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Employer Information Bulletin 102

The I-9 Process In A Nutshell

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The following is not intended to be legal advice pertaining to your situation and should not be construed as such. The information provided is intended merely as a general overview with regard to the subject matter covered.

## THE I-9 PROCESS IN A NUTSHELL

### Purpose

- This bulletin supplements the 1991 version of the "Handbook for Employers" (Form M-274) and the 1991 version of the I-9 instructions and form, which may both be downloaded from the Bureau of Citizenship and Immigration Services web site.
- This bulletin provides employers with basic guidance for compliance with requirements to complete, update, and retain I-9 forms for all employees, whether US citizens or non-citizens.
- **NOTE:** The "receipt rule" described in this bulletin is the most up-to-date receipt rule. The receipt rule stated in the Form I-9 instructions and the "Handbook for Employers" (Form M-274) is **NOT** the current rule. See Receipt Rule below.

### Introduction to Worksite Enforcement and Employment Eligibility Verification

The 1986 Immigration Reform and Control Act ("IRCA") sought to control illegal migration by eliminating employment opportunity as a key incentive for unauthorized persons to come to the US. IRCA's core prohibition is against the hire or continued employment in the US of an alien whom the employer knows is unauthorized for the employment. IRCA makes all US employers responsible for verifying through a specific process the identity and work authorization or eligibility of all individuals, whether U.S. citizens or not, hired after November 6, 1986. To implement this, employers are required to complete Employment Eligibility Verification Forms I-9 for all employees. An employer's obligation to review documents is not triggered until a person has been **hired**, whereupon the new employee is entitled to submit a document or combination of documents of his choice (**from List A or a combination of a List B and List C document on the reverse side of the I-9 form**) to verify his identity and work eligibility.

**Hired** = Actual commencement of employment of an employee for wages or other remuneration. The employee must complete Section 1 of the I-9 Form by the date of hire (i.e. no later than the date on which employment services start). (See Completing the I-9 Form below.)

### Protection from Discrimination<sup>1</sup>

IRCA also prohibits employers with 4 or more employees from discriminating against any person (other than an unauthorized alien) in hiring, discharging, or recruiting or referring for a fee because of a person's national origin or, in the case of a citizen or protected individual, citizenship status. Employers with 15 or more employees may not discriminate against any person on the basis of national origin in hiring, discharge, recruitment, assignment, compensation, or other terms and conditions of employment. The I-9 process may not be used to **pre-screen** employees for hiring. Furthermore, an employer may not demand more or different documents than an employee chooses to present, provided that the documents presented are acceptable under the I-9 requirements. An employer may not demand documents issued by **the Department of Homeland Security (formerly the Immigration and Naturalization Service)** in lieu of other acceptable document(s) from List(s) A or B and C and may not consider the fact that work authorization documents have future expiration dates as cause not to hire or to terminate.

<sup>1</sup> The Office of Special Counsel for Immigration Related Unfair Employment Practices ("OSC") investigates charges of job discrimination related to an individual's immigration status or national origin. It also investigates charges of document abuse discrimination--when employers request more or different documents than are required to verify employment eligibility and identity, reject reasonably genuine-looking documents or specify certain documents over others. All work-authorized individuals are protected from document abuse. OSC can be accessed via the Internet at <http://www.usdoj.gov/crt/osc/htm/aboutosc.htm>.

## Changes effective after 11/91 Publication of Form I-9 and “Handbook for Employers”<sup>2</sup>

**FORM I-151:** Form I-151 has been withdrawn from circulation and is no longer a valid List A document.<sup>3</sup>

**FORM I-766:** Form I-766 was introduced in January 1997 as an Employment Authorization Document (EAD). It should be recorded on the I-9 Form under List A. A previous version of the EAD is the Form I-688B, which continues to be an acceptable List A document. (See Employer Information Bulletin 104.)

**FORM I-551:** The **Permanent Resident Card** (new version of Form I-551) was introduced in 1990 as documentation issued to lawful permanent residents of the US. Older versions of Form I-551 remain valid until expiration, if any. The Form I-551 should be recorded on the I-9 Form under List A. On the back of the Form I-9, it is listed under List A #5 as an Alien Registration Receipt Card. (See Employer Information Bulletin 104.)

