

I-9 Compliance and Issues on Hiring Foreign National Workers

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You say INS, I say CIS, let's call the whole thing Immigration

- ✍ U.S. Department of Homeland Security Citizenship and Immigration Services (CIS) as of 3/1/2003
 - ✍ f/k/a Bureau of Citizenship and Immigration Services (BCIS)
 - ✍ f/k/a Immigration and Naturalization Services (INS)
- ✍ Department of Homeland Security (DHS):
 - ✍ CIS (responsible for adjudications)
 - ✍ Bureau of Customs and Border Patrol (BCBP)
 - ✍ Immigration and Customs Enforcement (ICE)

DHS, CIS, INS

What's the Difference?

- ✍ Security is the focus of the DHS.
 - ✍ CIS functions taking longer to process and higher levels of scrutiny; no such thing as a routine case; customer service often slow (at best).
 - ✍ Critical for employers and foreign workers and students to carefully follow immigration regulations.
 - ✍ Future consequences of unauthorized employment could be severe for the foreign national.

Immigration Basics

- ✍ Basis for U.S. work authorization
 - ✍ Birth
 - ✍ Through CIS
 - ✍ Naturalization
 - ✍ Refugee or asylee
 - ✍ Permanent resident
 - ✍ Nonimmigrant granted temporary work permission

(See handout U.S.C.I.S. *Employer Information Bulletin 2* for guidance on immigration terms.)

Work Authorization for Foreign Nationals (Aliens) is Incident to Immigration Status, Not Visa

✍ Visa vs. Status

- ✍ A visa is travel document that permits the holder to apply for admission to U.S. during period of the visa's validity; it has no relationship to how long the holder is authorized to be in U.S.
- ✍ Immigration status is the classification under which an alien is admitted (e.g., F-1 for student) and the period of time authorized to stay – shown on the Form I-94 issued at the border point of entry. Time may be date specific or “D/S” for duration of status, i.e., so long as they are following the rules for visa classification.

Immigration Status

- ✍ May change once an individual is in the U.S.
 - ✍ If granted, will be shown on Form I-797
 - ✍ Typically includes replacement Form I-94 with new period of authorized stay under new classification.
- ✍ Employment Incident to Immigration Status
 - ✍ For any employer, e.g., lawful permanent residents (LPR)
 - ✍ Employer specific, e.g., F-1 student (generally on-campus), J-1 (if authorized), H-1B

The Basic Rule on Hiring Foreign Nationals

It is illegal to knowingly hire or continue to employ anyone not legally authorized to work in the U.S.

When Do You “Know?”

- ✍ Actual knowledge
- ✍ Constructive knowledge that may be reasonably inferred by certain conditions, such as:
 - ✍ Employer fails to or improperly completes I-9;
 - ✍ Employer has information available that would indicate no work authorization, such as Labor Certification;
 - ✍ Employer acts with reckless and wanton disregard for consequences of permitting unauthorized individual to introduce unauthorized alien into workforce.
- ✍ May not be inferred from appearance or accent.

The Immigration Reform and Control Act of 1986 (IRAC)

- ✍ Employers must verify the identity and employment authorization of every employee hired after 11/6/86 by use of I-9 Form.
- ✍ Employers may not discriminate against individuals based on citizenship, lawful permanent resident status or national origin.

I-9 Document Abuse

- ✍ It is unlawful to:
 - ✍ Require an individual to produce a particular type of work authorization;
 - ✍ Request more documents than the law requires (unless investigating “known” violation;
 - ✍ Refuse to accept documents that appear to be genuine on their face
 - ✍ Refuse to hire individual because document has expiration date.
- ✍ These actions violate IRAC’s anti-discrimination provisions or Title VII of the Civil Rights Act.

Legally Obtain Immigration Status Information During Recruitment

- ✍ Avoid “surprises” after an offer has been made. During interviews you may ask:
 - ✍ “Are you legally authorized to work in the U.S.?”
 - ✍ Only if “no”: “What is your immigration status?”
 - ✍ If “yes”: Will you now or in the future require sponsorship for employment visa status?”

Ask *all* candidates.

Recruitment Questions, con't.

- ✍ You CANNOT ask:
 - ✍ Are you a U.S. citizen?
 - ✍ Are you a lawful permanent resident?
 - ✍ What kind of work authorization do you have?
 - ✍ How did you obtain citizenship/green card?
 - ✍ What is your home country?
 - ✍ Do you have work authorization for an unlimited time?

What is the Employer's Standard of Review for Documents?

- ✍ Must accept an I-9 List document if it *reasonably* appears on its face to
 - ✍ Be genuine; and
 - ✍ Relate to the individual who presents it.
- If not, you must explore further.

