

## America's Most Complicated Form Is Updated

On Friday March 8, 2013, the U.S. Citizenship and Immigration Services (USCIS) rolled out a brand new version of the [Form I-9](#), Employment Eligibility Verification Form, revamping America's most complicated one page form into a two-page form. In the world of immigration compliance, the release of the new Form I-9 is spectacular news. It's not every day the government does something that affects every employer in America. The passage of the Immigration Reform and Control Act (IRCA) imposed an affirmative duty on employers to verify the identity and work authorization of all persons hired after November 6, 1986. The mechanism to meet this duty became the Form I-9. In fact, federal law requires that every employer (including agricultural recruiter/referrer-for-a-fee hiring) complete a Form I-9 to verify an employee's identity and employment authorization.

### **When is the new form supposed to be used?**

The USCIS announced the Form is to be used immediately and published the details in the [Federal Register](#). USCIS has granted companies until May 7, 2013, a sixty-day grace period, to implement the new Form I-9. The grace period is designed to provide employers time to revise their Human Resource processes, distribute the forms and to provide electronic Form I-9 systems time to make necessary updates to their software. The ["Handbook for Employers Guidance for Completing the Form I-9 \(M-274\)"](#) has also been updated (3.8.13 version) to correspond to the new form and will be reviewed by our team in a separate *Immigration Update*.

### **Why is this important to my company?**

The focus on immigration compliance and related Form I-9 inspections has fluctuated over the years, but has steadily increased since the Bush administration utilized worksite actions (aka raids) as its means to aggressively target employers using unauthorized workers. The Obama administration has developed a "comprehensive worksite enforcement strategy that promotes national security, protects critical infrastructure and targets employers who violate employment laws or engage in abuse or exploitation of workers", according to Immigration and Customs Enforcement (ICE). Continuing to use administrative Form I-9 inspections as its tool of choice, ICE issued over 3,000 Notices of Inspection (NOIs) in 2012 with at least 3,000 more NOIs expected in 2013.

The Form itself is considered by many to be a complex document that translates into a time-consuming process. Accordingly, for some companies, it has been a source of criminal and civil liability. And yet for others it is a routine, simple form. It will be up to employers to decide whether the new Form I-9 streamlines the work eligibility process or complicates it further. It's worth noting that employers now have six pages of instructions to deal with before they reach the new two-page form. These instructions guide the preparer through the majority of the completion process and point out new directions as well as items previously found only in the M-274 Handbook for Employers.

## What are the changes to the instructions?

One of the largest changes in new Form I-9 is the lengthy instructions. In addition to expanding the number of pages of instructions from three to six, USCIS has provided clarity on several items. First, the new Form I-9 instructions provide a step-by-step guide for employers to complete each section. The instructions also define the four types of citizenship attestation options available for employees to select. Having these definitions handy should be helpful to employers trying to explain what an “alien authorized to work” or a “non-citizen national” is to new hires. It is surprising how many non-citizens are truly unaware of their own status.

Another interesting addition to the instructions is guidance about Unexpired Documents. In particular, the instructions state only original, unexpired document are acceptable. However, employers are reminded that there may be instances where an employee presents a document expired on its face that in fact has been extended. There is a helpful reference to workers with [Temporary Protected Status](#) (TPS) that sometimes have their work authorizations extended at the last minute by Congress.

We were particularly pleased to have information included on accepting receipts. Detailed guidance on the reverification requirements for various forms of receipts is now memorialized in the instructions. This is a welcome change, as receipt acceptance was only discussed in the M-274, Handbook for Employers before. Codifying what we have been advising employers for years, the instructions now remind employers while photocopies are not required, if made copies must always be retained and presented with Form I-9.<sup>1</sup>

Another best practice has also been noted in the new Form I-9’s instructions: the person who examined the documents must be the same person who signs Section 2. The document examiner AND the employee must both be physically present during the examination of the employee’s documents. Requiring both parties to be present translates into a prohibition on an age-old poor preparer practice to view the documents, copy them, attach them to the form and “fill it out later when I have time”.

Other clarifications include instructions indicating that border commuters from Canada and Mexico may use foreign addresses in Section 1 (but that all other employees must use U.S.

**Receipts**

If an employee is unable to present a required document (or documents), the employee can present an acceptable receipt in lieu of a document from the Lists of Acceptable Documents on the last page of this form. Receipts showing that a person has applied for an initial grant of employment authorization, or for renewal of employment authorization, are not acceptable. Employers cannot accept receipts if employment will last less than 3 days. Receipts are acceptable when completing Form I-9 for a new hire or when reverification is required.