**REMOVED DOCUMENTS FROM I-9 LIST: Effective September 30, 1997** via interim rule published at 62 Fed. Reg. 51001-51006, the following documents were removed from the list of acceptable identity and work authorization documents (listed on the 11/91 version of the Form I-9) to comply with the *Illegal Immigration Reform and Alien Responsibility Act of 1996 (IIRIRA)*: Certificate of US Citizenship (**List A #2**), Certificate of Naturalization (**List A #3**), Unexpired Reentry Permit (**List A #8**), and Unexpired Refugee Travel Document (**List A #9**). In addition, the acceptability of an unexpired foreign passport with Form I-94 indicating unexpired work authorization (List A #4) was made more limiting. Such combination of documents is only acceptable where the individual is employment authorized incident to status for a specific employer.

**RECEIPT RULE:** Originally effective September 30, 1997, amended by interim rule of *February 9, 1999*; the rule explaining **when receipts may be used** in lieu of original documents in the I-9 process (*receipt rule*<sup>4</sup>) now provides that:

- If an individual’s document has been **lost, stolen, or damaged**, then he/she can present a receipt for the application for a replacement document. The replacement document needs to be presented to the employer within 90 days of hire or, in the case of reverification, the date employment authorization expires.
- If the individual presents as a receipt, the arrival portion of the Form I-94 containing an unexpired temporary I-551 stamp (indicating temporary evidence of permanent resident status) and photograph of the individual, such document satisfies the I-9 documentation presentation requirement until the expiration date on the Form I-94. If no expiration date is indicated, an employer may accept the receipt for one year from the issue date of the I-94 Form.
- Form I-94 with a refugee admission stamp is acceptable as a receipt for 90 days, within which time the employee must present an unrestricted Social Security card together with a List B identity document, or an Employment Authorization Document (Form I-688B or I-766). To indicate refugee status, the stamp may include a reference to Section 207 of the Immigration and Nationality Act (INA) rather than use the words “refugee.”

## THE I-9 PROCESS

### General

Employers are responsible for the completion and retention of Forms I-9 for all employees, regardless of citizenship or national origin, hired for employment in the United States. An employee is any individual compensated for services or labor by an employer, whether by payment in the form of wages or other remuneration (such as goods or services such as food and lodging).

### For whom is a Form I-9 unnecessary?

- Employees hired before November 6, 1986, and continuously employed by the same employer;
- Individuals performing casual employment who provide domestic service in a private home that is sporadic, irregular or intermittent;
- Independent contractors (see Employer Information Bulletin 110);
- Workers provided to employers by individuals or entities providing contract services, such as temporary agencies (in such cases, the contracting party is the employer for I-9 purposes)

### Note:

- An employer is not permitted under the law to contract for the labor of an individual whom he knows is not authorized for employment. Employers who violate this prohibition may be subject to civil and criminal penalties.
- Employers are not permitted to request more or different documents than are required or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual presenting the document.

<sup>2</sup> These changes are not reflected on the current 1991 version of the I-9 Form, its instructions or the “Handbook for Employers” since the changes occurred after 1991.

<sup>3</sup> To replace their “green cards”, holders of Form I-151 Alien Registration Receipt Card must submit a completed Form I-90 along with a \$130 filing fee to their local District Office. (To download I-90 go to [www.uscis.gov](http://www.uscis.gov).)

<sup>4</sup> For more information on the receipt rule request Employer Information Bulletin 107; see more on Receipt Rule below.

## Retention of I-9 Records

An employer must retain the I-9 form of each employee **either** for three (3) years after the date of hire **or** for one (1) year after employment is terminated, **whichever is later**. All current employees, therefore, must have I-9's on file with the employer. Upon request, all Forms I-9 subject to the retention requirement must be made available to an authorized official of the **Department of Homeland Security**, Department of Labor, and/or the Office of Special Counsel for Unfair Immigration-Related Employment Practices of the Department of Justice.

