph (b)(15) was amended in the interim final rule to include, as paragraph (b)(16), those nonimmigrants admitted to the United States as a result of the United States-Canada Free-Trade Agreement (FTA). One commenter was supportive of the addition to this section.

Two commenters suggested that the 120-day limitation on work authorization during the pendency of an alien's extension application be eliminated. The commenters stated that by eliminating this limitation, aliens whose extension applications have not been adjudicated by the Service within 120 days would be authorized to continue to work throughout the pendency of the extension application.

One commenter stated that since an employer is not notified if an alien's application for extension of stay is denied, and such a denial automatically terminates the alien's work authorization, the employer will be denied due process.

To offer an unlimited period of work authorization to these classes of aliens would be contrary to the overall goal of the regulations. That goal is to ensure that only current work authorization documents issued to nonimmigrants, which specify a fixed date when employment authorization begins and ends, are presented by these workers. No rational reason exists to exempt

these classes of aliens from having to present current work authorization documents to an employer. The Service intends to make every effort to adjudicate applications for extensions of stay in a timely manner so that an alien's employment will not be interrupted. To that end, this final rule extends the 120-day period to 240 days to ensure that work authorization documents are issued to these aliens without causing a gap in their employment authorization.

By retaining a specified time period in this regulation, the employer will be able to determine, within a time certain, whether or not an employee has been granted an extension of his or her stay, and is, therefore, eligible to continue working. Since the employee, and not the employer, is provided notice of the Service's decision on the extension application, applying a time certain limitation will assist the employer in his or her responsibility to employ only those aliens authorized to work and will minimize the possibility that an employer is continuing to employ an unauthorized alien, e.g., an alien whose extension of stay has been denied. Giving an alien an unlimited period of work authorization would provide little incentive for an alien, whose extension application has been denied, to inform his or her employer of the denial.

37. Nonimmigrants: A–1 and A–2

Section 274a.12 paragraph (c)(1) was amended by the interim final rule by removing the designation "dependent son or daughter" so that this paragraph would be conformity with the interim regulations published on November 21, 1988. This paragraph also reflects the systemic change that now requires a foreign government official to present an executed Form I–566, including the proper endorsement, in an application for employment authorization. One commenter stated that the term "son or daughter" should not be removed from this section. The commenter stated that, in accordance with international agreements, 8 CFR 214.2(a)(2) and 8 CFR 214.2(g)(2) allow children and certain unmarried, dependent sons and daughters over the age of 21 to be employed in the United States. The elimination of the term "son or daughter" creates a discrepancy between 8 CFR 214 and 274a.

The comment will be accepted and the language "son or daughter" will be reinserted. The same change is made to § 274a.12 paragraph (c)(4).

38. Nonimmigrants: Students

Section 274a.12 paragraph (c)(3) relates to work authorization for nonimmigrant students. Comments related to this section will be addressed in a final rule that amends both this section, § 274a.12 paragraph (b), and 8 CFR 214.2(f).

39. Nonimmigrants: Asylees, Adjustment Applicants, Suspension Applicants, and Parolees

Section 274a.12 paragraphs (c)(8), (c)(9), (c)(10), and (c)(11) were amended in the interim final rule by making stylistic changes in removing the word "Any" at the beginning of each sentence and replacing it with the word "An." One commenter suggested that third and sixth preference adjustment of status applicants, who are given employment authorization pursuant to this section during the pendency of the adjustment application, should automatically be able to use the employment authorization document as an advance parole document for business travel without being required to make a separate advance parole application.

This comment will be rejected. The standardized employment authorization document is designed to verify an alien's eligibility to work in the United States. The purpose of the document is not to verify one's immigration status, nor is it to enable an adjustment of status applicant to travel abroad. The suggested change, therefore, is not warranted.

40. Suspension Applicants, Aliens in Exclusion and Deportation Proceedings, and Aliens Granted Deferred Action Status

Section 274a.12 paragraphs (c)(10), (13) and (14), although not modified by the interim final rule on the issue of "economic necessity," were commented on. Two commenters stated that no rationale has ever been provided for requiring that applicants for suspension of deportation, aliens in exclusion or deportation proceedings, and aliens granted deferred action status demonstrate "economic necessity" for employment authorization under 8 CFR 274a.12(c)(10), (13) and (14), respectively. The commenters gave an example in which an applicant for suspension of deportation whose savings exceed the so-called "poverty guidelines" may be required to exhaust such savings while applying for relief, while a destitute suspension applicant will be immediately authorized to work. The commenters questioned why these three categories of aliens have been singled out for the applicability of the "economic necessity" test while other categories of aliens are not required to demonstrate "economic necessity" to work.

