



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.5600  
Fax: 202.783.7853  
[www.aila.org](http://www.aila.org)

July 1, 2009

Mr. Michael Aytes, Acting Deputy Director  
Mr. Donald Neufeld, Acting Associate Director, Domestic Operations  
United States Citizenship and Immigration Services  
20 Massachusetts Ave., NW  
Washington, DC 20529

VIA E-Mail: [michael.aytes@dhs.gov](mailto:michael.aytes@dhs.gov)

RE: M-274 Handbook for Employers

Dear Mr. Aytes and Mr. Neufeld:

AILA wishes to recognize the substantial efforts of the USCIS in issuing the new M-274 Handbook for Employers. Given the complex and sometimes conflicting obligations that employers have under the various statutes, this is a particularly important time for the Service to issue a valuable document providing employers with much-needed guidance in this area. We appreciate the work that has gone into producing a document that clarifies many points for the employer community.

However, in the interest of disseminating meaningful information to employers, we believe that there are certain provisions in the Handbook that should be clarified or corrected. Some of the provisions appear to be inconsistent with law or regulation and with prior agency practice. Others are unclear and confusing and will likely result in employers making inadvertent I-9 errors and potentially denying work to authorized individuals in violation of anti-discrimination laws.

Because it is critical that employers have available clear and correct guidance to follow the laws relating to their I-9 obligations, we request that the Service give serious consideration to AILA's concerns. We also would like to reiterate our prior requests for more comprehensive rulemaking to address a number of shortcomings in the regulations. We would welcome the opportunity to discuss these issues more fully with the Service.

**A. Critical Concerns Raised by the New Handbook:**

First, we wish to discuss two important issues that we believe raise the highest level of concern. They relate to two categories of individuals whose continued work authorization we consider in the public interest,

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and where the M-274 states I-9 documentation requirements that reach beyond those in the statute and regulations.

**Issue: H-1B Portability – Evidence of Filing**

Page: 8 of the Handbook

On page 8 of the new Handbook, Table 2, row 2, the Service imposes a new requirement that H-1B employees who change employers must present a Service- issued receipt for the new petition (Form I-797) as evidence of employment authorization. This requirement is a departure from the longstanding practice of permitting “credible evidence” of the filing of the new H-1B petition and creates an obligation not required by the statute or regulations.

On October 17, 2000 President Clinton signed into law the American Competitiveness in the Twenty-first Century Act (AC21). Pub. L. 106-313, Oct. 114 Stat. 1251 (Oct. 17, 2009). AC21 provides that H-1B workers may “begin working for a new H-1B employer as soon as the new employer files a ‘non-frivolous’ petition for the alien.” The purpose of this rule was to ensure individuals already deemed to be eligible for H-1B status be allowed to continue to work without having to wait for Service action on their new petition.

Under 8 CFR § 103.2(a) (7) (i), “filing” means that the application has been physically received by the Service. This can be evidenced in a number of ways. Per guidance from legacy INS and the practice for many years, an H-1B worker who changes employers only needs “credible evidence” of filing of the H petition by the new employer. See: Immigration and Naturalization Service, Interim Guidance for Processing H-1B Applicants for Admission as Affected by the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313 (HQ OPS 70/20, January 29, 2001) (“Pearson Memo”).

The Service’s new interpretation might result in lengthy delays before an eligible H-1B employee can work. It also precludes employers from using email notices of receipt for premium processing cases or even using evidence from the Service’s own website showing the case was received by the Service.

AILA is concerned that this departure will result in unnecessary financial hardship to employers and to people who are clearly authorized to work while adding nothing to the integrity of our immigration system or our national security. AILA is also concerned that this new interpretation will result in confusion and discrimination by employers who struggle to understand the prohibition on requesting specific documents.

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We urge the Service to reconsider its position, and in the absence of further regulatory guidance, return to prior policy that allows the employer to accept credible evidence of the filing of an H-1B petition as I-9 documentation for employees authorized to work under H-1B portability.

**Issue: Cap Gap Authorization – Evidence of Filing**

On page 9 (Table 2), the Handbook states that students taking advantage of the “cap gap” provisions must present an I-20 and an I-797 receipt notice for I-9 purposes. This new requirement is inconsistent with the Agency’s directives that work authorization begins upon receipt and subsequent approval by the Service of the H-1B filing for the employee.