### Examples for terminated employees:

**Step one: Identify hire date and add 3-years = [date A]**

1. 11/01/93 + 3 years = 11/01/96                      or                      03/27/99 + 3 years = 03/27/02

**Step two: Identify termination date and add 1 year = [date B]**

1. 07/05/94 + 1 year = 07/05/95                      or                      05/19/03 + 1 year = 05/19/04

**Step three: Compare date [A] and [B]**

1. Compare 11/01/96 and 07/05/95
2. Compare 03/27/02 and 05/19/04

**Step four: Determine the later date [A] or [B] in each case. The later of the two becomes the retention date for the corresponding Form I-9.**

**Example results:**

1. 11/01/96 is later than 07/05/95, so 11/01/96 is the retention date for this terminated employee's I-9.
2. 05/19/04 is later than 03/27/02, so 05/19/04 is the retention date for this terminated employee's I-9.

## Missing I-9 Forms

An employer who discovers that an I-9 form is not on file for a given employee should request the employee to complete section 1 of an I-9 form immediately and submit documentation as required in Section 2. The new form should be dated when completed--**never** post-dated<sup>5</sup>. When an employee does not provide acceptable documentation, the employer must terminate employment of risk being subject to penalties for "knowingly" continuing to employ an unauthorized worker if the individual is not in fact authorized to work.

## Discovering an Unauthorized Employee

An employer who discovers that an employee has been working without authorization should reverify work authorization by allowing such an employee another opportunity to present acceptable documentation and complete a new I-9. However, employers should be aware that if it knows or should have known that an employee is unauthorized to work in the United, they may be subject to serious penalties for "knowingly continuing to employ" an unauthorized worker.

## Successive Employers and Reorganizations

Employers that acquire a business as a result of a corporate reorganization, merger, or sale of stock or assets, and retain the predecessor's employees are not required to complete new I-9's for those employees and may rely on the I-9s completed by the predecessor employer if the employees are continuing in employment, and they have a reasonable expectation of employment at all times. However, the successor employer will be held responsible if the predecessor's I-9s are deficient or defective.

<sup>5</sup> Employers may provide an explanatory annotation to an untimely-completed Form I-9.

## COMPLETING THE I-9 FORM

There are three sections of the Form I-9. The employee must complete Section 1. The employer must complete sections 2 and 3. The employer is required to ensure that **all** sections of the Form I-9 are timely and properly completed. **The Form I-9 is available in ENGLISH ONLY.**

### SECTION 1: EMPLOYEE INFORMATION AND VERIFICATION

#### Responsibility of the Employer

Employers must ensure that Section 1 is completed by the employee upon **date of hire** (i.e. 1<sup>st</sup> day of paid work). The signature and attestation under penalty of perjury portions of Section 1 are very important, and employers should take special care to ensure that employees complete these in full. Although employers are held responsible for deficiencies of information in Section 1 (i.e. where required information is not provided by the employee), they may not require employees to produce documents to verify Section 1 information.

**NOTE: An employee's signature and attestation of status under penalty of perjury are particularly important.** If a given employee refuses to provide his/her signature or attestation, there is no reason for the employer to proceed to complete Section 2, and the employer should not continue to employ the individual.

**NOTE:** An employee may not be able to provide a social security number if the Social Security administration has not yet issued the individual a social security card.<sup>6</sup> This information block is optional. Therefore, an employer cannot require an employee to complete it.

#### Responsibility of the Employee

Employees need to provide the information requested in Section 1. In particular, they must attest to their status by checking the applicable box indicating that they are:

- Citizen/national of the United States (**top box**),
- Lawful permanent resident with a "green card" (**middle box**), or
- Alien authorized to work in the United States until a specified date (**bottom box**).

Employees **must sign and date** this Section of the Form I-9 when completed.

**Note:** Employers should remind employees of format conventions such as providing dates in the format of month/day/year, since date formats in their countries of origin may have a different order.

**Note:** Certain aliens, such as asylees and refugees, are work authorized incident to their status and may not have an expiration date to fill-in for the bottom box of the attestation block in Section 1.

#### Responsibility of Translator or Preparer

If used by the employee to fill out Section 1, translators or preparers must also sign, date, and provide requested information in the Preparer/Translator Certification Block at the bottom of Section 1. Employers themselves must fill in and sign this block if they have assisted employees with Section 1.

<sup>6</sup> Some local Social Security Administration offices will give the individual their social security number upon request before the actual social security card is issued.

## SECTION 2: EMPLOYER REVIEW AND VERIFICATION

- The second part of the form requires the employer to list the documents that were produced by the worker to verify his or her identity and employment eligibility. There are three groups of documents that a worker may use for this purpose. The documents that can be presented by employees are listed on the reverse side of the Form I-9.<sup>7</sup> A worker may choose to provide a List A document (which establishes both identity and work authorization), or he/she may choose to provide one List B document (which establishes identity) and one List C document (which establishes work eligibility). Documentation must be rejected if it is expired, with two exceptions: the U.S. passport (a List A document) and all List B documents. Employers who fail to complete the Form I-9 or who hire or continue to employ workers they know are unauthorized to work in the United States may be subject to civil and, in certain cases, criminal penalties. See Employer Information Bulletin 111.
- Employers cannot refuse to hire an individual because the individual's document has an expiration date.

**Original Documents Only** - The employer or employer's representative/agent<sup>8</sup> must *personally*<sup>9</sup> review *original* document(s) that demonstrate an employee's identity and eligibility to work in the US.<sup>10</sup> Photocopies, or numbers representing original documents, are not acceptable. Exception: List C, #3, a certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the US bearing an official seal is acceptable. All identifying information, including the document title, the issuing authority, the document number, and/or the expiration date (if applicable) must be provided in full.

**RECEIPT RULE:** Employees who do not possess the required documentation when employment begins **may not submit receipts showing that they have applied for initial applications for documents or for applications for extension of documents.** An employer may only accept receipts for:

- A **replacement document** in lieu of the required document if a document was *lost, stolen, or damaged*. The replacement document must be presented within 90 days of the hire or, in the case of reverification; the date employment authorization expires.
- The individual presents as a receipt, the arrival portion of the Form I-94 containing an unexpired temporary I-551 ADIT stamp (indicating temporary evidence of permanent resident status) and photograph of the individual, until the expiration date. If no expiration date is indicated, an employer may accept the receipt for one year from the issue date of the I-94 form. The "green card" itself should be presented at the expiration date on the Form I-94.
- Someone granted refugee status will be issued a Form I-94 containing a refugee admission stamp. The employer can accept this as a receipt as long as the employee presents: 1) the departure portion of Form I-94 containing an unexpired refugee admission stamp, which is designated for purposes of this section as a receipt for the Form I-766, Form I-688B, or a social security card that contains no employment restrictions; and 2) within 90-days of the hire, or in the case of reverification, the date employment authorization expires, presents an unexpired Form I-766 or Form I-688B, or a social security card that contains no employment restrictions together with a document described under List B. This type of receipt is sufficient to evidence both identity and employment authorization for the 90-day receipt validity period.

**Common example:** An EAD (Form I-688B or I-766) is generally valid as evidence of work authorization for one year. The EAD may be renewed by the submission of a new application to the **U.S. Citizenship and Immigration Services**. Accordingly, a receipt acknowledging such an application is unacceptable.

**Note:** A receipt is never acceptable for employment lasting less than 3 working days.

### **Source of Confusion:**

- (1) Social Security Cards. Please request Employer Information Bulletin 112.
- (2) Multiple entries for document #'s and expiration dates must be filled out only where an employee has presented more than one document under one List (e.g., an unexpired passport with an unexpired I-94; unexpired passport with an unexpired I-94 and Form I-20 endorsed by the Designated School Official). All document numbers and expiration dates must be recorded.
- (3) List A or B documents from which the bearer cannot be identified are never acceptable even if unexpired.
- (4) Unexpired foreign passport containing an unexpired I-551 stamp. This constitutes temporary evidence of permanent resident status and must be reverified at the time the stamp expires; it does not constitute a receipt. The actual Form I-551, or "green card," should not be reverified even if it contains an expiration date.

