



USCIS REVISES I-9 MANUAL FOR EMPLOYERS

Posted on January 23, 2011 by Cyrus Mehta

US Citizenship and Immigration Services (USCIS) has revised its *Handbook for Employers: Instructions for Completing Form I-9 (M-274)*. Revised as of January 5, 2011, the handbook includes expanded guidance on lawful permanent residents, refugees and asylees, and acceptable documents for employees in temporary protected status (TPS).

The following is a summary of key changes in the revised handbook:

- **Employees With TPS**

TPS is a temporary immigration benefit that allows foreign nationals from designated countries to reside and work in the United States for a temporary period of time. The Department of Homeland Security (DHS) may extend a country's TPS designation and issue a Federal Register notice to automatically extend expiring employment authorization documents (EADs) for TPS beneficiaries. Thus, a TPS beneficiary may choose to present an EAD that is expired on its face so long as it has been automatically extended. The challenge to employers is how to determine whether a TPS beneficiary's expired EAD is valid as a List A document.

The handbook now provides guidance on how to identify a TPS EAD, how to determine whether the DHS has issued an automatic extension of expiring EADs, and how to explain that the TPS status was extended on the Form I-9 (Employment Eligibility Verification).

- **J-1 Exchange Visitors & F-1 Students, including F-1s Changing to H-1B Status (The Cap Gap)**

The handbook provides a detailed explanation on how to complete the I-9 for those individuals in J-1 exchange visitor status and F-1 and M-1 student

status. Additionally, the handbook explains how to complete the I-9 for F-1 students who are changing status to H-1B and are eligible for a "cap-gap" extension of status and employment authorization. The handbook confirms that the student's employment authorization will remain valid through September 30 of the calendar year for which the H-1B is filed, so long as the student's H-1B status will begin on October 1. Additionally, the handbook advises that an employer must re-verify a student's Form I-20 (Certificate of Eligibility for Nonimmigrant (F-1) Student Status). The I-20 must show that the cap-gap extension was endorsed by the student's designated school official. Re-verification must be done no later than October 1.

- **H-1B Employees Changing Employers (Portability)**

The handbook now states that an employee in valid H-1B status who changes (ports) to a new employer can begin to work with the new employer *upon filing* an H-1B petition with USCIS. The prior version of the handbook required the porting H-1B employee to obtain a Form I-797 (Receipt Notice) from USCIS before beginning work with the new employer. This approach created considerable delay because it often takes USCIS weeks to issue the official I-797.

The new version of the handbook explains that a porting H-1B employee may begin employment by presenting his or her Form I-94/I-94A (Arrival-Departure Record) issued for employment with the previous employer, along with his or her foreign passport, as a List A document. The employer should write "AC21" on the I-9, record the date that the new H-1B petition was submitted to USCIS in the margin next to Section 2 of the I-9, and attach documentation as specified in the handbook.

- **Extensions of Status**

The handbook explains that an employee with a petition for extension of status timely filed before the employee's work authorization expires is eligible for continued work authorization for up to 240 days beyond the expiration date of the authorization as long as the extension remains pending. The handbook provides a detailed explanation of how to complete the I-9 and the documentation to be attached for individuals in E-1, E-2, H-1B, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1 and TN status who have timely filed extensions with the same employer.

Where an H-1B extension is timely filed and the extension remains pending, the employer should write "240-Day Ext." and record the date the employer submitted the Form I-129 (Petition for a Nonimmigrant Worker) to USCIS in the margin of the I-9 next to Section 2.

Additionally, the handbook expands upon what documentation should be added to the I-9. Previously, the employer was advised to attach only the I-797. Now, the handbook adds that the employer should keep the following documents with the I-9 in this situation:

1. A copy of the new I-129 that was filed for the extension;
2. Proof of payment for the filing of the new I-129; and
3. Evidence that the new I-129 was mailed to USCIS.
4. After the extension is filed, USCIS will issue a receipt notice (Form I-797(C)), which should also then be added and kept with the I-9.

When the extension of stay is approved, the employer should record in Section 3 the document title, number, and expiration date listed. The handbook adds that the employer must give the employee the I-94A, which is evidence of the employee's employment authorized nonimmigrant status.

- **Interruptions in Employment**

The handbook now provides guidance to employers who are uncertain about whether a new I-9 is required after an employee has experienced a brief interruption in employment. The handbook provides examples of situations which include "continuing employment," such as maternity or paternity leave, leaves of absence, transfer from one business unit to another business unit of the same employer, or the same employer at another location. An employer is not required to complete a new I-9 in these situations so long as there is a reasonable expectation of employment at all times.

- **Electronic Retention of Forms I-9 and Documentation of Electronic Storage Systems**

The handbook offers expanded guidance to employers who use paper, electronic systems, or a combination of paper and electronic systems to keep I-9 forms. Employers must follow certain guidelines, outlined in the handbook, should they choose to keep their I-9s in an electronic generation or storage system. One requirement is that an employer must

maintain and make available upon request complete descriptions of the electronic generation and storage system and the indexing system that permit the identification and retrieval of documents and records maintained. Employers who are currently using, or contemplating the future use of, an electronic retention system should review the information outlined in the handbook and consult their Alliance of Business Immigration Lawyers (ABIL) attorney for guidance.

- **E-Verify and Federal Contractors**

The previous version of the handbook offered guidance to employers regarding participation in E-Verify and the corresponding I-9 responsibilities, such as maintaining a photograph of a List B document. The new version of the handbook provides additional guidance to federal contractors about their responsibilities under the amended Federal Acquisition Regulation (FAR) related to employment eligibility verification. The handbook explains that the regulation requires contractors with a federal contract that contains a FAR E-Verify clause to use E-Verify for their new hires and all employees (existing and new) assigned to the contract. The handbook also states that where an employee working for a FAR employer undergoes a name change and the employer chooses to verify existing employees by updating existing I-9 forms, a new I-9 must be completed.

- **Questions and Answers Section**

The handbook has expanded its Questions and Answers (Q&A) section to provide clarification to employers in a variety of situations related to the I-9, including the following helpful information:

- A Native American tribal document is acceptable as both a List B and List C document, and no other documents need be presented. For a current list of tribes recognized by the U.S. federal government, employers may visit the website of the Bureau of Indian Affairs at <http://www.bia.gov/>. A Certificate of Indian Status does not constitute an acceptable Native American tribal document and may not be accepted for I-9 purposes.
- An employer may accept a Social Security Card that has not been signed as a valid List C document.
- An employee may present an unexpired I-94 card notated with work-authorized status in two situations: (1) as a List A document along

with his or her foreign passport; or (2) as a List C document demonstrating work authorization from USCIS.

- Employers may accept documents bearing a different name than that which the employee has indicated in Section 1 of the I-9, so long as the documents reasonably relate to the employee. The employer may want to attach a brief memo to the I-9 detailing the employee's reason for the name discrepancy, including copies of any supporting documentation the employee chooses (but is not required) to provide.

The revised handbook for employers is available at <http://www.uscis.gov/files/form/m-274.pdf>.

For more information on the updated employer handbook or on potential changes to your I-9 policies and procedures, please contact our firm.

(This article has been extracted from the ABIL Immigration Insider, January 15, 2011, based on information provided by FosterQuan).

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