



January 25, 2016

Laura Dawkins, Chief, Regulatory Coordination Division
United States Citizenship and Immigration Services
Office of Policy and Strategy
20 Massachusetts Avenue NW
Washington, DC 20529-2140

**RE: Employment Eligibility Verification, Form I-9; Revision of a Currently Approved Collection;
80 FR 73200 (11/24/15); Docket ID USCIS-2006-0068; OMB Control Number 1615-0047**

Dear Ms. Dawkins:

The Alliance of Business Immigration Lawyers (ABIL) is pleased to submit these comments regarding the proposed revisions to Form I-9 and appreciates the opportunity to do so. The Alliance of Business Immigration Lawyers is comprised of 20 of the top U.S. business immigration law firms, each led by a prominent member of the U.S. immigration bar. ABIL member firms employ over 250 attorneys (700+ total staff) devoted to business immigration in 25 major U.S. cities, plus 25 international cities. More information about our organization is available at www.abil.com.

While we believe there may be legal issues with the request for information, we are limiting our comments to the substantive legal and practical issues that arise from the new proposed form and instructions. With our comments, we are making the assumption that current existing guidance, (for example: in the M-274 Handbook for Employers and I-9 central) will be revised in conjunction with any changes to the form and instructions. It is our understanding that links or references to specific page numbers will be added to the finalized set of instructions and into any guidance provided. In any areas where the guidance with the proposed I-9 and instructions are inconsistent with E-Verify guidance, we will also assume that those changes will be made. Therefore, we have not specifically noted where revisions should be made in those documents. ABIL also believes that certain changes being proposed would require a regulatory change in addition to changing the form and instructions. We are making the assumption that USCIS would be amending the regulations as appropriate to support any form changes.

We appreciate that USCIS is using technology to assist employers. We had been hearing for several years that USCIS was working on a "smart I-9." However, we strongly urge USCIS to hold off with implementing any "smart I-9" until it is fully functional, in both English and Spanish. Employers have

struggled with imperfect forms for many years and will welcome a form that makes their lives more efficient. However, in its current state, the proposed “smart I-9” muddies the waters by adding many more areas where employers can make mistakes. It does not appear that USCIS has fully beta-tested the proposed fillable form and we encourage USCIS to do so to see the problems, both logistically and factually. When tested, we found a number of areas where the information/guidance was not clear or was not consistent with other guidance provided.

It is also critical that USCIS not make changes in a vacuum. There are various changes going on in the immigration arena and it is critical that any changes to the I-9 form wait until those are determined and/or implemented. (For example, a proposed rule is currently in the comment period that will make changes to use of the EAD for Form I-9 purposes.) Having new policies come out at the same time as a new form adds significant confusion for employers. Additionally, we would like to request that USCIS consider a grace period of at least 120 days after the new form is published, until employers are required to use it, to ensure that there is time for appropriate guidance and training.

We recognize the amount of time and resources that have gone into this project. We encourage USCIS to use the fillable form with its instructions as a training tool, to be made available to employers through I-9 Central, until full implementation can be made.

While we strongly encourage USCIS to wait to implement the form, we are providing these comments to the proposed documents. As USCIS’ focus is on employer compliance, our comments are also based on our experience working with and representing employers in compliance matters. Due to the number of proposed changes, we have organized our comments to follow the order of the instructions and the form. We will then discuss the issues addressed in the two additional documents provided by USCIS, regarding the list of changes to the form and instructions.

Proposed Instructions for Form I-9

We recognize that USCIS is trying to be as thorough as possible with providing guidance. However, fifteen pages of instructions (up from six) for a two-page form seems excessive. Providing that much information is more likely to cause confusion and makes it unlikely that employers and employees will fully review the instructions. We are also concerned that employers using the paper version of the form may be hesitant to print out and provide instructions as required in an effort to save paper. A two-page form should not be this difficult and require this many instructions. This is in addition to the instructions and guidance in the M-274 Handbook for Employers, which is almost 70 pages, and on I-9 Central.

We encourage USCIS to consider whether much of the additional pages of proposed instructions is superfluous in nature and might be pared down significantly in favor of more concise language. The instructions should provide a simple, easy to follow overview for most essential matters, with additional guidance available in the M-274 as needed.

Page 1: General Instructions

We appreciate that changes have been made to the form to allow for more efficiencies if used electronically, including drop down lists and additional instructions. The changes will likely assist

employees and employers in completing the I-9 form and hopefully eliminate some of the more common errors made. We do question why the same changes haven't been made to the Spanish version of the form. Even though the Spanish version of the form is only used in Puerto Rico, the Spanish version may be used for reference and translation purposes. In fact, many employers (especially those with a large Spanish speaking population) do that. The need for additional instructions and drop down features are even more needed by employees whose primary language is not English. Therefore, having the Spanish version available will allow for more compliant I-9s. And for those employers in Puerto Rico who are using the Spanish language version, it seems prejudicial that they won't have the same compliance opportunities by using this new form with the new features. Therefore, we urge USCIS to consider having the same changes made for both the English and the Spanish versions of the form before publishing the final version. If this is not possible, we request that USCIS set a time limit of no more than six months after publication of the new English version of the form to make the Spanish version available. Finally, we use this opportunity to suggest (as many have done before) to consider allowing the Spanish version of the form anywhere in the United States as Spanish speakers are growing exponentially every day in this country.