Employees must present receipts within 3 business days of their first day of employment, or in the case of reverification, by the date that reverification is required, and must present valid replacement documents within the time frames described below.

There are three types of acceptable receipts:

1. A receipt showing that the employee has applied to replace a document that was lost, stolen or damaged. The employee must present the actual document within 90 days from the date of hire.
2. The arrival portion of Form I-94/I-94A with a temporary I-551 stamp and a photograph of the individual. The employee must present the actual Permanent Resident Card (Form I-551) by the expiration date of the temporary I-551 stamp, or, if there is no expiration date, within 1 year from the date of issue.
3. The departure portion of Form I-94/I-94A with a refugee admission stamp. The employee must present an unexpired Employment Authorization Document (Form I-766) or a combination of a List B document and an unrestricted Social Security card within 90 days.

When the employee provides an acceptable receipt, the employer should:

1. Record the document title in Section 2 under the sections titled List A, List B, or List C, as applicable.
2. Write the word "receipt" and its document number in the "Document Number" field. Record the last day that the receipt is valid in the "Expiration Date" field.

By the end of the receipt validity period, the employer should:

1. Cross out the word "receipt" and any accompanying document number and expiration date.
2. Record the number and other required document information from the actual document presented.
3. Initial and date the change.

See the Handbook for Employers: Instructions for Completing Form I-9 (M-274) at [www.uscis.gov/I-9Central](http://www.uscis.gov/I-9Central) for more information on receipts.

<sup>1</sup> While the form does not specifically address this issue for employers using the government’s E-Verify system, remember, there is NO choice for those employers regarding certain document copy retention. E-Verify employers must maintain copies of Permanent Resident Cards, Employment Authorization documents and U.S. Passport/Passport Cards.

addresses). The instructions also provide targeted guidance to temporary staffing agencies and explain they may enter the first day the employee was placed in the job pool to complete the date of employment blank in Section 2. Recruiters and recruiters for a fee are exempt and do not enter the employee's first day of employment.

## What are the changes to the actual Form I-9?

### *Section 1*

One of the largest changes to the Form I-9 is it has doubled in size. Page 1 is now reserved for employee information and a preparer and/or translator certification section, while Page 2 is reserved for the employer. This change will certainly remind employers that the employee should complete Section 1 and that the employer completes Section 2.

Page 1 of the Form I-9 has changed in its formatting and has added additional fields, some of which are "optional." Notably, the area above Section 1 reminds employers of the timing rules of the Form I-9: Section 1 must be completed by the employee no later than the first day of employment, but cannot be completed before accepting a job offer. Having employees complete Section 1 of the Form I-9 prior to offer and acceptance may be viewed as prescreening and a potential form of [discrimination](#) according to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

USCIS has added "optional" areas for employees to note any other names they have used and to complete their email address and telephone number. If employees have not used another name or choose not to provide their email or telephone information, USCIS instructs them to write "N/A" in the spaces. It remains to be seen if ICE will treat the field remaining blank as a technical violation.

The image shows the top portion of the USCIS Form I-9. It includes the Department of Homeland Security logo, the title 'Employment Eligibility Verification', and the USCIS Form I-9 header with OMB No. 1615-0047 and an expiration date of 03/31/2016. Below the header is a 'START HERE' instruction and an 'ANTI-DISCRIMINATION NOTICE'. The main section is 'Section 1. Employee Information and Attestation', which includes fields for Last Name, First Name, Middle Initial, Other Names Used, Address, Apt. Number, City or Town, State, Zip Code, Date of Birth, U.S. Social Security Number, E-mail Address, and Telephone Number.

One of the most confusing additions to the form is found in the attestation section involving Aliens Authorized to Work in the U.S. On the Form, these employees are provided the **choice** to provide **either** their Alien Registration Numbers/USCIS Number **OR** Form I-94 admission number.

The Form itself goes on to say that if the employee obtained his I-94 from U.S. Customs and Border Protection (CBP), he should also record his Foreign Passport number and Country of Issuance in the attestation information. The instructions on the Form, however, appear to indicate that there really is no choice. The instructions specifically state that if the employee has an A-Number/USCIS Number, it should always be recorded. If the employee has not received an A-Number/USCIS Number, then he should record the Admission Number. Next, the Form instructions go on to say if the Admission Number was issued by CBP, then the employee must also provide his foreign passport number and country of issuance. If the admission number, however, was issued by USCIS (or the employee entered without a passport), then he **must enter** "N/A" in the blanks for foreign passport number and country of issuance. It appears that

these changes take into the account the upcoming transition by CBP away from the use of a paper I-94.