The Service, after thoroughly reviewing the comments, has deemed it appropriate to retain "economic necessity" for those categories of aliens who are subject to exclusion or deportation proceedings or whose deportation has been delayed. To be consistent with this reasoning, applicants for suspension of deportation will no longer have to prove economic necessity to obtain work authorization under § 274a.12(c)(10). The Service believes that they are similarly situated, for purposes of applying for work authorization, to adjustment or asylum applicants who do not have to establish economic necessity. However, there is no valid basis to distinguish deportable aliens granted voluntary departure from the other categories of aliens who must establish economic necessity. Therefore, any deportable alien granted voluntary departure who applies for work authorization pursuant to § 274a.12(c)(12) must now establish an economic need to work. Furthermore, it is important to point out that the question here is not why economic necessity is needed for these groups, but rather whether economic necessity is a relevant factor in determining whether an alien is entitled to work authorization in the United States. Clearly, the requirement of demonstrating economic need is a relevant factor in this determination for aliens whose exclusion or deportation has been temporarily delayed.

41. Nonimmigrants: A–3, E, G–5, H, I, J–1, L–1, and FTAs Whose Application for Extension of Stay Has Not Been Adjudicated Within 180 Days

Section 274a.12 paragraph (c)(15) was removed and reserved by the interim final rule. Three commenters stated that they thought this section should be reinstated. They stated that by removing this section, an alien whose application for an extension of stay has not yet been adjudicated by the Service within 120 days will be forced to stop working, pending a decision by the Service. The commenters viewed this as a penalty imposed upon both the alien and the employer.

The Service disagrees that paragraph (c)(15) was removed to impose a penalty on employers and employees. The Service notes that § 274a.12(b)(15) extends the 120-day period to 240 days for certain aliens who have filed a timely application for extension of stay. This change coupled with the Service's efforts to timely adjudicate all applications should resolve the commenters' concerns.

42. Registry Applicants

Section 274a.12 paragraph (c)(16) was added by the interim final rule to include registry applicants to the list of aliens eligible to apply for work authorization. The Service received no comments on this paragraph. Thus, it will be retained in this final rule.

43. Nonimmigrants: B–1

Section 274a.12 paragraph (c) was amended in the interim final rule by adding a new paragraph (c)(17), to reflect the current practice of allowing nonimmigrant visitors for business (B–1) to request permission to work in the United States under certain limited circumstances. The interim final rule incorporated the requirements and limitations currently set forth in the State Department Foreign Affairs Manual (FAM 41.31) and the Service Operation Instructions (O.I. 214.2(b)). Two commenters suggested that visiting ministers of religion in the B–1 category also be included in this section. They noted that these nonimmigrants, who are engaged in evangelical tours and are supported by offerings contributed at each evangelical meeting, are authorized to obtain "work authorized" social security cards and to receive such compensation in the United States. See Foreign Affairs Manual, 41.31, n. 14.

One commenter stated that he did not believe that employment authorization was applicable to B–1 ministers or missionaries. The commenter stated that the nonimmigrant category of ministers or missionaries is not considered an employment-related category such as the H or L nonimmigrant visas, even though ministers and missionaries may be compensated for expenses incidental to their stay in the United States.

The Service will actively investigate this issue. The Service notes that pursuant to Matter of Hall, 18 I. & N. Dec. 203 (BIA 1982), evangelical ministers on tour are considered to be engaged in employment in the United States. While this decision is admittedly pre-IRCA, the concept that such an individual is not an unpaid volunteer of the church requires further exploration. Further, section 209 of the Immigration Act of 1990 adds a new nonimmigrant classification for religious organizations as section 101(a)(15)(R) of the Act. The Service will address these comments at a future date.

44. Aliens Released on an Order of Supervision

One commenter stated that aliens released on an order of supervision should be able to apply for work authorization. The comment is accepted and a new paragraph (c)(18) is added.

