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**Re: M-274 Handbook for Employers  
(January 5, 2011 and June 1, 2011 Revisions)**

Dear Ms. Scialabba, Ms. Carpenter, and Ms. Vanison:

The American Immigration Lawyers Association (AILA) wishes to recognize the efforts of U.S. Citizenship and Immigration Services (USCIS) for its recent revisions to the M-274, Handbook for Employers (rev. January 5, 2011 and June 1, 2011). Given the on-going issues that employers face when striving to comply with the complex and sometimes conflicting obligations in employment verification and compliance, AILA commends USCIS for continuing to provide employers with much-needed guidance in this area. In particular, we appreciate USCIS's consideration and incorporation of many of our prior suggestions into the most recent editions of the M-274.

While acknowledging the significant improvements that have been incorporated into the M-274, we would like to take this opportunity to bring to your attention a number of provisions that would benefit from clarification or correction. We appreciate the opportunity to provide this feedback and welcome the opportunity to discuss these issues more fully with USCIS.

#### **Comments on Part Two of M-274**

AILA commends USCIS for expanding Part Two of the M-274 to provide employers with more detailed information about completing Form I-9 for certain visa categories. Previous versions of the M-274 divided information about completing Form I-9 between Part Two and the Frequently Asked Questions (FAQ) section in Part Seven. By incorporating part of the information previously provided in Part Seven into Part Two, employers can refer to the consolidated information

without needing to refer to two separate sections. Please consider the following observations and recommendations for future revisions:

### ***Employment Authorized Categories***

1. Previous versions of the M-274 included a chart of visa categories that are employment authorized. This was extremely useful to employers who could consult the chart to quickly determine if a visa category conferred employment authorization. The current version of the M-274 does not include this chart. We recommend that USCIS reincorporate the chart into future editions with specific references to other M-274 sections where the visa categories are discussed.

### ***F-1 Curricular Practical Training***

2. Page 13 of the M-274 discusses the List A documents needed to support the employment of F-1 students for curricular practical training (CPT). Unlike previous M-274 versions, the current version fails to state that employment authorization is restricted to the employer and to the dates and number of hours stated on the Designated School Official (DSO) endorsement. Although the current M-274 states that Form I-20 specifies the approved employer in the text accompanying the example of how to complete List A on Form I-9 (page 14), we urge USCIS to incorporate this information in the explanation of the CPT program on page 13.

### ***Cap Gap Provisions***

3. AILA commends USCIS for clarifying on page 16 that students qualifying for F-1 cap gap employment authorization may present an expired Employment Authorization Document (EAD) with a Form I-20 endorsed by the DSO for cap gap work as acceptable proof of identity and employment authorization until September 30 of the year in which the H-1B petition is filed, or until it is rejected, denied or withdrawn. Previous M-274 versions required students to present a USCIS receipt notice for the H-1B petition in addition to the above documents, which exceeded the regulatory requirements.

### ***STEM Extensions***

4. Similarly, AILA commends USCIS for clarifying on page 16 that F-1 students who qualify for a STEM extension may present an expired EAD with a Form I-20 endorsed by the DSO for STEM-based employment as acceptable proof of identity and employment authorization for up to 180 days from the date of the expiration of the original EAD. Previous versions of the M-274 required students to present a USCIS receipt notice for the EAD application in addition to the above documents, which exceeded the regulatory requirements.

However, on page 6, the current language regarding acceptance of receipts for I-9 purposes is unclear with respect to timely-filed Optional Practical Training (OPT)

extensions for STEM students. The current M-274 states that “a receipt indicating that an individual has applied ... for an extension of an expiring Employment Authorization Document is NOT acceptable proof of employment authorization on Form I-9.” AILA urges USCIS to modify this language to acknowledge the exception for work-authorized F-1 students who have completed academic degrees in a STEM field and whose initial period of OPT has expired.

### ***H-1B Classification***

5. Page 17 of the M-274 states that when USCIS approves an H-1B petition for a new employee, the employer will receive a Form I-797 approval notice which indicates that the employee has obtained H-1B status. However, the I-797 only indicates approval of H-1B status when a change of status or extension of stay is granted together with the H-1B classification. If the petition requests consular processing, the approval notice does not state that the employee has obtained H-1B status. Similarly, if H-1B classification is approved, but the change of status or extension of stay is denied, the I-797 will not indicate that the employee is in H-1B status. We recommend that USCIS clarify this point.

