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Sunday Aigbe
Acting Chief, Regulatory Coordination Division
Department of Homeland Security
USCIS Office of Policy and Strategy
20 Massachusetts Avenue NW.
Washington, DC 20529

Submitted via: uscisfrcomment@dhs.gov

**RE: 60 Day Notice of Information Collection under
Review: Form I-9, Employment Eligibility
Verification
77 Fed. Reg. 18256 (Mar. 27, 2012)
OMB Control Number 1615-0047**

Dear Chief Aigbe:

The American Immigration Lawyers Association (AILA) submits these comments on the “60-Day Notice of Information Collection under Review: Form I-9, Employment Eligibility Verification,” published at 77 Fed. Reg. 18256 on March 27, 2012. This notice of information collection proposes new changes to Form I-9, Employment Eligibility Verification and the accompanying instructions.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in seeking immigration benefits, including lawful admission to the United States. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. We appreciate the opportunity to comment on the notice and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

General Comments

AILA commends USCIS’s on-going efforts to clarify and provide additional guidance to employers and employees about

the I-9 process. However, we have some significant concerns about the proposed I-9 and accompanying instructions.

The Length of the Proposed Form I-9 and Instructions Will Lead to Confusion and Loss of Documents

If the proposed changes are implemented, the I-9 will expand from one page to two pages. In addition, the employer will be required to provide employees with six pages of instructions (up from three), along with the one-page List of Acceptable Documents. As a result, the employer's paperwork, photocopying, and retention burden will double, and the potential for loss or separation of the required paperwork will increase. These concerns are significant given the fact that employers are required to retain the I-9 for substantial periods of time, particularly as it relates to long-term employees.

The Public Reporting Burden Is Significantly Underestimated

The estimated public reporting burden for the collection of information is estimated at 13 minutes per response, including time for reviewing the instructions and completing and retaining the form. This time estimate exceeds the public reporting burden for the current I-9 by only one minute and is grossly underestimated. Given that the instructions have increased from three to six pages in length and USCIS has substantially revised the content and format of the current form, the public reporting burden should be reexamined.

The Proposed I-9 and Instructions Should Prioritize Controlling Law, Regulations and Agency Guidance

AILA appreciates USCIS's efforts to provide references to existing sources of guidance. However, the mere listing of the various sources of guidance, including the M-274 *Handbook for Employers*, I-9 Central, and E-Verify, without identifying which source holds primary authority, is a recipe for confusion. USCIS should explicitly state that the statute, INA §274A, and the regulations at 8 CFR §274a are the controlling authority over the I-9 process. We understand that USCIS considers the M-274 as the most authoritative of its I-9 guidance. The proposed I-9 and instructions should clarify this point so that employers and employees can easily identify the source to follow in the event of conflicting or unclear information.

In addition, where the proposed instructions make reference to the M-274, I-9 Central, and E-Verify, we ask USCIS to identify the specific page or URL that contains the answer or clarification, or, at a minimum, name the section where the answer is found. Otherwise, the employer or employee will spend inordinate amounts of time trying to locate the information or find the correct web page.

USCIS Should Implement the Long-Awaited “Smart I-9”

While the fillable PDF version of the proposed I-9 uses drop down menus to enter certain field information such as “State” in Sections 1 and 2, and in the Preparer/Translator section, the proposed form does not use readily available technology to help employers and employees minimize the most common, avoidable I-9 paperwork errors. We urge USCIS to continue to work towards implementation of its plans to release a “Smart I-9” on its website, develop drop down menu features for other portions of the I-9, such as in the document verification section, and provide automatic prompts to alert employers and employees when required fields have not been completed.