45. Application for Employment Authorization/Interim Employment Authorization

Section 274a.13 paragraphs (a), (b) and (d) were amended in the interim final rule to add clarifying language to conform this section to the systemic changes made with respect to employment authorization, to wit: Form I–765. Three commenters suggested that the INS be required to adjudicate applications for employment authorization within 3 business days instead of the 60 days as reflected in the interim final rule. The commenters stated that since a job applicant has only 3 business days to present evidence of employment authorization to an employer, the INS should only be given the same number of days to process applications for work authorization. They concluded that if the INS needs 60 days to adjudicate applications, then a similar time period should be allowed for aliens to present evidence of employment authorization when hired for a job. One commenter suggested that under these circumstances, if the INS fails to adjudicate an application for employment authorization within the 3 business days, the alien should then be given automatic employment authorization pending a final decision by the INS.

The Service rejects these comment. Section 274a.13 paragraph (d) is revised to change the time period during which the Service will adjudicate applications for employment authorization from 60 to 90 days. The Service has experienced a large increase in the number of applications filed for benefits, and anticipates further increases based upon passage of the Immigration Act of 1990, particularly that portion that authorizes or allows the Attorney General to designated temporary protected status for aliens of certain nationalities. Every effect will be made to adjudicate applications for employment authorization as quickly as possible after receipt of the application. However, workload projections and staffing level projections indicate an increase to 90 days for adjudication is more in line with what can be accomplished. In accordance with the change made in paragraph (d), the INS expects to be able to adjudicate applications for work authorization within the 90–day period. However, if for some reason such an adjudication has not been completed within the 90-day period, the alien is automatically granted employed authorization for a period not to exceed 240 days. This provision does not require that the Service actually grant employment authorization for 240 days. A period of less than 240 days may be granted by the Service in its discretion.

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612. The information collection requirements contained in this regulation have been approved by the Office of management and Budget, under the provisions of the Paperwork Reduction Act. The OMB control numbers for these collections are contained in 8 CFR 299.5, Display of Control Numbers.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies); Freedom of Information; Privacy; Reporting and recordkeeping requirements; Surety bonds.

8 CFR Part 274a

Administrative, Practice and Procedure; Aliens; Employment; Penalties; Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 8 CFR parts 103 and 274a, which was published at 55 FR 25928–25937 on June 25, 1990, is adopted as a final rule with the following changes:

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 –U.S.C. 552, 552a; 8 U.S.C. 1101, 1103, 1201, 1304; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. Section 103.5 is amended by revising paragraph (a) to read as folows:

§ 103.5 Reopening or reconsideration.

(a) *Motions to reopen or reconsider in other than special agricultural worker and legalization cases.*—(1) *When filed by affected party.*—(i) *General.* Except where the Board has jurisdiction and as otherwise provided in part 242 of this chapter, when the affected party files a

motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision. Motions to reopen or reconsider are not applicable to proceedings described in § 274a.9 of this chapter.

(ii) *Jurisdiction.* The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. In that instance, the new official having jurisdiction is the official over such a proceeding in the new geographical locations.

(iii) *Filing Requirements.*—A motion may be accompanied by a brief. It must be—

(A) In writing and signed by the affected party or the attorney or representative of record, if any;

(B) In triplicate if addressed to the Board, in duplicate if addressed to an immigration judge, without any copies if addressed to a Service officer;

(C) Accompanied by the fee required by § 103.7 of this part;

(D) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

(E) Addressed to the official having jurisdiction; and

(F) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

(iv) *Effect of motion or subsequent application or petition.* Unless the Service directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date.

(2) *Requirements for motion to reopen.* A motion to reopen must—

(i) State the new facts to be proved at the reopened proceeding; and

(ii) Be supported by affidavits or other documentary evidence.

(3) *Requirements for motion to reconsider.* A motion to reconsider must—

(i) State the reasons for reconsideration; and

(ii) Be supported by any pertinent precedent decisions.

(4) *Deficient motion in Service case.*—

(i) *Motion to reopen.* A Service officer considering a motion to reopen shall reject a motion as deficient and not refund any filing fee the Service has accepted when the motion does not state new facts to be proved or when it is not supported by affidavits or other documentary evidence.

(ii) *Motion to reconsider.* A Service officer considering a motion to reconsider shall reject a motion as deficient and not refund any filing fee the Service has accepted when the motion does not state the reasons for reconsideration.