<sup>7</sup> See "Changes effective after 11/91 Publication of Form I-9 and *Handbook for Employers*" on page two for changes.

<sup>8</sup> Employers may not use agents to shield themselves from responsibility.

<sup>9</sup> Employers with remote hires may designate agents such as notaries public, attorneys, or other trusted individuals to exercise the Section 2 review of documents on their behalf. An employer is bound by the actions of such agent. What is key is that whoever fills out section 2 of the I-9 must personally review the employee's document(s).

<sup>10</sup> **Anti-Discrimination Warning:** Employers are not permitted to require a particular document(s) or combination of documents. The employer must accept any document from List A or combination of documents from Lists B and C, at the employee's discretion. Likewise, employers may neither require nor accept any more documentation than the minimum necessary to substantiate identity and work eligibility.

## Standards of Review<sup>11</sup>

The employer must review and accept documents that reasonably appear to be genuine and to relate to the person presenting them (e.g., the name on the Social Security card should be compared to the name on the state driver's permit and the photo on the driver's permit compared to the appearance of the person who presented the documents). Employers may reject documents if they do not reasonably appear to be genuine and ask employees who present questionable documentation for other documentation that satisfy the I-9 requirements. Employees who are unable to present acceptable documents should be terminated. Employers who choose to retain such employees may be subject to penalties for improper completion of the form or for "knowingly continuing to employ" unauthorized workers if such workers are in fact unauthorized.

**Note:** Employers should be alert for signs of fraud, such as a social security card that contains more than nine digits or that begins with "000."

## Signature and Date: Employers

Employers are required to sign and date the bottom of Section 2 and provide all requested information in the **CERTIFICATION** portion.

**Note:** *The personal attestation and signature of the employer are extremely important.* The person who actually reviews original documents -- whether that person is the employer, or an agent of the employer, such as a provider of contract services to the employer-- must sign and date the I-9 form.

## SECTION 3: UPDATING AND REVERIFICATION<sup>12</sup>

**Reverification requirement:** Employers are required to reverify employment eligibility. When an employee's employment authorization (indicated in Section 1) or evidence of employment authorization recorded in Section 2 has expired. An employer may also reverify employment authorization, in lieu of completing a new I-9, when an employee is rehired within three years of the date that the I-9 was originally completed and the employee's work authorization or evidence of work authorization has expired. The reverification requirement does not apply to the U.S. passport or "green card" (Form I-551). Note that temporary evidence of permanent resident status in the form of an unexpired foreign passport containing a temporary I-551 ADIT stamp is subject to the reverification requirement.

**IMPORTANT:** Most employers find it useful to institute a system that reminds them automatically, in advance, that a given employee's authorization document will expire. Advance warning assists both employees and employers, since early notice will usually allow employees time to renew the authorization prior to the expiration date and avoid penalties to employers for continuing to employ unauthorized workers. Enough advance warning is important so the employee can apply for and receive replacement documents in time to maintain uninterrupted employment.

## Reverification Process

No later than the date that employment authorization or employment authorization documentation expires, employers must reverify employment authorization on Section 3 of the I-9, or by completing a new I-9 form to be attached to the original I-9. To reverify expired status (Section 1) and/or expired work authorization document(s) (Section 2), an employee may present any currently valid List A or List C document. **Remember:** Receipts showing that the employee has applied for an extension of an expired employment authorization document is not an acceptable. (See Receipt Rule.)

**Note:** Employees are not required to present, for reverification purposes, a new version of the same document that was presented to satisfy Section 2 but subsequently expired. Any document or combination of documents that would be acceptable to demonstrate work eligibility/authorization under Section 2 may be presented for reverification purposes. It is the employee's choice as to which document to present.

<sup>11</sup> See Employer Information Bulletin 103.

<sup>12</sup> See Employer Information Bulletin 107.