Section 1: Employee Information and Attestation

Eliminate the “Optional” E-mail Address and Phone Number Fields

USCIS proposes to expand Section 1 of the I-9 to include fields for the employee’s e-mail address and phone number, both of which are marked “optional.” However, USCIS cites no authority or legitimate purpose in requesting this information. The purpose of the I-9 is to document the employer’s compliance with the laws requiring the verification of identity and employment authorization of new hires. An employee’s personal e-mail address and telephone number have no relevance to the verification process. USCIS should only request information on the I-9 that is directly linked to the employer’s I-9 obligations, and not include irrelevant, “optional” data requests.

Further, the proposed instructions state that the employee’s e-mail address and telephone number may assist DHS in contacting the employee regarding his or her employment verification.¹ USCIS should not suggest that in completing the Form I-9, new employees have an obligation to assist DHS in verifying their employment authorization. The I-9’s primary purpose – to facilitate the employer’s verification of the identity and employment authorization of new hires – is not furthered by requesting an employee’s phone number and e-mail address.

Also, these two “optional” fields will lead to substantial confusion in light of the statement in the proposed instructions that “[e]mployers are responsible for completing and retaining Form I-9” and that “[e]mployers may be fined if the form is not complete”² The instructions are silent as to whether the employer could be penalized for an employee’s election to leave the “optional” fields blank when completing Section 1. Thus, at a minimum, USCIS should amend the proposed instructions to explicitly

¹ The proposed Form I-9 instructions state, “Providing your e-mail address or telephone number is voluntary. However, including it may assist DHS in contacting you regarding verification of your employment authorization.” Page 1 of 9, Employee Information and Attestation.

² Page 1 of 9, “General Instructions.”

state that no penalty attaches if these “optional” fields are left blank by the employee.

Finally, it should be noted that the inclusion of these fields will likely give rise to questions from employers and employees – for example, whether the employees should provide work or personal phone numbers and e-mail addresses. Also, given the modern reality that phone numbers and e-mail addresses often change, the data is likely to become quickly outdated. These data fields will lead to confusion among employers as to whether they are obligated to monitor changes in employees’ contact information and update those fields in the event of a government audit. In order to avoid the inevitable problems described above, the proposed I-9 should be revised to eliminate these irrelevant data fields.

Clarify the Language Relating to Aliens Authorized to Work

The proposed I-9 and instructions refer to the “USCIS-Number” without explaining what this is. Unlike the Alien Registration Number and the I-94 Admission Number, which are well-established and commonly known, “USCIS-Number” does not fall into this category. We are aware of the Department of Homeland Security’s (DHS) upcoming plans to implement a “paperless,” electronic I-94, and we understand that there are interim plans to combine the traditional I-94 and number with a different temporary number that will be assigned upon entry to the United States. We understand that this information will be available only to the foreign national through access to a special government website. Given that this process has not yet been implemented or disseminated to the public, this field is guaranteed to result in great confusion among employers and employees, which will lead to data entry errors, false E-Verify Tentative Non-Confirmations (TNC), and possible civil money penalties.

In addition, the proposed I-9 and instructions regarding documentation for aliens with temporary work authorization are confusing and need to be rewritten. Question 2 of Section 1 in the proposed I-9 requests the Form I-94 Admission Number, foreign passport number, and country of issuance. Yet, it is not readily apparent if the request for the foreign passport number and country of issuance only applies if the employee answers Question 2 (I-94) or if it also applies if the employee answers Question 1 (A number/USCIS number).

If USCIS intends for the employee to provide *either* the A-number *or* the passport and I-94 number, this intent should be clarified by inserting the word “**OR**” in bold print between numbers “1” and “2.” In addition, the small note above this section—“*For aliens authorized to work, list your Alien Registration Number/USCIS-Number or Form I-94 Admission Number*”—should be highlighted to emphasize this point. As it is currently written, it is very easy to overlook the important “or”

clarification. Further, placing a box around Question 2 and the area for the foreign passport number and country of issuance might help clarify USCIS's intent and that there is no need to indicate "N/A" in the blanks under Question 2 if question 1 is completed.