(iii) *Correction of deficient motion.* If the affected party corrects the deficiency within 60 days of rejection of a motion, the Service officer having jurisdiction shall act upon the original motion and make a decision on the merits of the case. There is no fee for correction of a deficient motion within 60 days of its rejection as long as the filing fee has already been paid and accepted by the Service.

(5) *Motion by Service officer.*—

(i) *Service motion with decision favorable to affected party.* When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision in order to make a new decision favorable to the affected party, the Service officer shall combine the motion and the favorable decision in one action.

(ii) *Service motion with decision that may be unfavorable to affected party.* When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

(iii) *Proceeding before Board or immigration judge.* When a Service officer is the moving party in a proceeding before the Board or an immigration judge, a copy of the motion must be served on the affected party. The motion and proof of service must be filed with the official having jurisdiction. The affected party has 10 days from the date of service to submit a brief. This time period may be extended as provided in §§ 3.8(c) and 3.22(b) of this chapter.

(6) *Appeal to AAU from Service decision made as a result of a motion.* A field office decision made as a result of a motion may be applied to the AAU only if the original decision was appealable to the AAU.

(7) *Other applicable provisions.* The provisions of § 103.3(a)(2)(x) of this part also apply to decisions on motions. The provisions of § 103.3(b) of this part also apply to requests for oral argument regarding motions considered by the AAU.

* * * * *

PART 274A—CONTROL OF EMPLOYMENT OF ALIENS

3. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a, and 8 CFR part 2.

4. Section 274a.1 is amended by revising paragraphs (c), (j), (k) and (l) to read as follows:

§ 274a.1 Definitions.

* * * * *

(c) The term *hire* means the actual commencement of employment of an employee for wages or other remuneration. For purposes of section 274A(a)(4) of the Act and § 274a.5 of this part, a hire occurs when a person or entity uses a contract, subcontract or exchange entered into, renegotiated or extended after November 6, 1986, to obtain the labor of an alien in the United States, knowing that the alien is an unauthorized alien;

* * * * *

(j) The term *independent contractor* includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. The use of labor or services of an independent contractor are subject to the restrictions in section 274A(a)(4) of the Act and § 274a.5 of this part;

(k) The term *pattern* or *practice* means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts;

(l)(1) The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not

limited to, situations where an employer:

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) Knowledge that an employee is unauthorized may *not* be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

5. Section 274a.2, paragraph (a), introductory text, is amended by:

a. Removing the first sentence and by adding in its place two new sentences; and

b. Adding in the third sentence from the end of the paragraph, before the phrase "after May 31, 1987", the phrase "and hired" to read as follows:

§ 274a.2 Verification of employment eligibility.

(a) *General.* This section states the requirements and procedures persons or entities must comply with when hiring, or when recruiting or referring for a fee, or when continuing to employ individuals in the United States. For purposes of complying with section 274A(b) of the Act and this section, all references to recruiters and referrers for a fee are limited to a person or entity who is either an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802).

* * *

* * * * * *

6. Section 274a.2 paragraph (b)(1)(i)(A) is amended by removing the term "hiring" and replacing it with the term "hire".

7. Section 274a.2 is amended by:

a. Revising in paragraph (b)(1)(v) introductory text, the second sentence;

b. Removing in paragraph (b)(1)(v)(A)(*1*) in the term "Unexpired" the capital "U" and replacing it with a lower case "u";

c. Removing in paragraph (b)(1)(v)(B)(*1*)(*i*) in the second sentence the word "drivers' " and replacing it with the word "driver's" and by removing, in the second sentence, the word "should" and replacing it with the word "shall";

d. Redesignating existing paragraphs (b)(1)(v)(B)(*1*)(*iii*) through (b)(1)(v)(B)(*1*)(*viii*) as new paragraphs (b)(1)(v)(B)(*1*)(*iv*) through (b)(1)(v)(B)(*1*)(*ix*);

e. Adding a new paragraph (b)(1)(v)(B)(*1*)(*iii*); and

f. Adding in paragraph (b)(1)(v)(B)(*1*)(*v*) a sentence to the end of the paragraph to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(b) * * *

(1) * * *

(V) * * * The identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I–9.

