



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

April 13, 2021

Alejandro Mayorkas
Secretary
Department of Homeland Security
1880 2nd Street SW
Washington, DC 20024

Re: Modernizing the Form I-9 Employment Eligibility Verification Process

Dear Secretary Mayorkas:

On behalf of the American Immigration Lawyers Association (AILA), we write to express our gratitude to the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) for granting continued flexibility regarding the in person review requirement for the Form I-9 employment eligibility verification process during the global COVID-19 pandemic¹ and to suggest an important opportunity to modernize the process. While there are a multitude of areas that require modernization of our immigration system, the focus of this letter is to respectfully urge DHS and ICE to reconsider its interpretation of the regulatory requirement, found at 8 C.F.R. § 274a.2, that an employer “[p]hysically examine the documentation presented by the individual establishing identity and employment authorization” when completing Form I-9, Employer Eligibility Verification. Currently, the physical inspection requirement is interpreted by USCIS and ICE to mean that the employer must review the documentation *in person*. We believe this strict interpretation of regulations, formulated almost three and one-half decades ago, can and should be updated as part of a longer-term operational effort to maximize efficiencies and improve employee and employer experience (including improving the health and safety of those involved in the Form I-9 process). AILA believes that certain virtual review (which includes a video conference where the employee’s identity and the proffered documentation are reviewed simultaneously but does not include a faxed or emailed set of documents alone) of documentation for Form I-9 purposes constitutes physical examination within the meaning of the existing regulations. Further, the temporary relaxation of the in-person verification requirement should, due to changes in technology and business realities, become – perhaps with some adjustments – a permanent change to agency interpretation.

Regulatory Language

A shift in agency interpretation does not require legislation. The existing regulation (8 CFR § 274a.2(b)(1)(ii)(A)) requires that an employer “[p]hysically examine the documentation presented by the individual establishing identity and employment authorization.” One definition of

¹ *DHS Extends Form I-9 Requirement Flexibility (Effective Mar. 31, 2021)*, U.S. CITIZENSHIP & IMMIGRATION SERV. (Mar. 31, 2021), <https://www.uscis.gov/i-9-central/form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-mar-31-2021>.

“physical” is “perceptible to the senses,” which would include sight. In medicine, a “physical inspection” is “the process of examining the body by means of *sight*, touch, percussion, *or* auscultation to diagnose disease or verify fitness.”²

Even if “physically” originally assumed “in person,” that assumption is no longer the most logical. When the relevant regulations were drafted, the authors could not have conceived of the current quality of video offerings and technology that provide clear, secure, and thorough methods of verifying identity and capturing document images. E-Verify was also unavailable. The combination of new video technologies make virtual review a much more secure and accurate procedure.

In order to be responsive to the COVID-19 global pandemic as well as technological advancements, federal and local governments and the private sector have begun to reevaluate in-person requirements. Examples include the following:

- The majority of states have enacted some form of remote online notarization law allowing notarial acts (which are meant to confirm the identity of the signatory) to be completed using audio-visual communication rather than in-person confirmation of identity.³
- Thirty-eight of the 69 immigration courts are offering Webex video conferencing for hearings.⁴
- Members of AILA have experienced criminal proceedings being handled via video; and there are even moves in some states toward virtual grand jury hearings.⁵
- The Miami Asylum Office has announced that on March 24, 2021, a pilot program allowing video appearances of attorneys and representatives will begin.
- The Internal Revenue Service interprets “in-person” for interview recordings to include telephone interviews.⁶
- Virtual medical exams have become common. In fact, Medicare regulations state that “face-to-face” includes telemedicine.⁷
- In some states, marriages do not require an in-person officiant.⁸

² Both definitions found in the Collins Online Dictionary.

³ *Coronavirus: Federal and state governments work quickly to enable remote online notarization to meet global crisis*, DLA Piper (Feb. 11, 2021), <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/>.

⁴ *Operational Status Map*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir-operational-status/operational-status-map>.

⁵ See C. Villani, *Lori Loughlin, Husband Plead Guilty in 'Varsity Blues,'* LAW360 (May 22, 2020), <https://www.law360.com/california/articles/1276185>.

⁶ *Simien v. Internal Revenue Service*, 2007-1 USTC 50,352.

⁷ 42 CFR § 424.22(a)(1)(v)(A)(4)(B).

⁸ *Procedures for Virtual Marriage Ceremonies Conducted by Non-City Clerk’s Office Marriage Officers*, OFFICE OF THE CITY CLERK, THE CITY OF NEW YORK, <https://www.cityclerk.nyc.gov/assets/cityclerk/downloads/pdf/Ceremonies%20Procedures%20for%20non%20city%20clerk%20conducted%20ceremonies%20FINAL%2005%2007%202020.pdf>.

- Real estate closings are being handled virtually.⁹
- New York conducts statewide virtual workers' compensation hearings using a computer or mobile device.¹⁰
- U.S. citizens may apply for replacement social security cards online.¹¹

There are clear ways to allow for secure and thorough document review without an in-person requirement.