Finally, many EAD holders have an A Number, a valid passport number, and an I-94 number. Therefore, the form should state whether the A Number is a required field. Without these clarifications, the employee may not understand the circumstances in which he or she can simply record "N/A," and the employer will not understand if it must insist that the employee provide passport information to complete the I-9 correctly. We note that the issue of when an employee must complete the Social Security number field in Section 1 of the current form has been an ongoing challenge for many.

Clarify That the Social Security Number Is Voluntary for Non-E-Verify Employers

Consistent with USCIS policy, we suggest that the proposed I-9 be amended to include the following language in Section 1 by the Social Security number field: "*Required for E-Verify employers, otherwise optional.*" Although the instructions state that providing a Social Security number is voluntary except for those who work for E-Verify employers, we recommend that the instructions also clarify that an employee may start work without a Social Security number and provide guidance to employers regarding proper completion of the I-9 when the employee does not have the number available until after the date of hire.

Clarify the Instructions for the Preparer/Translator Block

The proposed instructions for the Preparer/Translator section are ambiguous. They seem to suggest, for example, that if an employer merely provides a standard Spanish language translation of the instructions to its employees, who then complete the I-9 themselves, the Preparer/Translator section must be completed by the employer. An employer should not be required to complete the Preparer/Translator section merely by providing the Spanish version of the Form I-9 or instructions to the employee for reference. USCIS should amend the instructions to clarify this issue.

Section 2: Employer Review and Verification

The Proposed Form I-9 and Proposed Instructions Should Clarify the Employer's Three-Day Requirement

AILA commends USCIS for clarifying in the proposed instructions that employers must complete Section 2 within three *business* days and that the first day of work is not counted in the three days (the "Monday-Thursday rule"). We also commend USCIS for including language that distinguishes between the date when the employee accepts the job offer

and the employee's first day of work for pay. While many employers refer to the date of hire as the first day of work for pay, others refer to the date of hire as the date the employee accepts the job offer and consider the start date the first day of work for pay. It is well-established that the employer must ask the employee to complete Section 1 of the I-9 no earlier than the date the job offer is accepted and no later than the first date of work for pay, and that the employer must complete Section 2 no later than three days after the start date. To that end, we urge USCIS to amend the language in the proposed Form I-9 and instructions as follows:

- The instructions state that the employer should “ensure that Section 1 is completed properly and on time. Employers may not ask an individual to complete Section 1 before he or she has accepted a job offer.”³ The instructions should explicitly state that the employer may ask an individual to complete Section 1 any time *on or after the date the job offer is accepted but no later than the first date of work for pay*.
- The statement in the instructions that “[e]mployers must complete Section 2 ... within 3 business days of the employee’s first day of work for pay” suggests that the employer may not complete Section 2 *before* the employee’s first day of work for pay.⁴ The instructions should state that the employer may complete Section 2 at *any time* after the employee has accepted an offer of employment, *but no later* than three business days after the employee’s first day of work for pay.
- Employers that complete the I-9 after the date the job offer is accepted, but before the first day of work for pay should be permitted to insert an *anticipated* start date in the Certification in Section 2. For an employer completing the I-9 before the worker is scheduled for the first shift, the actual first day of work for pay is often uncertain due to background checks, training schedules, the work-flow pipeline, and other factors. As the I-9 is signed by the employer under penalty of perjury, employers have a legitimate concern that their signatories may face sanctions if they insert a specific first date of work on the form that ultimately is not correct. Permitting the insertion of an anticipated start date in the Certification in Section 2 would allow the employer to attest to the date honestly and in good faith at the time of I-9 completion. We recommend that USCIS amend the language in the proposed I-9 to: “first (or anticipated) day of work for pay.”
- This option will also help employers that are in the process of a merger, acquisition or other corporate change. Where the

³ Page 2 of 9, “Section 2. Employer Review and Verification.”