* * * * *

(b) * * *

(*1*) * * *

(*iii*) Voter's registration card;

* * * * *

(*v*) * * * If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address;

* * * * *

8. Section 274a.2 is amended by:

a. Removing in paragraph (b)(1)(v)(C)(*3*) in the term "certification" the lower case "c" and replacing it with an upper case "C";

b. Revising paragraph (b)(1)(v)(C)(*4*);

c. Revising paragraph (b)(1)(v)(C)(*8*); and

d. Revising paragraph (b)(1) (vi) through (viii) to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(b) * * *

(1) * * *

(v) * * *

(C) * * *

(*4*) An original or certified copy of a birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal;

* * * * *

(*8*) An unexpired employment authorization document issued by the Immigration and Naturalization Service.

(vi) If an individual is unable to provide the required document or documents within the time periods specified in paragraphs (b)(1) (ii) and (iv) of this section, the individual must present a receipt for the application of the replacement document or documents within three business days of the hire and present the required document or documents within 90 days of the hire. This section is not applicable to an alien who indicates that he or she does not have work authorization at the time of hire.

(vii) If an individual's employment authorization expires, the employer, recruiter or referrer for a fee must reverify on the Form I–9 to reflect that the individual is still authorized to work in the United States; otherwise the individual may no longer be employed, recruited, or referred. Reverification on the Form I–9 must occur not later than the date work authorization expires. In order to reverify on the Form I–9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization. The employer or the recruiter or referrer for a fee must review this document, and if it appears to be genuine and to relate to the individual, reverify by noting the document's identification number and expiration date on the Form I–9.

(viii) An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.

(A) An individual is continuing in his or her employment in one of the following situations:

(*1*) An individual takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;

(*2*) An individual is promoted, demoted, or gets a pay raise;

(*3*) An individual is temporarily laid off for lack of work;

(*4*) An individual is on strike or in a labor dispute;

(*5*) An individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;

(*6*) An individual transfers from one distinct unit of an employer to another distinct unit of the same employer; the employer may transfer the individual's Form I–9 to the receiving unit;

(*7*) An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and

Forms I–9 where applicable. For this purpose, a related, successor, or reorganized employer includes:

(*i*) The same employer at another location;

(*ii*) An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets;

(*iii*) An employer who continues to employ any employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement. For purposes of this subsection, any agent designated to complete and maintain the Form I–9 must record the employee's date of hire and/or termination each time the employee is hired and/or terminated by an employer of the multi-employer association; or

(*8*) An individual is engaged in seasonal employment. (B) The employer who is claiming that an individual is continuing in his or her employment must also establish that the individual expected to resume employment at all times and that the individual's expectation is reasonable. Whether an individual's expectation is reasonable will be determined on a case-by-case basis taking into consideration several factors. Factors which would indicate that an individual has a reasonable expectation of employment include, but are not limited to, the following:

(*1*) The individual in question was employed by the employer on a regular and substantial basis. A determination of a regular and substantial basis is established by a comparison of other workers who are similarly employed by the employer;

(*2*) The individual in question complied with the employer's established and published policy regarding his or her absence;

(*3*) The employer's past history of recalling absent employees for employment indicates a likelihood that the individual in question will resume employment with the employer within a reasonable time in the future;

(*4*) The former position held by the individual in question has not been taken permanently by another worker;

(*5*) The individual in question has not sought or obtained benefits during his or her absence from employment with the employer that are inconsistent with an expectation of resuming employment with the employer within a reasonable time in the future. Such benefits include, but are not limited to, severance and retirement benefits;

(*6*) The financial condition of the employer indicates the ability of the employer to permit the individual in question to resume employment within a reasonable time in the future; or

(*7*) The oral and/or written communication between employer, the employer's supervisory employees and the individual in question indicates that it is reasonably likely that the individual in question will resume employment with the employer within a reasonable time in the future.