### ***AC21 Portability***

6. Page 17 of the M-274 states that to qualify for H-1B portability under the American Competitiveness in the Twenty-First Century Act (AC21), the new petition must not be frivolous and must have been filed prior to the expiration of the beneficiary’s period of authorized stay. However, this does not reflect all requirements for portability. Section 105 of AC21 states that a nonimmigrant who was previously issued an H-1B visa or otherwise provided H-1B status is eligible for portability if: (a) the individual has been lawfully admitted to the United States; (b) an employer has filed a nonfrivolous petition for new employment on his or her behalf before the date of expiration of the period of authorized stay; and (c) subsequent to lawful admission, the individual has not been employed without authorization in the United States prior to the filing of a nonfrivolous H-1B petition. In addition, the M-274 portability statement should clarify that, consistent with the clear statutory language, H-1B portability is available for beneficiaries who currently hold, or in the past have held, H-1B status. There has been no formal guidance from USCIS on this issue other than a communication to AILA that H-1B portability is only available where the beneficiary currently holds H-1B status, which is inconsistent with the plain language of section 105 of the statute.<sup>1</sup> We recommend that USCIS update the M-274 to accurately reflect

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<sup>1</sup> On April 7, 2011, USCIS Headquarters indicated to AILA that H-1B portability only applies to nonimmigrants who are currently in H-1B status or in an authorized period of stay based on a timely filed petition to extend H-1B status. *See* Questions and Answers, USCIS American Immigration Lawyers Association (AILA) Meeting, April 7, 2011, *published on* AILA InfoNet at Doc. No. [11040735](#) (*posted* Apr. 7, 2011). USCIS has further stated that it interprets INA §214(n) as allowing nonimmigrants who are currently in H-1B status, or who are in a period of authorized stay as a result of a pending H-1B extension, to begin employment upon the filing of a new nonfrivolous H-1B petition by the prospective employer.

the language of section 105 and to include a corrected interpretation of H-1B portability that is consistent with section 105.

### ***E-1/E-2 Classification***

7. Page 18 states that individuals in the E-1 and E-2 categories are employers. However, E-1 and E-2 nonimmigrants may also be employees of treaty trader or investor qualified companies. We recommend that USCIS amend the M-274 to reflect that fact.

### ***J-1 Classification***

8. Page 12 of the M-274 discusses the List A documents that support the employment of J-1 visa holders. Unlike previous M-274 versions, the current version fails to state that J-1 employment authorization is restricted to the employer indicated on the Responsible Officer (RO) endorsement and for the dates stated on the endorsement. We urge USCIS to include this information in future versions of the M-274.

### ***240-Day Automatic Extensions***

9. Page 18 of the M-274 provides detailed information to employers about completing Form I-9 after an employee's status expires where the employer timely files a petition to extend his or her stay. In the H-1B and H-2A extension sections on Page 17, USCIS provides more detailed information on completing the I-9 during the 240-day automatic extension period. As this information applies to employees in a number of visa classifications in addition to H-1B and H-2A, we recommend that USCIS include it on Page 18 in the extension section for employers. AILA commends USCIS for removing the Q classification from the list of employment-based nonimmigrant categories that qualify for the 240-day extension. For clarity, we recommend that USCIS identify on page 18 the employment-based nonimmigrant categories that cannot benefit from the 240-day automatic extension, namely the E-3, H-1B1 and Q categories.

### ***Receipt Rule***

10. AILA commends USCIS for clarifying that the prohibition on accepting receipts for extensions for I-9 purposes is limited to receipts for extension of Form I-766 (EAD), and does not include receipts for certain timely-filed nonimmigrant extensions such as H-1B or TN pursuant to 8 CFR § 274a.12(b)(20). This point of confusion was raised in our July 2009 comments on the prior M-274 version and we appreciate the clarifying language.