⁴ Page 3 of 9, “Section 2. Employer Review and Verification.”

employer chooses to execute new I-9s for the acquired workforce, human resource personnel are often placed in an impossible situation as they attempt to address hundreds or thousands of new I-9s in a compressed time frame tied to corporate, business, and tax- oriented deadlines. We urge USCIS to amend the instructions to specifically confirm that as long as the employees of the existing employer have accepted the offer to remain with the successor, the successor employer may complete the I-9s in advance of the corporate transaction and list the expected closing date of the transaction as the anticipated first date of work for pay.

- Finally, regardless of whether the proposed I-9 is amended, the instructions should clarify that if an employer completes the Certification in Section 2 and signs Section 2 *after* the acceptance of the job offer, but *before* the employee's first day of work for pay, the employer may insert an anticipated first day of work for pay on the I-9. The instructions should also be amended to establish very clearly that the employer is not obligated to update that field, if the employee ultimately begins working on a different day. In the event of an I-9 inspection, DHS will have access to the information of the first day of work for pay from the employer's payroll records, and thus will be able to evaluate timeliness of completion without regard to the date indicated on the I-9 form.

Provide Guidance to Employers Who Have Actual or Constructive Knowledge That a Document Is Fraudulent

The proposed instructions provide a warning that an employer may not specify which documents the employee may present. We urge USCIS to also clarify that while an employer is not expected to be a document expert, the employer may not accept a document if it has actual or constructive knowledge that the document is fraudulent or that the employee is not authorized to work.

Clarify Confusing Instructions and Provide Guidance to Prevent Common Errors

The instructions should clarify that the Issuing Authority must be recorded even if it is obvious from the document name. A useful example to include would be the Social Security card in List C, for which the document title should be "Social Security card" and the issuing authority should be "Social Security Administration" (or "SSA") or "Department of Health and Human Services" (or "HHS"), as applicable.

To avoid confusion and incorrect completion, we recommend that the fields in Section 2 on the proposed I-9, currently entitled, "Print Family Name (Last Name)" and "Given Name (First Name)," be listed as "Print Employer Representative's Family (Last) Name" and "Employer

Representative's Given (First) Name.” As currently written, the employer may view those fields as requesting information about the employee's name rather than about the company signatory.

We also recommend that the instructions be amended to clarify that an employer may use I-9 forms that are legibly pre-printed or stamped with the employer's standard information (e.g., name and title of employer signatory, name, and address of company). The instructions should also be amended to clarify that if an employer uses pre-printed or stamped copies of the I-9, the employer representative must provide an original signature and date in Section 2 at the time of the verification not via a pre-signed form.

Provide Guidance or Links to Information about Special Verification Requirements

The instructions do not provide guidance for employers completing I-9s for employees who are work authorized but present documentation that is not explicitly included in the List of Acceptable Documents. For example, employers are often confused about the proper way to record I-9 documentation presented by employees who are work authorized under H-1B portability, F-1 student cap-gap, and F-1 STEM extension provisions. The instructions and the List of Acceptable Documents should be modified to include guidance on proper documentation for these special situations or, at a minimum, provide referrals and links to the M-274 for more information.

Additionally, Section 2 of the instructions should explain more clearly the reasons that there are multiple boxes for document identification in List A. The instructions should be amended to clarify that while List A is most often completed with data from a single document (such as a U.S. passport, permanent resident card, or EAD), there are circumstances in which a foreign national employee must present two or even three documents together to complete List A, such as an H-1B employee who is required to present a foreign passport and I-94 card. The instructions should be amended to clarify this point and to instruct employees who present a single List A document to leave the additional document boxes blank or enter “N/A.”

USCIS should also clarify the instructions regarding the document identification data that is necessary when additional documents are required to complete List A. While we are sensitive to space limitations, and certainly do not want the form to spill over to a third page, perhaps the boxes for additional documents can ask for all identifying information on a single line: “Document Title/Number/Issuing Authority.” To accommodate all of this data, we suggest that USCIS enlarge the right margin of Section 2, List A, and shorten the space for List B and C.

