

# Client Alert

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## United States Citizenship and Immigration Services Releases Revised Form I-9 Updating the List of Acceptable Employment Eligibility Verification Documents

By Philip J. Perry, John D. Shyer and Abizer Zanzi

### Background

A principal purpose of the Immigration Reform and Control Act of 1986 (IRCA) was to assure that only employees who are legally authorized to work can obtain employment in the United States. It is widely recognized that IRCA has not been successful at achieving this aim, and the US Department of Homeland Security is now implementing measures intended to tighten workplace enforcement.

Under IRCA, US employers that knowingly hire unauthorized aliens are subject to penalties. In order to comply with IRCA and its corresponding regulations, employers must verify that each new employee is authorized to work in the United States by completing an "I-9" Employment Eligibility Verification Form no later than the third day of employment. This form provides a list of acceptable documents which an employee may submit for inspection by the employer in order to establish his or her identity and employment eligibility. Under the current law, employers are not required to be experts in document analysis, but they must examine the documents presented by the employee and determine whether they appear to be genuine on their face.

In 1996, the US Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, which mandated a reduction in the number of documents that employers may accept from newly hired employees during the employment verification process.<sup>1</sup> In 1997, the Immigration and Naturalization Service (INS) (now the United States Citizenship and Immigrations Service or USCIS—a component of the Department of Homeland Security), published a revised list of acceptable documents in order to comply with this law; but, for the next 10 years, INS and USCIS failed, in fact, to amend Form I-9 to reflect changes in the list of acceptable documents.<sup>2</sup> Indeed, INS and USCIS exercised "prosecutorial discretion" not to enforce the 1997 regulatory revisions, thereby permitting employers to continue to rely on the outdated list of acceptable documents contained in the Form I-9.

On November 7, 2007, however, USCIS released an updated version of Form I-9 to bring the form into compliance with the regulatory revisions made in 1997. With these revisions to Form I-9, the Department will be more aggressive in enforcing IRCA and employers may now be subject to penalties under IRCA for

"Employers should begin using the new Form I-9, which is available through USCIS, immediately in order to avoid inadvertently violating IRCA."

accepting documents that are not listed on the new form.

## Updated List of Acceptable Documents

The Form I-9 requires employers to certify that they have examined documents submitted by a new employee from the Lists of Acceptable Documents accompanying the form. There are three Lists of Acceptable Documents:

- **List A:** Documents that establish both identity and employment eligibility, such as a US Passport, Permanent Resident Card, unexpired Employment Authorization Document, etc.
- **List B:** Documents that only establish identity, such as a state driver's license or ID card, school ID card, voter's registration card, US Military card, etc.
- **List C:** documents that only establish employment eligibility, such as a US Social Security card, original or certified copy of a birth certificate, US Citizen ID Card, etc.<sup>3</sup>

New employees must provide either one document from List A, or one document each from Lists B and C in order to comply with Form I-9.

The new Form I-9 has a revision date of June 5, 2007. USCIS plans to publish a notice in the Federal Register that will provide employers with a 30-day grace period, as of the date of such notice, to transition to the new form. Although USCIS will wait until the end of the grace period before prosecuting noncompliance with the new Form I-9, employers are strongly urged to use the new form immediately. The new form revises the list of acceptable documents that may be used to prove both identity and employment eligibility (List A). Most notably, USCIS removed five documents from List A because they lacked features sufficient to prevent counterfeiting, tampering and fraud. The following

documents are no longer acceptable for employment verification:

- Certificate of United States Citizenship (Form N-560 or N-570)
- Certificate of Naturalization (Form N-550 or N-570)
- Outdated version of the Alien Registration Receipt Card (Form I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

USCIS made further additions and revisions to "List A." The following documents are now the *only* documents that may be used to establish both identity and employment eligibility:

- US Passport (unexpired or expired)
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
- Unexpired foreign passport with a temporary I-551 stamp
- Unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B)
- Unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer

Lists B and C of the Lists of Acceptable Documents in Form I-9 were left unchanged.

Employers should be aware that they may not specify or otherwise limit which of the acceptable documents an employee may choose to present in order to prove his or her identity and employment eligibility. If the documents provided by the employee are included on the Lists of Acceptable Documents, the employer must accept them. Failure to do so may result in a violation of IRCA.

## Other Revisions to Form I-9

In addition to updating the list of acceptable documents, USCIS changed the placement of its anti-discrimination notice on the "instructions" page of Form I-9. IRCA, in addition to providing sanctions for employers that knowingly hire unauthorized aliens, contains anti-discrimination provisions intended to prevent employers from overreacting to the threat of sanctions by discriminating against individuals based on their national origin or citizenship status. USCIS changed the position of the notice in order to give it more prominence. The relocation of the notice reemphasizes the civil rights protections for employees during a time when employers are anticipating greater enforcement of IRCA by DHS. Thus, employers should follow the same procedures in the same fashion for every new employee regardless of race, color, religion, gender, national origin, citizenship status or other protected class status.

## Conclusion

USCIS revised Form I-9 in order to tighten the IRCA compliance process for employers by eliminating documents that posed greater risks of forgery. Employers should begin using the new Form I-9, which is available through USCIS, immediately in order to avoid inadvertently violating IRCA.<sup>4</sup>

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### Endnotes

- <sup>1</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. 104-208.
- <sup>2</sup> 62 FR 51001-51006.
- <sup>3</sup> The complete Lists of Acceptable Documents for each category are attached to the new Form I-9, OMB No. 1615-0047.
- <sup>4</sup> Both the new Form I-9 and the revised Handbook for Employers (M-274) may be downloaded from the USCIS website, <http://www.uscis.gov>, or obtained by contacting USCIS directly at 1-800-870-3676.

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