* * * * *

9. Section 274a.2 is amended by revising paragraphs (b)(2)(ii) and (iii) to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(b) * * *

(2) * * *

(ii) Any person or entity required to retain Forms I–9 in accordance with this section shall be provided with at least three days notice prior to an inspection of the Forms I–9 by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Departmet of Labor. At the time of inspection, Forms I–9 must be made available in their original form or on microfilm or microfiche at the location where the request for production was made. If Forms I–9 are kept at another location, the person or entity must inform the officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor of the location where the forms are kept and make arrangements for the inspection. Inspections may be performed at an INS office. A recruiter or referrer for a fee who has designated an employer to complete the employment verification procedures may present a photocopy of the Form I–9 in lieu of presenting the Form I–9 in its original form or on microfilm or microfiche, as set forth in paragraph (b)(1)(iv) of this section. Any refusal or delay in presentation of the Forms I–9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act. No Subpoena or warrant shall be required for such inspection, but the use of such enforcement tools is not precluded. In addition, if the person or entity has not complied with a request to present the Forms I–9, any Service officer listed in § 287.4 of this chapter may compel production of the Forms I–9 and any other relevant documents by issuing a subpoena. Nothing in this section is intended to limit the Service's subpoena power under section 235(a) of the Act.

(iii) The following standards shall apply to Forms I–9 presented on microfilm or microfiche submitted to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor: Microfilm when displayed on a microfilm reader (viewer) or reproduced on paper must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral which enables the observer to positively and quickly identify it to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or whole numbers. A detailed index of all microfilmed data shall be maintained and arranged in such a manner as to permit the immediate location of any particular record. It is the responsibility of the employer, recruiter or referrer for a fee:

(A) To provide for the processing, storage and maintenace of all microfilm, and

(B) To be able to make the contents thereof available as required by law. The person or entity presenting the microfilm will make available a reader-printer at the examination site for the ready reading, location and reproduction of any record or records being maintained on microfilm. Reader-printers made available to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor shall provide safety features and be in clean condition, properly maintained and in good working order. The reader-printers must have the capacity to display and print a complete page of information. A person or entity who is determined to have failed to comply with the criteria established by this regulation for the presentation of microfilm or microfiche to the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor, and at the time of the inspection does not present a properly completed Form I–9 for the employee, is in violation of section 274A(a)(1)(B) of the Act and § 274a.2(b)(2).

* * * * *

10. Section 274a.2 paragraph (b)(3) is amended by:

a. Adding in the second sentence after the phrase "If such" the word "a"; and

b. Removing the last sentence and adding new text to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(b) * * *

(3) * * * The copying of any such document and retention of the copy does not relieve the employer from the requirement to fully complete section 2 of the Form I–9. An employer, recruiter or referrer for a fee should not, however, copy the documents only of individuals of certain national origins or citizenship statuses. To do so may violate section 274B of the Act.

* * * * *

11. Section 274a.2 is amended by revising paragraph (c)(1) to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(c) * * *

(1) * * *

(i) If upon inspection of the Form I–9, the employer determines that the Form I–9 relates to the individual and that the individual is still eligible to work, that previously executed Form I–9 is sufficient for purposes of section 274A(b) of the Act if the individual is hired within three years of the date of the initial execution of the Form I–9 and the employer updates the Form I–9 to reflect the date of rehire; or

(ii) If upon inspection of the Form I–9, the employer determines that the individual's employment authorization has expired, the employer must reverify on the Form I–9 in accordance with paragraph (b)(1)(vii); otherwise the individual may no longer be employed.

* * * * *

12. Section 274a.2 paragraph (d) is amended by:

a. Removing in paragraph (d)(1) introductory text the phrase ", and the recruiter or referrer has completed the Form I–9";

b. Revising paragraphs (d)(1)(i) and (d)(1)(ii);

c. Removing at the end of paragraph (d)(2) the phrase "commencing from the date of the initial execution of the Form I–9." and adding in its place the phrase "from the date of the rehire." to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(d) * * *

(1) * * *

(i) If upon inspection of the Form I–9, the recruiter or referrer for a fee determines that the Form I–9 relates to the individual and that the individual is still eligible to work, that previously executed Form I–9 is sufficient for purposes of section 274A(b) of the Act if the individual is referred within three years of the date of the initial execution of the Form I–9 and the recruiter or referrer for a fee updates the Form I–9 to reflect the date of rehire; or

(ii) If upon inspection of the Form I–9, the recruiter or referrer determines that the individual's employment authorization has expired, the recruiter or referrer for a fee must reverify on the Form I–9 in accordance with paragraph (b)(1)(vii) of this section; otherwise the individual may no longer be recruited or referred.