The proposed instructions and List of Acceptable Documents should include the documents that are acceptable under List C, Item 8 – employment authorization document issued by DHS. We understand that this item includes any number of documents not named elsewhere on the List of Acceptable Documents, including the Naturalization Certificate. We urge USCIS to provide a specific list, or some useful examples, of the documents that an employer may accept under List C, Item 8.

Also, the instructions should clarify the special verification rules for refugees and asylees, who are authorized for unrestricted employment incident to their lawful status.⁵ Even though they are not required to do so, refugees and asylees often apply for and obtain DHS-issued EADs, which unfortunately contain an expiration date. This often results in the employer, as well as the refugee or asylee, to wrongly assume that work authorization expires when the card expires. The language in the proposed instructions adds to this confusion by directing the employer to reverify work authorization upon expiration of an EAD for asylees and refugees. USCIS should amend the instructions to reflect that refugees and asylees are employment authorized incident to status, regardless of any EAD expiration date. In addition, the instructions should be amended to provide guidance to employers to determine whether a worker is a refugee or asylee without committing national origin related discrimination, so that the employer does not mistakenly reverify or terminate a refugee or asylee due to an expiring or expired EAD card.

Section 2 of the proposed instructions correctly states the rule that an employer may, but is not required, to copy the documents presented in the I-9 process.⁶ E-Verify employers, however, must copy certain documents, just as they must capture the employee's Social Security number in Section 1. In addition, some states have document copying mandates. Accordingly, we recommend the inclusion of the following parenthetical in the proposed instructions: “(Note: Employers who participate in E-Verify must retain copies of documents as specified by E-Verify. Also, certain states may have laws that require employers to retain copies.)” If USCIS elects to not put employers on notice of state laws that arguably conflict with federal law, the above sentence could be limited solely to the E-Verify warning.

Apparent Formatting for Bar Coded Information Is Unwarranted

We note that the bottom of the proposed I-9 includes a reference to a “3-D Barcode.” Under the assumption that USCIS is contemplating a future data collection from this form, we strongly object to any such data

⁵ 8 CFR §274a.12(a)(3) and (5).

⁶ Page 3 of 9, “Section 2. Employer Review and Verification.”

collection and note that it would be contrary to the Privacy Act Statement contained on page 6 of the instructions. The existing regulatory scheme likewise provides no basis for electronic collection of this information except in the case of an Immigration and Customs Enforcement (ICE) audit, and only then in circumstances in which the employer has elected to use electronic I-9s or electronic storage. If USCIS anticipates future automatic data collection, we ask that it publish a notice with a detailed explanation of the reasons and purpose for such a collection and provide additional time for public comment.

Receipts

We would also request that the agency clarify the instructions on page 4 that while under 8 CFR §274a.2(b)(1)(vi)(A)(3), an employee who provides a receipt for a lost, stolen, or damaged document must present the replacement document within 90 days of the “hire,” the regulation, based on the new “work for pay” date contained in the proposed I-9, should allow the employer to start the 90 day clock *no later than the first date of work for pay*. In addition, during this time frame, if an employee chooses to present a different qualifying document than the replacement document, such practice should constitute timely compliance by the employee and employer for I-9 completion purposes. For example, an employee might present a receipt for a replacement EAD and in the interim be issued an I-551 alien registration card. Certainly, the employer should not terminate or suspend such an employee waiting for the damaged or lost EAD card to be replaced when presented with a valid I-551 card authorizing the employee to work.

Finally, the instructions should warn that an employer must not accept a receipt if the employer or recruiter for a fee has actual or constructive knowledge that the individual is not authorized to work.

Conclusion

We appreciate the opportunity to comment on the proposed form I-9 and instructions and look forward to a continuing dialogue with USCIS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION