

PUBLICATION

USCIS Revises I-9 Handbook for Employers

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USCIS has issued a January 5, 2011 version of the "Handbook for Employers" designed to guide employers in the mystifying details involved in completing the deceptively simple one-page Form I-9 for each new hire. The new version adds lots of helpful, well organized information about tricky situations and updates photos of a few document types. It resolves some confusion about such topics as grandfathered employees, the time within which to complete section 2, name changes and inconsistencies or misspellings, correcting mistakes on Forms I-9s, using agents to review employee documents, and state drivers license and IDs that state they are not for employment authorization. Unfortunately it continues some errors about documents and continues to provide little real guidance about what documents are and are not authentic, given the immense variation in valid documents and the limited number of valid documents depicted.

Below is a summary of most important changes. Many small and formatting changes are not mentioned.

Table of Contents: Adds detail

Part 2: Completing Form I-9

Adds a complicated new section about what kinds of "Interruptions of Employment" might or might not trigger a requirement to complete a new I-9 form, including "Leaves of Absence, Layoffs, Corporate Mergers" (pages 20-21). This guidance derives from administrative sanctions cases from early years of the I-9 program when INS had been seeking to contain the scope of "grandfathered" employees hired before November 7, 1986, for whom an I-9 would not be required at all. The new Handbook adds corresponding sentences about "grandfathered" employees at page 3, whose "rehire" triggering I-9 completion could have serious implications. Also a Q&A on acquisitions (pp. 44-45) and grandfathered status (p. 47).

Includes the relatively new concept that section 2 of I-9 must be completed by the third day after hire (by Thursday following a Monday hire) (p. 3).

Adds:

- "You may not begin the Form I-9 process until you offer an individual a job and he or she accepts your offer." (p. 3)
- "However, you may only accept unexpired documents. If you choose to make copies of documents your employee presents, you must do so for all employees, regardless of national origin or citizenship status. Return the original documents to your employee when you are finished." (p. 4)
- "If a designated agent or notary public completes this section, he or she must provide the employer's name and address under his or her signature." (p. 5)
- "A receipt indicating that an individual has applied for an initial Employment Authorization Document (Form I-766) or for an extension of an expiring Employment Authorization Document (Form I-766) is NOT acceptable proof of employment authorization on Form I-9. Receipts are never acceptable if employment lasts fewer than three business days." (p. 6)

- "For example, the Employment Authorization Document (Form I-766) must be reverified on or before the expiration date." (p. 9)

Eliminates repetition about how to deal with minors and disabled workers who lack documents (pp. 6-8)

Replaces "NOTE: Do not reverify List B identity documents, such as a driver's license" with this:

NOTE: U.S. citizens and noncitizen nationals never need reverification. Do not reverify the following documents: An expired U.S. passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card (Form I-551), or a List B document that has expired.

Adds the underlined phrase in the following (p. 9):

NOTE: You must reverify an employee's employment authorization on Form I-9 no later than the date that the employee's employment authorization or employment authorization document expires, whichever is sooner.

Rephrases and moves to pages 19 and 20 the discussion on "Reverifying or Updating Employment Authorization for Rehired Employees"

Takes the chart of tricky situations with "Temporary Employment Authorization" from old Handbook pages 8-9, as well as some Q&As, and expands it into more explanatory text discussions at pages 10-19 concerning:

- Refugees and Asylees
- Temporary Protected Status (TPS)
- Exchange Visitors and Students (including "STEM" and "Cap Gap" optional practical training)
- H-1B and H-2B (including "portability")
- Extensions of Stay for Other Nonimmigrant Categories (240 day rule)
- Completing Form I-9 for Nonimmigrant Categories when Requesting Extensions of Stay (240 day rule)

Provides new and much needed guidance at page 19 in a section on "Recording Name Changes for Current Employees," stating "You are not required to update Form I-9 when an employee changes his or her name," but recommending that employers inquire about and keep records concerning such name changes. Also adds a Q&A #26-28 on when an employee presents documents with different names due to a name change, variations or misspellings in names (pp. 41-42)

Part 3: Photocopying and Retaining Form I-9 (pp. 23-26), adds the following:

- Explanation about how long to keep I-9s after an employee's termination
- "Only the pages of the Form I-9 on which you or the employee enter data must be retained."
- "Employers who complete Forms I-9 electronically must attest to the required information in Section 2 of Form I-9. The system used to capture the electronic signature should include a method to acknowledge that the attestation to be signed has been read by the signatory."
- "Copies that are scanned and stored electronically must be retrievable consistent with DHS's standards on electronic retention, documentation, security, and electronic signatures for employers and employees, as specified in 8 CFR Part 274a.2(b)(3)."
- "USCIS recommends that employers who choose to retain copies of employees' documentation keep those copies together with their Forms I-9."
- "NOTE: E-Verify employers should provide E-Verify case summaries in addition to Forms I-9 when they receive a request for inspection."

Part 6: E-Verify

- Adds a section on E-Verify concerning Federal Contractors (page 35)

Part 7: Questions & Answers (pp. 29-49):

- Clarifies about U.S. nationals-- Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) (pp. 37, 38)
- Native American tribal documents (pp. 38-39)
- Replaces the former chart of nonimmigrant classifications authorized to work "incident to status" with this: "Most employees who present a foreign passport in combination with a Form I-94 or I-94A (List A, Item 5) are restricted to work only for the employer who petitioned on their behalf. If you did not submit a petition for an employee who presents such documentation, then that nonimmigrant worker is not usually authorized to work for you. See Part 2 for more information on nonimmigrant employees." (p. 41)
- Discusses not leaving blank any field of section 1 (except SSN for non-E-Verify employer) (p. 43)
- Explains how to correct a mistake on a Form I-9 (p. 43)
- Adds: "For example, it is not acceptable for a notary public to view employment authorization and identity documents, but leave Section 2 for you to complete. The person who views an employee's employment authorization documents should also complete and sign Section 2 on your behalf." (p. 44)
- Adds a section about acquisition of a workforce (pp. 44-45), discussing the choice to complete I-9 for all or none of the workers, but mentioning special rules for federal contractors with FAR E-Verify clause, opining that grandfathered workers generally should not be re-verified, and advising employers to seek legal counsel (!).
- Instructs on maintaining security and privacy of I-9 information (p. 46)
- Discusses peculiarities in the Commonwealth of the Northern Mariana Islands (CNMI) (p. 48-49, 51)
- Eliminates numerous topics that are now covered elsewhere or must have been deemed insignificant.

Part 8: Acceptable Documents

List A

- New I-551 "green cards" that are actually green, but eliminates picture of older I-551 with INS seal, and still lacks picture of the version lacking any expiration date.
- Continues to show "processed for I-551" temporary stamp that has long been eliminated in favor of a different, more secure stamp including an officer's authorization number (p. 55)
- Continues to fail to depict the CBP stamp that is the required "endorsement" that transforms an immigrant visa into a temporary I-551 (p. 56), frustrating the security purposes of the CBP stamp affixed during inspection upon first admission.
- Eliminates the newer 2009 version of the back side of I-766 and leaves the old 2004 version (p. 56). Given that these cards are never issued valid for more than two years, this seems ridiculous.
- Fixing a previous error, moves pictures of I-20 and DS-2019 for F-1 and J-1 from List C to List A section, and refers to I-94 on the next page (which shows a type of date-defined stamp that looks meaningfully different from an I-94 for F or J admission), but continues to fail to depict the second page of the I-20 or DS-2019 where the critical school/program officer's endorsement must be included (p. 57)
- Adds documents that are acceptable only in the CNMI (p. 58).

List B

- Eliminates the picture of the back side of a drivers license and state-issued ID and adds some very important text: "Some states may place notations on their [drivers' licenses/ID cards] that state the card does not confirm employment authorization. For Form I-9 purposes, these [drivers' licenses/cards], along with every other state's, establish the identity of an employee. When presenting any [driver's license/state-issued ID card], the employee must also present a List C document that establishes employment authorization." (p. 60)

List C

- Adds this text for birth certificates: "Beginning October 31, 2010, only Puerto Rico birth certificates issued on or after July 1, 2010 are valid. Please check www.uscis.gov for guidance on the validity of Puerto Rico birth certificates for Form I-9 purposes."

Index: Eliminates the 2-page topical index.