## Where Reverification is *not* Required

Permanent Resident Cards (also known as Alien Registration Receipt cards, Forms I-551, Resident Alien Cards, Permanent Resident Cards, or “Green Cards”) are issued to lawful permanent residents<sup>13</sup> and conditional resident and should not be reverified when the cards expire. Temporary evidence of permanent resident status in the form of a temporary I-551 stamp in an unexpired foreign passport is subject to reverification. This is because of the temporary nature of this document. Likewise, List B documents need not be reverified when they expire. In fact, List B documents are acceptable when initially shown, even when expired.

## Rehires

Employers may reverify information of an employee rehired within 3 years of the date of the initial execution of the Form I-9 as an alternative to completing a new Form I-9. If the rehire’s basis of employment eligibility, as listed on the retained I-9, remains the same, the employer must update the previously completed I-9. If the basis of work eligibility has expired, the employer must reverify. To update or reverify on the previously completed I-9, employers must complete Section 3 items A (name), B (date of rehire), and C (new documentation) in full, as applicable. In this section, as in Section 2, it is important that the person who actually examines the documents on behalf of the employer personally sign and date the attestation provision at the bottom of the form.

**To update:** Employers should record the date of rehire, sign and date Section 3 of the previously completed I-9 or complete a new I-9.

**To reverify:** Employers should record the date of rehire, record the document title, number, and expiration date (if any) of documentation presented to reverify expired work authorization or work authorization documentation, sign, and date Section 3 of the previously completed I-9. A new Form I-9 may be chosen to be completed instead.

**Note:** Documentation for reverification purposes may be the renewed version of the originally presented document or any other acceptable document from List A or List C that demonstrates current work eligibility/authorization. List B documents do not need to be updated or reverified, even if expired.

## Other Issues

### Copying of Documentation

- An employer may, but is not required to, copy a document (front and back) presented by an individual solely for the purpose of complying with the I-9 verification requirements. If such a copy is made, it must be retained with the Form I-9. 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. If employers choose to keep copies of I-9 documentation, then it should be done for all employees, and the copies should be attached to the related I-9. Employers should not copy the documents only of individuals of certain national origin or citizenship status. To do so may constitute unlawful discrimination under section 274B of the Immigration and Nationality Act.

### Interim Employment Authorization

- Also note, except in the case of an initial application for employment authorization in the case of an applicant for asylum and certain applicants for adjustment of status, the **Department of Homeland Security** is required to adjudicate applications for employment authorization on Form I-765 within 90 days from the date of receipt of the application by the **U.S. Citizenship and Immigration Services**. Failure to complete the adjudication within 90 days will result in the grant of an employment authorization document for a period not to exceed 240 days. Such authorization shall be subject to any conditions noted on the employment authorization document. However, if the application is denied prior to the expiration date of the interim employment authorization, the interim employment authorization document granted under this section shall automatically terminate as of the date of the adjudication and denial. See 8 C.F.R. 274a.13(d) at [www.uscis.gov](http://www.uscis.gov). In order to receive this interim employment authorization document, the individual needs to go to a local **U.S. Citizenship and Immigration Services** office. If the local office refuses to issue an interim employment authorization document, please contact the Office of Business Liaison.

### How to Document Extensions of Stay for Certain Nonimmigrants Continuing Employment with the Same Employer

- The following nonimmigrants with pending applications to extend their stay are automatically authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay: A-3s, E-1s, E-2s, G-5s, H-1s, H-2As, H-2Bs, H-3s, Is, J-1s, L-1s, O-1s, O-2s, P-1s, P-2s, P-3s, aliens having a religious occupation pursuant to 8 C.F.R. 214.2(r), and TNs. To document this extension of employment authorization on the Form I-9, any occupation pursuant to 8 C.F.R. 214.2(r), and TNs. To document this extension of employment authorization on the Form I-9, any expiration date noted in Sections 1 and 2 should be updated to clearly reflect this extension. The update should be initialed and dated.

<sup>13</sup> Expired cards must be renewed so that cardholders will have valid evidence of their status and registration for new employment, for travel outside the US, and to obtain certain other benefits.