### ***Refugees and Asylees***

11. We also thank USCIS for clarifying that refugees and asylees are authorized to work incident to status. The language in the Q&As on page 46, correctly states

this and that refugees and asylees may present a Form I-94 that does not have an expiration date. However, there is confusing and incorrect language relating to refugees and asylees in other sections of the Handbook. The instructions on page 10 correctly state that refugees and asylees should record “N/A” in Section 1 of Form I-9 in the space requesting the expiration date of employment authorization and do not need to present an unexpired EAD to document employment eligibility. However, in a subsequent paragraph on page 10 and in the receipt chart on page 6, the current M-274 characterizes the I-94 card with an unexpired refugee admission stamp as a receipt with a 90-day expiration date rather than as a document establishing that the employee is authorized to work incident to status. The M-274 also incorrectly states that refugees and asylees are required to present either an unexpired EAD or unrestricted Social Security card as evidence of work eligibility for reverification purposes. We urge USCIS to remove the inconsistency in its language on page 10 and the reference to refugees from the chart on page 6 to avoid unnecessary confusion.

### ***Interim EADs***

12. Current regulations provide that USCIS will issue an interim EAD valid for a period not to exceed 240 days if an EAD has not been issued within 90 days of filing. Previous M-274 versions provided guidance to employers about procedures that should be followed by an employee who filed for an EAD extension that was not issued within 90 days. AILA urges USCIS to provide instructions in the current M-274 for applying for an interim EAD card in these circumstances.

### ***TPS Extensions***

13. Pages 10 and 11 of the M-274 provide detailed information regarding the automatic extension of employment authorization for designated temporary protected status (TPS) beneficiaries upon publication of a notice in the Federal Register. Because of the difficulty of locating these Federal Register notices, we recommend that the M-274 include the URL on the USCIS website ([www.uscis.gov/tps](http://www.uscis.gov/tps)) where such notices are posted as well as a recommendation that the employer retain a copy of the notice to support the new work authorization period recorded in Section 3 of Form I-9.

### ***Name Changes and Identity***

14. Page 19 states that except for government contractors (who are required to enroll in E-Verify) and employers who voluntarily enroll in E-Verify, employers are not required to update Form I-9 when an employee changes his or her name and that asking for evidence of the name change is purely permissive. USCIS suggests that the employer may request evidence of the name change to verify identity and credibility and retain copies of name change documentation so that the employer's actions are documented in the event of an audit. Unfortunately, this guidance may lead to a dispute over the employer's right to insist on the production of acceptable evidence of identity when presented with an employee

name change request or when presented with a claim that the individual is using a name and social security number that belong to someone else. AILA recommends that the Handbook clearly state that an employer may insist on additional documentation if it has a good faith basis for challenging an employee's asserted identity and that the employee may be required to cooperate with the employer's investigation.

### ***Date of Hire***

15. AILA commends USCIS for clarifying when Section 1 and Section 2 of Form I-9 must be completed. Previous I-9 versions stated that an employee must complete Section 1 "at the time of hire - when the employee begins work." The new M-274 clarifies and expands upon this phrase so that employers know that Section 1 may be completed at any time between the acceptance of a job offer and the first day of work for pay. AILA further commends USCIS for clarifying the expiration of the three-business day requirement for completion of Section 2. Previously, there was no clear guidance on whether the first day of paid employment counted as the first day of the three-day period. Recently, USCIS E-Verify confirmed that the first day of work is excluded from the three-day period within which employers must initiate the E-Verify process. We are pleased that USCIS has confirmed the timing for completion of Section 2 of Form I-9 consistent with the timing of initiating E-Verify.

### ***Continued Employment***

16. Page 21 advises employers on the conditions to be considered in weighing whether an employee returning from a leave of absence maintained a good faith belief in continuing employment throughout the absence. An employer's judgment regarding the employee's objective, good faith belief frequently requires legal advice and guidance, particularly because the judgment has the potential to become the basis for a claim of unlawful discrimination, wrongful discharge, or a claim of unauthorized employment in the event of an I-9 audit. AILA recommends that the Handbook expressly state that the employer seek legal guidance regarding the appropriate course of action.