Further, virtual review actually allows for a more thorough review and scrutinization of documentation than does in-person review. With clear color copies of the front and back of a document, the reviewer can enlarge the document to more closely examine perceived issues. The copies can be shared with the employer's attorney if the employer has questions about their authenticity. And many employer representatives may be more comfortable taking additional time to review a questionable document virtually than when sitting with the employee in person.

Finally, even if there is a return to "normal operations," we expect that employees may continue to wear masks. Virtual review allows the employer to more safely compare the photograph on the identity and employment authorization documentation with the employee's own face. Virtual review eliminates concerns about asking an employee to remove a mask and concerns about touching documentation and the possible transmission of a virus through touch. As we move into a post COVID-19 world it is critical that employees and employers are protected during the onboarding process.

A Change in Interpretation Would Benefit Employers, Employees, and the Federal Government

This change in interpretation would benefit employers, employees, USCIS, ICE, and the Immigrant and Employee Rights (IER) section of the Department of Justice for a number of reasons. Employers, as a matter of business reality, often hire new employees without any sort of in person meeting. Many employees work for an employer without ever setting foot in the employer's offices. The Form I-9 process, as currently defined, requires that remote hires meet with an employer representative or agent to complete the Form I-9 in person. Such in person reviews by agents are more difficult than they were prior to COVID-19.

In the past, employers have relied on notaries or third party services when possible for this process, even though notaries/vendors are generally not trained in the specific rules related to the Form I-9 and risk paperwork violations, inadvertently committing an act that may constitute discrimination,

⁹ Sydney Franklin, *Real Estate Transactions Go Virtual*, THE NEW YORK TIMES (Nov. 11, 2020) <https://www.nytimes.com/2020/11/11/realestate/10virtual-deals.html>.

¹⁰ *Virtual Hearings*, WORKERS COMPENSATION BOARD, NEW YORK STATE, <http://www.wcb.ny.gov/virtual-hearings/>.

¹¹ *Social Security Number and Card*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/ssnumber/#issnrc>.

or otherwise rejecting acceptable documentation. In at least one state¹², notaries are prohibited from completing the Form I-9, leaving employers scrambling to identify agents for the I-9 process.

Many employers require their employees to identify someone to act as the employer's agent for I-9 completion. This leaves the Form I-9 in the hands of someone who is even less likely to understand the complex Form I-9 rules, more likely to break those rules or otherwise commit paperwork errors, or to mistakenly attest to the fact that the new hire is authorized to work in the U.S. even if the new hire is not.

Allowing employers to have their trained professionals conduct virtual review of new hire documentation reduces the number of paperwork errors, reduces the risk of discrimination, and reduces the chances that the employer will accept fraudulent or unacceptable documentation. Because, as set out above, virtual review is in many cases *more thorough* than in person review, and because document review is more likely to be conducted by professionals trained in the I-9 process, allowing virtual review would in many cases increase compliance with USCIS, ICE, and IER objectives relating to paperwork requirements, confirmation of employment authorization, and nondiscrimination.

In the specific COVID-19 context, a revised interpretation of physical review would also help employers tailor their virtual review processes to reduce or eliminate the need for follow-up document inspections after a return to normal operations. A clear statement of the specific requirements for acceptable virtual review would also help ICE and IER in their enforcement efforts now and in the future when reviewing I-9s completed during 2020 and beyond.

Suggested Process for Virtual Review

AILA respectfully suggests that DHS and ICE publish guidance allowing for virtual review of identity and employment authorization documents in the following circumstances:

1. The review is conducted via a web-based audio/visual meeting (i.e., not by fax or e-mail);
2. Copies of the front and back of the documents presented are made and retained with the Form I-9; and
3. The employer uses E-Verify to confirm the identity and employment authorization of the new hire.

Conclusion

Many facets of our daily life that would previously have involved “in person” encounters have shifted dramatically over the past year, and in many cases may permanently change to virtual environments going forward. In light of these changes and the opportunities presented by virtual

¹² See CA Business and Professions Code sections 22440-22449.

review, employers are seeking the option to review I-9 documents virtually as a permanent alternate to in person document review, something that would benefit not only employers but also the federal government. President Biden has made clear that one of his priorities is to modernize the immigration system.¹³ We believe that modernizing the process for completing Form I-9, the most commonly completed immigration form in our country, is a perfect place to start.

We thank you for your consideration of this matter. If you require any additional information or clarification, please contact Sharvari (Shev) Dalal-Dheini at (202) 507-7621 or by email at sdalal-dheini@aila.org or Diane Rish at (202) 507-7642 or by email at drish@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

cc: Tracy Renaud, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services
Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement
Alberto Ruisanchez, Deputy Special Counsel, Immigrant and Employee Rights Section, U.S. Department of Justice

¹³ *Biden to sign order to modernize the U.S. immigration system on Tuesday*, REUTERS (Jan. 29, 2021), <https://www.reuters.com/article/us-usa-biden-immigration/biden-to-sign-order-to-modernize-the-u-s-immigration-system-on-tuesday-idUSKBN29Y23G>.