In April of 2008 the Service issued Interim Final regulations creating the “cap gap” work authorization provision. (73 FR 18944, 4/8/08.) This provision was created to extend the authorized stay and OPT employment authorization for those F-1 students who were the beneficiaries of timely-filed H-1B petitions with the Service. The Regulation specifies that employment authorization for an F-1 student with valid optional practical training is extended “automatically” when the H-1B petition “[h]as been properly filed . . . .” 8 CFR § 214.2 (f) (5) (vi) (A) bridges the gap between the end of the F-1 status and the start of the H-1B status. The regulations contain no requirement that the F-1 student receive an I-797 or an I-20 to evidence work authorization. To help clarify this provision, ICE released a Fact Sheet confirming:

Because the cap-gap extension is automatic, the updated Form I-20 is not required for a student to continue working; it merely serves as proof of the extension of OPT employment authorization.

U.S. Immigration and Customs Enforcement, Updates to Post-Completion Optional Practical Training (OPT), SEVP Policy Guidance 0801-01 (Apr. 25, 2008) available at [http://www.ice.gov/doclib/sevis/pdf/cap\\_gap\\_fact\\_sheet.pdf](http://www.ice.gov/doclib/sevis/pdf/cap_gap_fact_sheet.pdf).

Unfortunately, in many cases waiting for the I-20 or the I-797 creates a delay and will render many work authorized students unable to document their work authorization. In fact, we are already receiving reports from our members that employers who adhere strictly to the Handbook have already taken valuable employees off the payroll because of glitches in issuing the I-20 or delays in mailing the I-797. This is especially difficult for students where SEVIS database correction may be necessary. This requirement also has the potential of creating an administrative nightmare by having F-1 OPT students rushing for I-20s unnecessarily from already overburdened DSOs in the coming days and weeks. The additional requirement of getting the new I-20 and/or producing an I-797 seems to exceed the regulations and be contrary to the intent of the “cap gap” rule.

Instead, we recommend that the M-274 track the requirements in the regulations and agency guidance by providing that the employer should accept credible evidence of filing

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of the H-1B petition when reverifying the expiring EAD card, with a subsequent update of the I-797 receipt notice to demonstrate that the student's H-1B petition has been accepted for processing, and a subsequent update with the appropriate I-9 documentation of H-1B work status if the case is approved.

## **B. Additional Areas of Concern in the Handbook:**

### **Page 2 – Phone Number for Forms**

The M-274 directs employers to call 1-800-870-3636 for additional forms. The correct number of the forms line is 1-800-870-3676.

### **Page 7 - Receipts**

On page 7, the Handbook states: “A receipt indicating that an individual has applied for initial employment authorization or for an extension of expiring employment authorization is NOT acceptable proof of employment authorization on Form I-9.”

AILA concern:

This section is confusing because it does not clearly limit this guidance to receipts for extension of EAD cards. Most employers will not realize that while Service policy does not allow an employer to accept a receipt for an EAD extension, the regulations do allow an employer to accept a receipt for certain timely-filed non-immigrant extensions such as H-1B or a TN extensions. 8 CFR § 274a.12(b)(20); Austin T. Fragomen, Jr. and Steven C. Bell, *Immigration Employment Compliance Handbook*, 7<sup>th</sup> Ed., § 4:77 (Thompson West 2007). This provision is likely to confuse employers who may terminate individuals who are clearly authorized to work.

We recommend that the paragraph specify that employment authorization means an EAD card.

### **Page 8 – Work Authorization for Refugees**

The Handbook misstates the work authorization requirements for refugees, who are work-authorized incident to status.

Table 1 of the Handbook states that an unexpired I-94 card with a refugee admission stamp is valid for “90 days from date of hire or, for reverification, the date employment authorization expires.” Page 9 Table 2 of the Handbook provides that the same document, the I-94, indicating asylee status “does not expire.”

AILA concern:

This instruction seems inconsistent with both 8 CFR § 274a.12 (a) (3) and two previous memoranda issued by USCIS acknowledging that both asylees and refugees are

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authorized to work incident to status. (See William R. Yates, Acting Associate Director, Operations, The Meaning of 8 CFR 274a.12(a) as it Relates to Refugee and Asylee Authorization for Employment, HQADJ 70/21.1.13, March 10, 2003; Dea Carpenter, Deputy General Counsel, Employment Authorization of Aliens Granted Asylum, HQCOU 90/15, June 17, 2002. The memoranda specifically indicates that asylees and refugees may simply present evidence of their status, and are then recognized as having unlimited work authorization incident to status.

## **Page 12: Reverification of Employment Authorization for Current Employees**

The Handbook does not clarify that U.S. passports and identity documents, which by recent regulation must be unexpired, do not need to be reverified upon expiration. See 73 FR 76505, 12/17/08. While it is true that there has never been an obligation for employers to reverify expiring identity documents, the recent regulation that requires that only unexpired documents are acceptable is likely to cause confusion regarding expired documents in a reverification context. We recommend that the Agency clarify this important issue in this section.

The Handbook also provides a confusing explanation of automatic extensions of work authorization and misstates the current practice of local CIS offices regarding interim EADs.

The Handbook states:

To maintain continuous employment authorization, an employee with temporary employment authorization should timely file for new employment authorization or an extension of stay prior to the expiration of his or her current document or authorized period of stay. If the employee is authorized to work for a specific employer and has filed an application for an extension of stay, he or she may continue employment with the same employer for up to 240 days from the date the authorized period of stay expires. If an employee has timely filed for new employment authorization and USCIS fails to adjudicate that application within 90 days, the employee will be granted an employment authorization document for a period up to 240 days.

AILA Concern:

The paragraph cited above combines the rules from two different sections of the regulations. One part of the paragraph is related to certain non-immigrant extensions such as H-1B or L-1, and the second part of the paragraph is related to a totally different section regarding EAD extensions that have been pending more than 90 days.

In addition, while the Handbook accurately describes the regulatory provision regarding issuance of an interim EAD card after an I-765 has been pending for 90 days, USCIS has not issued the EAD locally since 2006. See Michael Aytes, Elimination of Form I-688B, Employment Authorization Card, August 18, 2006 ([http://www.uscis.gov/files/pressrelease/ElimI688B\\_081806R.pdf](http://www.uscis.gov/files/pressrelease/ElimI688B_081806R.pdf)). AILA is concerned

that since the Handbook refers in several places to this practice the language will mislead employers and employees into believing that interim work authorization is available.<sup>1</sup>

### **Page 12 and 13: Reverification**

There are several statements within the section on reverification that require correction and clarification.

AILA concerns:

On page 13, the Handbook states that employers must complete a new Form I-9 at verification if the form used for the previous verification has been replaced by a newer version. This contradicts the regulations, which permit an employer to note the reverification on the existing form for rehires that took place within three years. 8 CFR § 274a.2(c)(1)(i).

Also, this section does not clearly explain that an employer should not reverify an I-551 permanent resident card with a future expiration date. The regulations establish that lawful permanent residency is a status that does not expire.<sup>2</sup> The Table 2 requirement for conditional residents to use the I-797 receipt as a one year "extension" of the I-551 contradicts the plain language of the regulations. If the Service wishes to treat conditional permanent residents differently than permanent residents in the I-9 process, the agency must follow the regulatory process to effect such a substantial change in its stated position. In prior guidance to employers, USCIS has assured employers that both the permanent resident card and the conditional resident card must be unexpired at the time of hire but does not require reverification if it expires after hire. The agency should continue to take this position as it conforms to the regulations, it is consistent with prior agency guidance and it upholds the rights of the two protected groups, permanent residents and conditional permanent residents.

While question 18 correctly states that "You should not reverify an expired Alien Registration Receipt Card/Permanent Resident Card (Form I-551)," other sections of the Handbook are confusing and should be clarified. The Handbook should state: "Although some I-551 Permanent Resident Cards have an expiration date, employment authorization

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<sup>1</sup> Additionally, AILA is troubled that in the field, the Service has virtually eliminated issuance of the 90-day interim EAD card without providing for an alternative method for seeking interim work authorization. AILA asks the Service to consider reinstating the practice of issuing interim EADS at local offices when EAD adjudication has exceeded 90 days.

<sup>2</sup> "1) An alien who is a lawful permanent resident (with or without conditions pursuant to section 216 of the Act), as evidenced by Form I-551 issued by the Service. An expiration date on the Form I-551 reflects only that the card must be renewed, not that the bearer's work authorization has expired." 8 C.F.R. § 274a.12(a)(1).

continues and there is no need to reverify this document upon expiration." This cautionary note could be added at the bottom of page 12 after the heading: "Note: Do not reverify List B identity documents, such as a driver's license." Furthermore, it should also be clarified that U.S. passports that have expired since the date of hire do not require reverification. Question 17 at page 31 also should be clarified.

### **Page 21 and 22 : Levels of Fines**

The M-274 misstates the fines and penalties that ICE may assess on employers for violating the employer sanctions laws.

The Handbook states on page 21:

If DHS determines that you have knowingly hired unauthorized aliens (or are continuing to employ aliens knowing that they are or have become unauthorized to work in the United States), it may order you to cease and desist from such activity and pay a civil money penalty as follows:

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

On page 22, the Handbook states:

Employers . . . may also be ordered to pay a civil money penalty as follows:

1. First Offense: Not less than \$375 and not more than \$3,200 for each individual discriminated against.
2. Second Offense: Not less than \$3,200 and not more than \$6,500 for each individual discriminated against.
3. Subsequent Offenses: Not less than \$4,300 and not more than \$16,000 for each individual discriminated against.

AILA concern:

The levels of fine listed in the handbook are inaccurate and misleading. On March 27, 2008 the federal government published a regulation adjusting for inflation civil money penalties assessed or enforced under sections 274A, 274B, and 274C of the Immigration and Nationality Act (INA). These adjusted civil money penalties were to be effective for violations occurring on or after the effective date of these rules. Thus the Handbook is misleading in that it appears that any violations would be fined at that higher level, when in fact violations that occurred before March 27, 2008 are fined at lower levels.

Additionally, the third level of fines for hiring violations on page 21 under the current regulations is \$16,000, not \$11,000 as stated in the M-274.

**Page 32: Social Security Printouts**

Q&A 20 states:

20. Q. Some employees have presented Social Security Administration printouts with their name, Social Security number, date of birth and their parents' names as proof of employment authorization. May I accept such printouts in place of a Social Security card as evidence of employment authorization?

A. No. Only a person's official Social Security card is acceptable.

AILA concern:

The answer is misleading and may cause an employer to reject a SSA receipt for a replacement document. AILA suggests USCIS amend the answer to question 20 to state:

A. Typically, only a person's official Social Security card is acceptable employment authorization document. However a receipt issued by Social Security for a replacement card may be acceptable as a receipt valid for 90 days. (see Table 1 page 7)

**Page 34: NIV classification Table**

Please note that the list of non-immigrant categories is missing the O-1 category.

**Page 43: List A Document Table**

Please note that the header is missing from the table of List A documents.

**Other Considerations**

1) The Service should consider more clearly outlining how to complete an I-9 for the more complicated immigration categories such as:

Non Immigrant Visa Categories  
NIV Extensions of Stay  
AC 21 H-1B  
Cap-Gap OPT/H-1B  
F-1 OPT  
F-1 CPT  
J-1  
J-1 Academic Training

2) The Service should consider adding a space under List A to list a 3<sup>rd</sup> document for circumstance where a third document may be required. For example, an F-1 with CPT must present the following three documents to properly complete an I-9:

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- i) passport (identity document)
- ii) I-20 which has the CPT notation
- iii) I-94 card

### **Conclusion**

AILA appreciates the opportunity to raise its concerns with the new Handbook for Employers, and acknowledges the efforts of the Service to help clarify and guide employers in the proper completion, and maintenance of the Form I-9. AILA suggests that the Agency withdraw the M-274 Handbook until it is able to correct the inaccuracies and errors in the current document.

Thank you for your attention to this matter.

FOR THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION:

M-274A Taskforce  
Josie Gonzalez, Chair  
Cynthia Lange  
Marketa Lindt  
Charles Miller

cc: John Morton  
Assistant Secretary for Immigration  
and Customs Enforcement

Dea Carpenter  
Acting Chief Counsel, USCIS

Peter Vincent  
Principal Legal Adviser, ICE

Howard McMillan  
Chief, Verification Division, USCIS

Katherine Lotspeich  
Deputy Chief, Verification Division, USCIS