Original documents only except certified copies of birth certificates, if applicable.

Who is an “Employee?”

- ✍ “An individual who provides services or labor for wages or other remuneration.” 8 CFR 274a.1(f).
- ✍ Note: DOL position is that individuals doing work for which someone is normally compensated must be paid. Foreign workers cannot “volunteer” to do work that they are not legally authorized to perform; workers who do so violate their immigration status and the employer violates the law.

Up-date Your I-9 Resources (?)

- ✍ The “current” (downloadable) version of the I-9 (including the *Lists of Acceptable Documents*) and *Handbook for Employers* (Form M-274) are dated 11/21/91. They do not reflect changes in regs effective since that date; new versions expected within year. (SEE handout page 16 for details on effective changes in regs re: acceptable I-9 documents and *receipt rule*.)
- ✍ Until new I-9 published:
 - ✍ Continue to use “current” version of I-9 and Lists (don’t refuse documents just because of new regs)
 - ✍ But DO follow new *receipt rule*.

I-9 Receipt Rule

When is a Receipt Acceptable in Lieu of Original?

New regulations restrict use of receipts. Handout p. 19. Receipts acceptable for:

- ✍ Application for replacement (lost, stolen, damaged) EAD – NOT for initial hire or expired EAD.* Actual document must be produced within 90 days.
- ✍ Form I-94 w/ temporary I-551 stamp may be accepted as proof of LPR, but Form I-551 must be presented within 1 yr of issuance.
- ✍ Form I-94 showing refugee status, but after 90 days must produce either unrestricted SS card (along with List B identity document) or Form I-766, EAD. Handout p. 24.

Receipts NOT acceptable:

- ✍ Employment less than 3 days
- ✍ Notice on Form I-797 for
 - ✍ Application for EAD card
 - ✍ Application for change-of-status

* Unless 240 Day Rule applies; see later slide.

I-9 Exceptions

✍ I-9 not required:

- ✍ Employees hired before 11/6/86
- ✍ Independent contractors
- ✍ Casual hires (sporadic, irregular or intermittent employment, such as a domestic worker)
 - ✍ Once-a-week work requires I-9

Re-verification not required:

- ✍ Certain changes in employment such as temporary leave, with or without pay, or change in work location without change in employer.

I-9 Completion – When?

- ✍ Section 1 must be completed by the employee at the time employment begins (Day 1).
- ✍ Section 2 must be completed by the employer by the 3d day of employment (or by the 1st day if working 3 or fewer days).
- ✍ Section 3 (if applicable) must be completed by the expiration date of the foreign national's work authorization.

Do not back-date entries; supplement or add note to explain good-faith attempt to comply, if necessary.

I-9 Completion – Common Problems

- ✍ Section 1 – make sure employee completes all items, signs and dates. If not signed and dated, employer assumes liability for false statements.
- ✍ SSN: OPTIONAL for I-9 (but required for other tax forms). Handout p. 18. If approval is pending, write “pending;” update once number is received. Initial and date change.

I-9 Completion – Common Problems

✍ Section 1 – the 2d and 3d boxes:

✍ *Alien # A_____* = the number on the Alien Registration Card or EAD card.

✍ *Alien Authorized to work until ___/___/___ (Alien # or Admission # _____)* = expiration date of work permission and the number either on the EAD card or on the I-94 card.

I-9 Completion – Common Problems

✍ Section 2 – Basic Rules

- ✍ Employees must always have choice of what documents to present.
- ✍ You cannot ask to see specific immigration document.
- ✍ Do not over document – stay on one side or the other of the “documentary line” dividing list A documents from List B and C.
- ✍ Be sure to record date document expires, if applicable.

I-9 Completion – Common Problems

✍ Section 2, con't.

- ✍ If a driver's license is provided under List B, be sure to specify the state of issuance.
- ✍ Do not sign the *Employer Review and Verification* unless you have *personally* viewed all the documents; if agent reviews, agent signs.
- ✍ Document the expiration date of the EAD, if applicable.

I-9 Completion – Common Problems

- ✍ Section 3 – Reverification of time-limited EAD – by date of expiration. Remember *receipt rule* applies. Note new reverification date, if applicable
 - ✍ Establish system to ensure timely notice to employee
 - ✍ May choose to reverify employee re-hired within 3 years of original I-9 if EAD expired.
 - ✍ Temporary evidence of LPR (I-551 stamp in passport) must be reverified; LPR “green card” (Form I-551) not subject to reverification.

I-9 Special Issues

✍ H-1B Portability

- ✍ Individuals holding valid H-1B may “port” or work for another employer upon *filing* the new H-1B petition – no EAD yet approved.
- ✍ No clear guidance for documentation.
- ✍ Suggestion: note “H Portability” on I-9, and attach copy of Receipt of Notice issued by CIS. Amend when approval received.

I-9 Special Issues

✍ F-1 Students

- ✍ On-campus employment authorized so long as maintaining status.
 - ✍ CIS recommends requiring no documents to “prove” status, but should establish some procedure to check with campus international student advisor.
- ✍ Generally must have valid EAD to work off-campus.
 - ✍ Optional Practical Training limited to one year.

Speaking of F-1 Students

- ✍ “On-campus” generally means literally that.
 - ✍ Student at one system school NOT automatically authorized to work on campus of another school or Office of Chancellor;
 - ✍ Multi-campus locations of same school probably o.k.Always work with international student advisor if unclear.

- ✍ Off-campus employment may be authorized under limited circumstances, but would need international student advisor’s assistance to obtain EAD

I-9 Special Issues

✍ The 240-Day Rule

- ✍ Certain classifications of workers may continue to work for their sponsoring employers while an application for extension is pending; these include J-1, H-1B, and TN. So long as the application was filed in good faith and before the original status expired, they may continue to work in the same position for 240 days or until otherwise notified. This is a rare exception to the *Receipt Rule*.

I-9 Special Issues

- ✍ How to Document Continuing Employment Eligibility Under 240-Day Rule?
 - ✍ No clear guidance
 - ✍ Keep copies of delivery receipts, cancelled checks, etc.
 - ✍ Update expired employment authorization in Sections 1 and 2 with extension information – initial and date.

The Immigration Reform and Control Act of 1986

✍ Penalties for Non-compliance

- ✍ Civil penalties for employing unauthorized workers: \$250 – \$10, 000 per alien (3d offense)
- ✍ Paperwork violations initial hires: \$100 - \$1,000 for each I-9
 - ✍ Technical: missing information on I-9 Form
 - ✍ Substantive: no I-9 Form; missing information on I-9 Form that tends to show lack of verification or improper documents reviewed or verified
- ✍ Penalty affected by mitigating/aggravating factors

I-9 Form Retention

- ✍ Retain 3 years after employment begins or one year after termination, whichever is longer. *See System Personnel Records Document Retention Schedule.*
- ✍ Must be made available to CIS upon 3 days' written demand. No requirement that Forms be maintained in one central location, but keeping terminated employee forms separate may be advisable.

Tax Procedures

- ✍ Remember that the Office of the Chancellor Tax Services has procedures and forms to be used when hiring non-resident aliens (note that student workers have separate procedures).

See:

http://www.financialreporting.mnscu.edu/Tax_Services/index.html

Or contact Steve Gednalske (651) 632-5016, or Ann Page (651) 632-5007.

SSA Issues

- ✍ Initial assignment for all foreign national taking longer due to additional security checks.
 - ✍ Know system procedures to use before SSN obtained and/or permissible use of “dummy” numbers.
- ✍ As of 10/13/04 students must present original proof that they have been authorized by their school to work and *have secured employment or a promise of employment* before a SSN will be assigned.

HR should work with international student advisors on standard letters.

H-1B Issues

- ✍ Discretionary campus decision about whether to sponsor employees for H-1B at all or for certain types of positions, based on legitimate biz reasons. Remember, H-1B only for professional occupations (4 yr degree usual).
- ✍ Consider time and costs (approx. \$3,000 attny and filing fees for initial 3 years, not including \$1,000 optional premium processing); return home airfare if terminated, etc. Filing petition is *employer's* responsibility.
- ✍ Establish a policy/procedure for deciding
 - ✍ Who makes decision? HR should participate (at least!)
 - ✍ Clearly establish who has authority!

H-1B Issues

- ✍ H-1B employment is employer-specific, but:
- ✍ An H-1B may be employed by more than one employer at once.
 - ✍ Each employer must file separate petition.
 - ✍ May not receive honorarium for “work” for another employer unless on behalf of sponsoring employer.

Employment-based LPR Petitions

- ✍ No legal requirement to assist.
 - ✍ But may to help keep employee. May not assist with dependents.
- ✍ As with H-1B, establish procedure to decide.
 - ✍ Instructors may be eligible for a streamlined version of LPR: “special handling,” which must be filed within 18 months of initial hiring.
 - ✍ Contact immigration attorney to explore as far in advance as possible.

Resources

✍ www.uscis.gov

✍ Office of General Counsel

✍ Kris Kaplan (651) 296-3905;
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✍ We're all in this together!