Requiring employees to complete this information only when they obtain their admission number from CBP adds the potential for additional errors in this section of the Form, as it will require employees to take the extra step of understanding/identifying whether they received their I-94 admission number from CBP or not. Accordingly, we expect this portion of the Form I-9 to be time consuming for affected employees. Previously, employees with I-94 numbers only had to enter the number and expiration date into the attestation information.

Also of interest is a space for a “3-D Barcode” on the revised version: neither the Instructions nor the Federal Register notice explain what this box will be used for in the future. Likely, this will be used in the future if USCIS issues an electronic Form I-9.

### OLD Attestation

I attest, under penalty of perjury, that I am (check one of the following):

A citizen of the United States

A noncitizen national of the United States (see instructions)

A lawful permanent resident (Alien #) \_\_\_\_\_

An alien authorized to work (Alien # or Admission #) \_\_\_\_\_ until (expiration date, if applicable - *month/day/year*)

### NEW Attestation

I attest, under penalty of perjury, that I am (check one of the following):

A citizen of the United States

A noncitizen national of the United States (See instructions)

A lawful permanent resident (Alien Registration Number/USCIS Number): \_\_\_\_\_

An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) \_\_\_\_\_. Some aliens may write "N/A" in this field. (See instructions)

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: \_\_\_\_\_

OR

2. Form I-94 Admission Number: \_\_\_\_\_

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: \_\_\_\_\_

Country of Issuance: \_\_\_\_\_

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)

3-D Barcode  
Do Not Write in This Space

## What are the changes to the actual Form I-9?

### Section 2

Page 2 of the Form I-9 has a few interesting differences from the prior Form. One of the most helpful changes is the addition of document information fields for List A documents, which will be useful for recording document information for F-1 and M-1 students as well as employees with J visas, including SEVIS and DS 2019 numbers). In the prior version of the Form, information was limited to two different documents and capturing the additional information the M-274 required for F-1 Students and J Visa employees' on the Form I-9s was difficult to complete.

List A Identity and Employment Authorization	
Document Title:	FOREIGN PASSPORT
Issuing Authority:	CHINA
Document Number:	CC1234567
Expiration Date (if any)(mm/dd/yyyy):	01/05/2021
Document Title:	I-94 CARD
Issuing Authority:	CBP
Document Number:	12-34567890
Expiration Date (if any)(mm/dd/yyyy):	03/03/2014
Document Title:	I-20
Issuing Authority:	USCIS
Document Number:	3456789012
Expiration Date (if any)(mm/dd/yyyy):	03/03/2014

Noticeably absent is a place to record the Visa number for foreign workers. While not mandatory, the USCIS [encourages employers](#) to enter employees' visa information into the E-Verify system because it may prevent tentative nonconfirmations (TNCs). If your company complies with this E-Verify optional request, then as a best practice, we recommend that you also note the visa information on the Form I-9.

Another notable change in Section 2 of the Form I-9 is the clear labeling of the first day of employment as a field in the Employer Certification. Prior versions of the Form I-9 included a small area among a paragraph of text for the employee's date of hire information, but the current version makes it much easier for employers to remember to complete this important information and should lower the number of technical violations from

ICE that result from employers failing to fill out this date. Also of interest, is the new language: “The employee’s first day of employment”, as it appears to allow employers’ to make a distinction between the date of hire and the date an employee will actually begin work.<sup>2</sup>

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) [redacted] and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Old Version of Form I-9

Certification  
I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.  
The employee’s first day of employment (mm/dd/yyyy) [redacted] (See instructions for exemptions.)

New Version of Form I-9

## What are the changes to the actual Form I-9?

### *Section 3*

The heading for Section 3 now reads “Section 3, Reverification and Rehires.” This may assist employers in understanding that there is no requirement for employers to update the Form for employee name changes. We still believe recording name changes is a best practice if handled consistently for all employees in an effort to avoid discrimination and document abuse claims.

## What are the changes to the actual Form I-9?

### *List of Acceptable Documents*

Significantly, the new Form I-9 includes a revised List of Acceptable Documents on the last page. List A, Box 5 provides more concise guidance for a non-immigrant alien authorized to work for a specific employee because of his or her status. The most important change to List C, Box 1, where explicit guidance for employers regarding restricted Social Security Cards is offered. Employers are reminded that Security Cards are not acceptable as List C documents if they include one of the following restrictions: (1) Not Valid for Employment; (2) Valid for Work Only with INS Authorization; or (3) Valid for Work Only with DHS Authorization.



