Untruth in Advertising: The Mysterious "Rebranding" of Immigration Form I-9

by Angelo A. Paparelli

The line between Madison Avenue, the birthplace of the advertising industry, and Pennsylvania Avenue, the center point of the Executive Branch of government, seems ever more blurred. When these two avenues, however, are intersected by Baker Street, the residence of Sherlock Holmes, the blur becomes an unsolved puzzle of intrigue.

This small stroll down the Grid begins in the most pedestrian way. As a matter of routine, when government functions are changed and federal agencies given new monikers by act of Congress, the agencies and the affected public are often left with the detritus of stockpiled old forms bearing the former agency's official name. The logical bureaucratic solution is to publish the forms anew with name of the successor agency emblazoned at the top, while allowing the public a reasonable period to continue using the old form so that paper is not wasted and forests are not clear-cut any sooner than necessary.

That was then, this is now. Enter Madison Avenue. Today, government forms are not merely published with the name of the new agency; they are instead "rebranded." Witness the June 21, 2005, proclamation by press release of USCIS and ICE (http://uscis.gov/graphics/publicaffairs/newsrels/i-9_050621.pdf) which announces the rebranding of the Employment Eligibility Verification (Form I-9) used by every U.S. employer to legitimize the employment eligibility of every newly hired worker. As these two units of the Department of Homeland Security (DHS) announced:

> USCIS, an entity within DHS, presently maintains many of the immigration forms that USCIS and ICE inherited from the former INS [Immigration and Naturalization Service]. USCIS is currently rebranding these forms, including the I-9, to reflect the transfer to DHS.
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> Aside from replacing outdated references to the Department of Justice and the former INS with references to DHS and its components, the current edition of Form I-9 is the same as the 11/21/91 edition.

Where, then, does Baker Street irregularity arise?

When USCIS first issued its new version, the published I-9 form indeed contained a substantive change in Section 1 (the employee attestation portion of the form). The newly released version of the form split a two-part attestation that every eligible employee could choose, namely, that he or she is "a citizen or national of the United States," into two separate choices. Under this new version, the employee could attest to

being a U.S. citizen, a U.S. national,[1] a Lawful Permanent Resident (or green card holder) or an alien with a time limit on the right to work in the United States. Thus, the employee could no longer equivocate in answering by checking the combined box (U.S. citizen or national) and must instead affirmatively choose one of four options. The combination of both the "citizen" and "national" options into a single attestation box is significant because some aliens were able to avoid criminal responsibility for falsely claiming U.S. citizenship and the resulting loss of green-card eligibility.[2]

So, where's the mystery? Well, it seems that from its original publication of the new form I-9 to today, the USCIS switched forms without providing an explanation. The new "new" I-9 form again combines U.S. "citizen or national" into a single selection. To see for yourselves, take a look at the I-9 recently posted on the Web sites of two universities, the New Jersey Institute of Technology (http://www.njit.edu/humanresources/pdf/i-9.pdf) and the University of Oklahoma (http://www.ou.edu/ohr/forms/9.pdf) – both of which break out "citizen" and "national" as separate choices – with the official version now published by USCIS (http://uscis.gov/graphics/formsfee/forms/files/i-9.pdf), which inexplicably resumes the confusing combination of the two selections.

What did the USCIS and its sister enforcement agency, ICE, intend by this formulaic sleight-of-hand? Surely, it would have been reasonable that the agencies announce an

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[1] The Department of State explains how an individual under U.S. immigration law can be a U.S. "national" http://travel.state.gov/law/citizenship/citizenship_781.html. While one interpretation of the term refers to "certain inhabitants of the Commonwealth of the Northern Mariana Islands, who became United States citizens by virtue of Article III of the Covenant, to opt for non-citizen national" status, elsewhere in the Immigration and Nationality Act -- Section 101(a)(22) -- "national" is defined as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." Could not an undocumented immigrant who is well-settled in this country, perhaps arriving here long ago as a young child, consider it reasonable and true that s/he "owes permanent allegiance" to the United States?

[2] As noted in the minutes of an April 18, 2001 published meeting of the INS Texas Service Center with the American Immigration Lawyers Association (AILA InfoNet Doc. No. 01041902):

> [Question # 1] An alien who falsely represents or has falsely represented that he/she is a U.S. citizen to obtain a benefit under the INA or any federal or state law is inadmissible and not eligible for an immigrant visa or adjustment of status. No waiver is available in adjustment cases for such a false claim. Does the TSC agree that checking the block on form I-9 which states "I am a citizen or national of the United States" (emphasis added) is not a false claim to U.S. citizenship? The statute addressing false claims specifically refers to a false claim to U.S. citizenship and does not reference a false claim to being a U.S. national. Absent other evidence warranting the finding of a false claim to citizenship, will the TSC favorably adjudicate the application for adjustment submitted by an alien who has inappropriately checked the referenced box on form I-9?
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> Answer: The TSC recognizes the distinction between "citizen and national" of the United States. The TSC will continue to favorably adjudicate otherwise approvable 485 [green card] applications where the alien has checked the referenced "citizen or national" block of the I-9 unless there is other specific evidence of a false claim to US citizenship.

Compare, however, *Ateka v. Ashcroft*, a September 24, 2004, decision of the 8th Circuit Court of Appeals (No. 03-2962) that affirmed an order of removal (deportability) because the alien in question, though having checked off the combined citizen-or-national box on the I-9, had also affirmatively acknowledged to a government officer that he had indeed made a false claim to U.S. citizenship.

intention to rebrand the I-9 form and eliminate a loophole that allowed some unqualified individuals who falsely claimed U.S. citizenship to obtain green cards.

So why the bait-and-switch?

One possible explanation is that the agencies belatedly realized that a different form had mistakenly been published, perhaps one that had not yet been formally approved by the Office of Management and Budget under the Paperwork Reduction Act.

Whatever the reason for the unannounced change in forms, government agencies should not behave like dealers in a game of Three-Card Monty. It's time for the government to come clean and solve the mystery. USCIS and ICE should explain the reasons for the switch and vow never again to announce the publication of a rebranded but otherwise unchanged form, and then surreptitiously replace it with a different version. Let's see if DHS will 'fess up.

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