* * * * *

13. Section 274a.7 is amended by revising paragraph (a) to read as follows:

§ 274a.7 Pre-enactment provisions for employees hired prior to November 7, 1986.

(a) The penalty provisions set forth in section 274A (e) and (f) of the Act for violations of sections 274A(a)(1)(B) and 274A(a)(2) of the Act shall not apply to employees who were hired prior to November 7, 1986, and who are continuing in their employment and have a reasonable expectation of employment at all times (as set forth in § 274a.2(b)(1)(viii)), except those individuals described in section 274a.2 (b)(1)(viii)(A)(*7*)(*iii*) and (b)(1)(viii)(A)(*8*).

* * * * *

14. Section 274a.9 paragraph (b) is amended by:

a. Removing in the second sentence the term "which" and adding in its place the term "that";

b. Removing in the third sentence the term "shall" and adding in its place the term "may" and also removing the phrase "a citation or" which precedes the phrase "a Notice of Intent to Fine."

15. Section 274a.9 is amended by:

a. Revising paragraphs (c) introductory text and (c)(1)(i);

b. Adding in paragraph (d) second sentence after the term "hearing" the term "submitted";

c. Adding in paragraph (d) fifth sentence after the phrase "If the Notice of Intent to Fine was served by" the term "ordinary";

d. Revising in paragraph (d) the last sentence;

e. Adding in paragraph (e) before the term "mail)," the term "ordinary" to read as follows:

§ 274a.9 Enforcement procedures.

(c) *Notice of Intent to Fine.* The proceeding to assess administrative penalties under section 274A of the Act is commenced when the Service issues a Notice of Intent to Fine on Form I–763. Service of this Notice shall be accomplished pursuant to Part 103 of this chapter. The person or entity identified in the Notice of Intent to Fine shall be known as the respondent. The Notice of Intent to Fine may be issued by an officer defined in § 242.1 of this chapter with concurrence of a Service attorney.

(1) *Contents of the Notice of Intent to Fine.*

(i) The Notice of Intent to Fine will contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the penalty that will be imposed.

* * * * *

(d) *Request for Hearing Before an Administrative Law Judge.* * * * In the request for a hearing, the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine.

* * * * *

16. Section 274a.10 paragraph (b) is amended by:

a. Removing in paragraph (b) wherever it appears the phrase "Administrative Law Judge" and replacing it with the phrase "administrative law judge";

b. Removing in the first sentence of introductory text the phrase "An employer or a recruiter or referrer for a fee" and adding in its place the phrase "A person or entity";

c. Removing in the fourth sentence of introductory text the term "violation" following the phrase "However, a single" and adding in its place the term "offense";

d. Adding in paragraph (b)(1), introductory text, immediately before the phrase ", shall be subject to the following order:" the phrase "in the United States"; and

e. Removing in paragraph (b)(3) the phrase "does its own hiring, or its" and adding in its place the phrase "do their own hiring, or their"

17. Section 274a.12 paragraph (a) is amended by:

a. Revising in paragraph (a), introductory text, the last sentence;

b. Removing at the end of paragraph (a)(1) the "semicolon" and adding a "period"; and

c. Adding at the end of paragraph (a)(1) a new sentence to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

(a) *Aliens authorized employment incident to status.* * * * Any alien within a class of aliens described in paragraphs (a)(3) through (a)(8), and (a)(10) through (a)(12) of this section, who seeks to be employed in the United

States must apply to the Service for a document evidencing such employment authorization.

(1) * * * An expiration date on the Form I–551 reflects only that the card must be renewed, not that the individual's work authorization has expired;

* * * * *

18. Section 274a.12 paragraph (b)(15) is amended by:

a. Removing each reference to "120" and adding in its place "240";

b. Removing in the first sentence after the phrase "for an extension of such" the word "status" and adding in its place the world "stay"; and

c. Removing in the fourth sentence the term "regional" where it precedes the phrase "service center director", and removing the word "status" and adding in its place the term "stay".

19. Section 274a.12 paragraph (c) is amended by:

a. Removing in the second sentence, introductory text, the term "indicated" and adding in its place the term "stated";

b. Adding in paragraphs (c)(1) and (c)(4) following the phrase "unmarried dependent child" the phrase "; son or daughter";

c. Removing in paragraph (c)(10), at the end of the first sentence and before the period, the phrase "; if the alien establishes an economic need to work";

d. Adding in paragraph (c)(12), introductory text, at the end of the first sentence and before the period the phrase "; if the alien establishes an economic need to work";

e. Removing in paragraph (c)(12), introductory text, second sentence, the term "[granting]";

f. Removing in paragraph (c)(13), introductory text, first sentence, the term "temporary";

g. Removing, in paragraph (c)(17)(i), first sentence, the letter "1" where it appears in the reference "101(a)(15)(B)" and replacing it with the number "1";

h. Removing, in paragraph (c)(17)(i), first sentence, the phrase "Immigration and Nationality" where it appears before the term "Act"; and

i. Adding a new paragraph (c)(18) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(18) An alien against whom a final order of deportation exists and who is released on an order of supervision under the authority contained in section 242(d) of the Act may be granted employment authorization if the district director determines that employment authorization is appropriate. Factors which may be considered by the district director in adjudicating the application for employment authorization include, but are not limited to, the following:

(i) The existence of economic necessity to be employed;

(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support; and

(iii) The anticipated length of time before the alien can be removed from the United States.

* * * * *

20. Section 274a.13 is amended by:

a. Revising paragraph (a);

b. Removing in paragraph (d) the references to the number "60" and adding in their place the number "90"; and

c. Removing, in paragraph (d), the reference to the number "120" and adding in its place the number "240", to read as follows:

§ 274a.13 Application for employment authorization.

(a) *General.* An application for employment authorization (Form I–765) by an alien under § 274a.12(a) (3) through (8) and (10)–(11) and under § 274a.12(c) of this part shall be filed in accordance with the instructions on Form I–765 with the district director having jurisdiction over the applicant's residence or the district director having jurisdiction over the port of entry at which the alien applies. The approval of an application for employment authorization shall be within the discretion of the district director. Where economic necessity had been identified as a factor, the alien must provide information regarding his or her assets, income, and expenses in accordance with the instructions on the Form I–765.

* * * * *

Dated: August 15, 1991.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 91–19964 Filed 8–22–91; 8:45 am]

BILLING CODE 4410–10–M

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

Small Business Size Regulations; Waiver of the Nonmanufacturer Rule

AGENCY: Small Business Administration.

ACTION: Notice to waive the "Nonmanufacturer Rule" for various metal plates, sheets and strips.

SUMMARY: This notice advises the public that the Small Business Administration (SBA) is establishing a waiver of the "Nonmanufacturer Rule" for the products listed within Product and Service Code 9535. These classes of products are being granted waivers because no small business manufacturers or processors are available to participate in the Federal procurement market. The effect of a waiver is to allow an otherwise qualified small business regular dealer to supply the product of any domestic manufacturer on a Federal contract set aside for small business or awarded through the SBA 8(a) program.

PSC	Product lines granted waivers
9535	Plate *, sheet and strip; Titanium, Nickel-Copper, Nickel-Copper-Aluminum, Copper-Nickel, and Copper.

* Aluminum plate is excluded.

EFFECTIVE DATE: August 23, 1991.

FOR FURTHER INFORMATION CONTACT: James Fairbairn, Industrial Specialist, phone (202) 205–6465.

SUPPLEMENTARY INFORMATION: After an initial survey of a wide variety of product lines, SBA notified the public by notice in the **Federal Register** on December 18, 1990 (Vol. 55, No. 243 p. 51913), of its proposed intention to grant waivers of the so-called Nonmanufacturer Rule. After a thirty day comment period, small business sources were found for only two of the many products. A final waiver for most of the products was subsequently published in the **Federal Register** on May 15, 1991 (Vol. 56, No. 94, p. 22306). Due to administrative error, products listed in Product Service Code 9535 in the proposed notice of intent of December 18, 1990 were inadvertently omitted from the final waiver list of May 15, 1991. A government agency has since provided SBA with a small business manufacturing source for one of the omitted products, aluminum plate. That class of product is thus not included in this final waiver list. The basis for a waiver is that no small business manufacturer or processor is available to participate in the Federal procurement market for these specific classes of products. On November 15, 1988, Public Law 100–656 incorporated into the Small Business Act the existing SBA policy that recipients of contracts set aside for small business or the SBA 8(a) Program shall provide the products of small business manufacturers or processors. This requirement is commonly known as the