Unfortunately, the List of Acceptable documents remains glaringly incomplete with regard to guidance on temporary work authorization documents for employees benefiting from H-1B portability, CapGap, STEM extension, certain non-immigrant extensions of stay or those in Asylee status presenting I-94s and a stamp as well as Conditional Permanent residents presenting I-551 cards with I-797 notices of action. While these documents are referenced in various places in the new M-274, long gone is the chart of temporary work authorizations that previous version of the Handbook provided. Employers would have benefited from a comprehensive list of acceptable documents in one place, instead of having to page through the Handbook to determine if a certain document is acceptable. This oversight on the part of the USCIS, whether intentional or not, almost invites employees lawfully authorized to work, including Asylees and Conditional Lawful Permanent Residents, to be incorrectly deemed unauthorized to work.

<sup>2</sup> This scope of this article does not include a discussion regarding date of hire vs. date of work for pay, but the authors remind employers that, while there may be different ways, consistency is critical for any organization.

## What if my company uses an Electronic I-9 system?

The new form affords no surprises to the human resource and legal community as the government has previously released the draft form. In fact, the comment period actually afforded stakeholders ample opportunity to offer input into the final form. It is assumed that all reputable electronic I-9 providers used the draft form to consider the necessary updates for their systems. These vendors now have a sixty-day grace period to implement all the changes. If your vendor has not contacted your company about the new Form, you may wish to obtain confirmation that there will be no delays in implementation. Furthermore your company may want to ask for assurances that the new form will be fully tested and bug free prior to the required implementation of the new form. Remember effective May 7, 2013, prior versions of the Form I-9 (Rev. 08/07/09 Y and Rev. 02/02/09 N) either in paper or electronic format will no longer be acceptable for use. Use of prior versions of the Form I-9 past May 7 will be counted as [technical violations](#) should the employer be audited by Immigration and Customs Enforcement (ICE) which, if left uncorrected, can range from fines of \$110 to \$935 each.<sup>3</sup>

SUBSTANTIVE / UNCORRECTED TECHNICAL VIOLATION FINE SCHEDULE			
SUBSTANTIVE VERIFICATION VIOLATIONS	STANDARD FINE AMOUNT		
	1ST OFFENSE \$110 – \$1100	2ND OFFENSE \$110 – \$1100	3RD OFFENSE + \$110 – \$1100
0% – 9%	\$110	\$550	\$1,100
10% – 19%	\$275	\$650	\$1,100
20% – 29%	\$440	\$750	\$1,100
30% – 39%	\$605	\$850	\$1,100
40% – 49%	\$770	\$950	\$1,100
50% or more	\$935	\$1,100	\$1,100

See <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>

## What should employers do now?

Employers need to spend time familiarizing themselves with the changes to the new Form I-9 and the new M-274 Handbook for employers. It is imperative that all U.S. employers take note of the new Form I-9. Start distributing the new Forms now and request all previous blank versions of the forms be discarded.<sup>4</sup> While the new Form I-9 offers clarity to employers, the potential to make mistakes appears to have increased. The additional information to be captured requires attention to detail by both the preparer and the employee. Employers must immediately train their employees on the new requirements as well as the anticipated trouble

<sup>3</sup> Based on the [Matrix](#) Immigration and Customs Enforcement utilizes fines may be higher.

<sup>4</sup> For those of you skimming this update do not discard any older forms completed for active employees or terminated employees within the retention period. Again, do not throw away any employee Form I-9s -- only blank forms due to expire on May 7<sup>th</sup>!

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spots. Review your protocols and ensure that all your immigration compliance specialists understand the changes. The release of the new form also provides a wonderful opportunity to ensure your company's processes, procedures and policies are updated. If your company uses E-Verify, it is also an excellent time to monitor use of the system and ensure compliance.

## Conclusion

While both the Obama Administration and Congress are engaging in a dialogue over [Comprehensive Immigration Reform](#), a key component of most reform proposals includes increased worksite enforcement and regulation of employers hiring undocumented workers. It is expected that ICE's inspection of Form I-9s will continue to be issued and employers will continue to be [fined](#), regardless of what the Form I-9 looks like. The message remains the same: be proactive; review your immigration-related compliance. Seize the release of the new Form I-9 as an opportunity-review your exposure and take action to minimize it.

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