### ***Mergers and Acquisitions***

17. On page 20, the Handbook treats a corporate merger or acquisition as a hiring event requiring completion of new I-9s for employees of the purchased or merged entity within 3 days of the effective date of the merger or acquisition, unless the successor employer avails itself of the special rule permitting it to accept the predecessor's I-9s as evidence of verification subject to liability for all errors and omissions.<sup>2</sup> In prior communications, AILA has recommended that DHS amend

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<sup>2</sup> New Q&A No. 41 discusses the options available to the acquiring employer. Option A involves the preparation of all new I-9s, with the effective date of the acquisition or merger as the date the employee began employment in Section 2. Although the Option A explanation does not state expressly that the

the I-9 regulations to grant successor employers a more reasonable timeframe to review the predecessor's I-9s and to update, correct, or prepare new I-9s to the extent necessary. There is precedent for such extensions in the E-Verify guidance and regulations, which require a contractor to review existing I-9s to determine whether they meet the special requirements of the E-Verify program. From a policy perspective, a successor employer should not be forced to choose between a penalty for untimely I-9 completion for a newly acquired work force or acceptance of complete liability for the past errors and omissions of the acquired employer.

### **Comments on Part Three of M-274**

We thank USCIS for expanding Part Three of the M-274 to provide employers with more detailed information about imaging and retaining I-9 forms. With the inclusion of more detailed information in Part Three, AILA has the following comments:

#### ***Software Performance Standards***

1. Page 23 of the M-274 states that employers may use any electronic recordkeeping, attestation, and retention system that complies with DHS standards, but USCIS does not articulate what it views as acceptable software performance standards. In light of the recent Abercrombie & Fitch enforcement action, AILA recommends that DHS promulgate minimum I-9 software certification standards—analogue to the IRS regulations governing certification of tax preparation software—to enable employers to make informed decisions when evaluating I-9 vendor products and services.
2. Page 24 of the M-274 states that an employer may change electronic storage systems as long as the system meets the performance requirements of the regulation. AILA recommends that USCIS advise employers to document deficiencies in the discontinued software product prior to implementing a new application. AILA further recommends that allowances be made for employers that ameliorate historic deficiencies moving forward.

#### ***Record Maintenance Requirements***

3. Page 25 of the M-274 states that the alteration, loss, or erasure of an electronic record may expose the employer to allegations of document tampering. For large organizations comprised of business units with different EINs, the management of verification records for employees that transfer between units is logistically challenging. AILA recommends that USCIS provide advice to employers with respect to records requirements governing the transfer of employees between business units with different EINs, and specifically address whether the former

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acquiring employer must complete I-9s for the acquired employees within 3 days of the effective date of the transaction, that is the implication. For the reasons stated herein, the 3-day turnaround is unrealistic.

business unit is required to retain a digital copy of the employee's I-9 after transferring the employee to the new business unit.

### ***Mergers and Acquisitions***

4. With respect to employee transfers resulting from a merger, acquisition or intracompany transfer, AILA recommends that USCIS clarify that the successor organization maintains the obligation to process and finalize TNC resolutions associated with employee transfers.

### ***Correction of Records***

5. Page 25 states that a required security feature of an electronic I-9 system is the ability to capture and retain individual identification data in connection with any modification of the stored record. AILA recommends that USCIS approve a security system override that would permit electronic corrections to I-9 records in association with the updating of integrated HRIS or ATS to reflect a properly documented name change. Such a modification will ensure that those employers that have recognized the benefit of minimized SSA/TNC mismatch notification will continue to benefit from the full integrated system.

### **Updating, Indexing, and Accessibility of M-274 Information**

As a general matter, we suggest that the agency improve the accessibility of information for employers seeking to comply with the guidance in the Handbook. First, AILA urges USCIS to provide an update page at the beginning of each new edition to identify changes from the prior edition. It is very time-consuming and frustrating for employers to compare each version of the Handbook to determine which sections have been changed, deleted or supplemented. We also recommend that USCIS develop an index to the sections and topics within the M-274 to make it easier for employers to find the appropriate topic. This would be particularly helpful for the "Questions" section in Part Seven. Although the section is divided into eight sub-sections, a lot of valuable material is included in the questions that is not easily accessible to an employer searching for information on a specific topic.

We appreciate the opportunity to raise these concerns and acknowledge the efforts of USCIS to clarify and guide employers in the proper completion and maintenance of Form I-9. Thank you for your attention to this matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION