

To: NMPF
From: Glen D. Wasserstein, Esq.
Date: January 13, 2010
RE: I-9 COMPLIANCE: Background and Guidance

As workplace enforcement of immigration law becomes more of a priority for the federal government, complying properly with the I-9 requirements is more important than ever to US employers of foreign nationals.

US employers must generally meet two related obligations with regard to the I-9 employment eligibility verification system: (1) An employer must not knowingly hire, or continue to employ, any person not authorized to work in the United States; and (2) an employer must verify the identity and employment eligibility of every new employee, whether the person is a U.S. citizen or foreign national, hired on or after November 6, 1986.

The I-9 procedure provides a record for government agents and also provides employers with a good faith defense against potential charges. However, even if an employer completes the employment eligibility verification procedure properly, it still can be subject to severe penalties if it otherwise has knowledge of the unauthorized status of any of its employees. This “knowledge of unauthorized status” is currently being defined by DHS and the federal court system.

Please note that under the new rule, employers will no longer be able to accept expired documents to verify employment authorization on the Form I-9. Under previous rules, a U.S. passport and all List B documents were acceptable for the Form I-9 even if they are expired.

In addition to the new rules detailed below, the new rules create much more severe employer penalties for knowingly hiring unauthorized aliens:

First Offense: Not less than **\$375** and not more than **\$3,200** for each unauthorized alien;
Second offense: Not less than **\$3,200** and not more than **\$6,500** for each unauthorized alien; or
Subsequent Offenses: Not less than **\$4,300** and not more than **\$11,000** for each unauthorized alien.

As these monetary penalties are quite severe and can be meted out in conjunction with prison sentences, it is more important than ever to be vigilant in your I-9 process.

1. Information to be verified

A. What Must Be Verified?

On the I-9 form (newly revised and issued on 06/05/07, and the version is required for all employers as of January 1, 2008), the employer must verify the employee's (a) identity and (b) authorization to work. Note that on the issue of authorization to work there are three categories: (1) U.S. citizens; (2) lawful permanent resident aliens ("green card" holders), who have an unlimited right to work in the United States; and (3) a variety of other non-U.S. citizens having some type of *time-limited* work authorization (which also may or may not be limited to a specific employer).

B. When Must I-9 Verification Occur?

Section 1-Employee attestations

Section 1 of the I-9 form must be completed by the *employee* on the first day the employee begins work (the first day performing labor for the employer, rather than the day of hire). The employee must attest on the I-9 form, under penalty of perjury, that he is not an unauthorized alien, and that the documents he has presented are genuine and relate to him. A Spanish version of the form is available. However, the Spanish version of the form may be filled out by employers and employees in Puerto Rico only. Spanish-speaking employers and employees in the 50 states and other U.S. territories may print this for their reference, but may only complete the form in English to meet employment eligibility verification requirements. The employee may choose from among several acceptable documents to submit to the employer to verify his or her identity and authority to work (see discussion of List A and List B documents). An employer may not insist on seeing any one specific type of document. Importantly, employers should be aware that where an employee is an alien with only limited, temporary work authorization, the employer later must re-examine and re-verify the alien's work eligibility before it is scheduled to expire in order to determine whether that authorization has been extended in order to continue the alien worker's employment.

The new form states that the employee providing his/her Social Security is optional, except for employers who are participating in USCIS E-Verify Program. Please note that employers are responsible for ensuring that section 1 is timely and properly filed.

Section 2-Employer Verification

The *employer* must complete Section 2 of the I-9 form within 3 business days of hiring an employee and attest, under penalty of perjury, that it has examined certain original documentation presented by the employee, that such documentation "appears on its face to be genuine" and relates to the named individual, and that to the best of the employer's knowledge the employee is authorized to work in the United States.

Under the new rules, if employees are authorized to work, but are unable to present the required documents within 3 business days, they must present a receipt for the application of the documents within 3 business days and the actual documents within 90 days.

The I-9 forms must be maintained in the employer's files for a minimum of 3 years, and at all times during the individual's employment until at least 1 year after any termination of employment.

Employers are now permitted to sign and retain I-9 forms electronically. For many years, the INS/DHS regulations had permitted employers to retain either the original paper version of the I-9 or a copy on microfilm or microfiche but did not allow the forms to be stored electronically. These rules created significant document retention problems for employers, particularly for large employers and for those who wish to automate their document retention systems. In June, 2006, United States Immigration and Customs Enforcement ("ICE") published an interim rule to implement Public Law 108-390, which had become effective on April 29, 2005. The rule permits employers to complete, sign, and store Forms I-9 electronically, as long as certain performance standards are met.

Section 3-Reverification Requirements

Employers must complete Section 3 when updating and/or reverifying the Form I-9. Employers must reverify employment eligibility of their employees **on or before the expiration date recorded in Section 1**. Employers CANNOT specify which document(s) they will accept from an employee.

A. If an **employee's name has changed** at the time this form is being updated/reverified, complete Block A.

1. Examine any document that reflects that the employee is authorized to work in the U.S. (see List A or C);
2. Record the document title, document number and expiration date (if any) in Block C, and
3. Complete the signature block

B. If an employee is **rehired within three (3) years** of the date this form was originally completed and the employee is still eligible to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.

If an employee is rehired within three (3) years of the date this form was originally completed and the employee's work authorization has expired or if a current employee's work authorization is about to expire (re-verification), re-verify the new document(s) and complete Block B and the signature block.

C. **Acquisition** of another firm: The new handbook states that the acquiring employer will be held responsible for the compliance of the I-9s created by the prior employer. Employers in this situation are urged to carefully audit the I-9s prior to the acquisition, and to re-execute them if necessary.

II. The Verification Process: Acceptable Documentation of Authorization to Work

The documents that may be used for I-9 verification have been reduced significantly since 1991. Certain of the acceptable verification documents listed on the reverse side of the prior I-9 forms have been eliminated by the newer versions. Acceptable verification documents must still include one document from Document **List A** (establishing *both identity and legal work authorization*) **or** one document each from Document **List B** (establishing *identity only*) **AND** from Document **List C** (establishing *legal work authorization*). Acceptable forms of employment authorization and identity documents Act are as follows:

List A Documents:

1. U.S. Passport (unexpired or expired);
2. Alien Registration Receipt Card or Permanent Resident Card (“green card”) (DHS Form I-551);
3. An unexpired machine readable foreign passport with a temporary I-551 stamp; (added in the new 04/03/09 Form)
4. An unexpired employment authorization document issued by the DHS which contains a photograph (Form I-766)(added on 06/05/07 Version)

Please note that older Employment Authorization documents: Form I-688, Form I-688A, or Form I-688B have been **REMOVED** from the list of acceptable List A documents (on the 06/05/07 version);

5. In the case of a nonimmigrant alien authorized to work only for a specific employer, an unexpired foreign passport with an Arrival-Departure Record – Form I-94 – bearing the same name as the passport and containing an endorsement of the alien’s nonimmigrant status, and the name of the approved employer with whom the employment is authorized, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

6. A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI. (added on the new 04/03/09 version)

Please note that 5 documents were **REMOVED** from List A of the List of Acceptable Documents by the prior version (dated 06/05/07). These documents can no longer be accepted on initial verifications and all re-verifications:

Certificate of U.S. Citizenship (Form N-560 or N-561)
Certificate of Naturalization (Form N-550 or N-570)
Alien Registration Receipt Card (I-151)
Unexpired Reentry Permit (Form I-327)
Unexpired Refugee Travel Document (Form I-571)

List B Documents: Establish Identity Only (to be used in conjunction with List C)

1. A state-issued driver's license or identification card containing a photograph (or certain other identifying information);
2. A school identification card with a photograph;
3. A voter's registration card;
4. A U.S. military card or draft record;
5. An identification card issued by a federal, state, or local government agency or entity containing a photograph (or certain other identifying information);
6. A military dependent's identification card;
7. A Native American Indian tribal document;
8. A U.S. Coast Guard Merchant Mariner Card; or
9. Driver's license issued by a Canadian government authority.

For individuals under 18 years of age who are unable to produce an identity document, a school record or report card, a clinic, doctor or hospital record, and a daycare or nursery school record are acceptable List B documents. Further, minors under the age of 18 may be exempt from producing one of the enumerated identity documents in certain other situations.

List C Documents: Establish Employment Authorization Only (to be used in conjunction with List B)

A Social Security account number card with no employment restrictions;

A Certification of Birth Abroad issued by the Department of State, Form FS-545;

A Certification of Birth Abroad issued by the Department of State, Form DS-1350;

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;

A Native American Indian tribal document;

A U.S. Citizen Identification Card, DHS Form I-197;

An identification card for use of a resident citizen in the United States, DHS Form I-179; or

An unexpired employment authorization document issued by the DHS.

Some common issues regarding verification documents:

A. Genuineness.

The law states that the verification documents presented by the employee must “*appear on their face to be genuine.*” Whether a document appears to be genuine involves a standard of reasonableness. Employers are not expected to be experts in detecting fraudulent documents. This standard provides a good faith defense even if documents the employee presented actually turn out to be fraudulent. Employers need simply apply general knowledge and common sense: if nothing seems unusual, that should be sufficient. If the documents do not reasonably appear on their face to be genuine or do not relate to the person presenting them, the employer must not accept them.

B. Photocopying:

The I-9 rule allows, but does not require, employers to make copies of the employee’s verification documents to attach to the I-9 form. However, the employer must be consistent in this practice; either make copies of documents for all employees or for none at all. In other words, it may not make copies of verification documents only for some workers (ie Hispanics, foreigners, etc.). Therefore, an employer should give careful thought in deciding on its I-9 verification policy based on individual needs and circumstances. If copies of the verification documents are kept, they should be retained with the I-9 forms.

1. Advantages of photocopying and attaching the documents:

The employer has clear proof that it inspected the documents;

The employer can show good faith in an attempt at compliance by showing copies of the documents themselves;

If any questions regarding the validity of the documents arise later, for example in an internal audit or a DHS inspection, there is less need to track down the employee to look again at the original verification documents.

2. The disadvantages of photocopying and attaching the documents;

A document that the average employer would have no reason to question might appear clearly fraudulent to the DHS. If a copy of the document is not attached, the DHS cannot use the copy to second-guess the employer. Moreover, even if the photocopy does not look suspicious to the DHS, the document may show that the employer inaccurately recorded material information on the I-9 form itself or may contain identity information about the employee (height, eye color, age, etc.) which very clearly does not describe the actual employee; and

By attaching a copy of the documents, many employers are tempted to forego completing the document lists in Section 2 and simply rely on the document copies to “speak for themselves” (which constitutes a verification violation).

In conclusion, proper I-9 compliance offers a first lien of defense against accusations of employer violations. It is essential to act consistently and within the current rules. Please feel free to contact Glen D. Wasserstein, Esq. at glen@immigrationgroup.com or (202) 416-1789 for more information.

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