Page 1: Obtaining and Using Forms I-9

We understand that USCIS is trying to implement a "smart I-9" and that USCIS' ultimate goal is to assist employers with their I-9 compliance. We are concerned that the current proposed form seems to fall short in its goals and will only partially increase compliance. For example, the instructions state "Forms I-9 obtained from the USCIS website are not considered electronic Forms I-9 under DHS regulations and, therefore, may not be electronically signed." We urge USCIS to consider waiting to release this revised electronic form version until it contains tools that allow for a compliant electronic signature. We also urge USCIS to provide additional warnings and guidance to employers regarding retention of the forms after signature. Many employers are unclear regarding the current guidance on the use of a pdf document to save completed I-9 forms.

Requiring employers to still print out the electronic form and having employees/employers handwrite on it, is problematic and removes many of the efficiencies inherent in the use of an electronic form. In addition, much of the new guidance and safeguards are really only available for those employees and employers using the electronic version of the form. Realistically and practically, many people will still use the paper version. By then limiting the guidance for those using the paper version, you create two classes of employers. It is essential that the same instructions and guidance be provided to employers and employees, regardless of how the form is completed, if the goal is increased compliance. Realistically, based on the logistics, you will also have a class of employers whose I-9 forms are completed half on paper and half electronically, adding to the compliance concerns.

Additionally, the language in the last sentence of page 1, "You are not required to print, retain or store the page containing the Lists of Acceptable Documents..." may lead to confusion regarding the responsibility of the employer to provide the employee with all instruction pages. The Form I-9 indicates that "instructions must be available during completion of this form" and presumably the Lists of Acceptable Documents are part of these instructions. Therefore, we recommend that USCIS clarify this guidance.

Page 2: Entering Your Employee Information

Last Name (Family Name) and First Name (Given Name) - We request that USCIS review its guidance on how an employee should list his name if he has only a single name. The inconsistent guidance among the DHS agencies (including CBP, DOS, ICE and USCIS) causes a lot of confusion and concern. On the one hand, USCIS is advising employees to list their full legal name on the form. However, USCIS is then advising that if there is only one name, to place it in the “last name” field and list “N/A” in the “first name” field. This form is signed under the penalty of perjury. Therefore, we are concerned about the advice to an individual to incorrectly list their name if they believe that their one name should be their first name.

Middle Initial - if a person does not have a middle initial, the proposed instructions state to now enter N/A. This is a recurring theme in the new instructions. We urge USCIS to reconsider this as it is a significant burden on employers and employees when completing the form. In using the paper form, the entire form will potentially be filled with “N/A” which is not only unnecessary but will subject employers to potential fines by ICE. In the past, ICE has said that where the instructions to the form require specific action, they can then hold employers liable for the failure to follow it. We understand that in some instances, it makes sense to list N/A in a field (for example, where there is no expiration date) to show that a field wasn’t just overlooked. However, to list N/A everywhere where you don’t have information to provide seems unnecessary. In addition, the use of the abbreviation N/A means “not applicable” and in many cases, when a person chooses not to answer, the more appropriate answer would be “none”. Therefore, if USCIS insists on keeping the N/A requirements throughout the forms, we suggest that the guidance allow for the use of “N/A”, “none” or similar statements.

Other Last Names Used – we appreciate that USCIS is revising this field from “All other names used.” However, this section still needs more guidance. We request that USCIS provide information on how to complete the form if there is more than one last name that has been previously used. If someone has been married and divorced more than once, or has a hyphenated last name that is not always used, this is common. On the other hand, we also question the purpose of this field. It was our understanding that this field is helpful in determining identity and to review documents which may be in more than one name. It is not uncommon for people to have changed (or used different) first names and in some cultures, a first name is changed upon marriage. Therefore, if the purpose of this field is really to provide clarity, we encourage USCIS to consider whether this change from “All Other Names Used” to “Other Last Names Used” should be made.

Address – We ask USCIS to provide further guidance on this field. The proposed instructions advise employees to provide the “current address of your residence.” The term “residence” has various legal definitions which can add to the confusion. This is important because we would not want an employee to use an incorrect definition of residence on this form that could then be held against him in a tax or other legal context. In many cases, the Form I-9 is completed when a person is in a temporary living situation, for example, at a hotel or in temporary housing after relocating for a job. Therefore, we suggest that USCIS revise the guidance to state that an employee should list the address of where they are staying at the time that the I-9 is completed, even if it is temporary. In addition, we suggest that USCIS add a clarification that the address of the employer should not be listed in this field, as it is not uncommon for an employee in a temporary living situation to list the Employer address in Section 1.

Apartment Number – the instructions state to enter N/A if there is no apartment number. Again we strongly request that USCIS reconsider this N/A requirement as it is unnecessary and overly

burdensome. If a person leaves this field blank, the assumption should be that there is no apartment number.

U.S. Social Security Number – The Social Security Number (SSN) is voluntary except for E-Verify employers. While stated in the instructions, many employers are confused by this guidance as an SSN is needed for other employment-related purposes. We ask USCIS to consider stating on the face of the form (as was done in a previous version) that the SSN is voluntary.

If a person does not yet have an SSN, previous guidance was to leave this section blank and then, have the employee go back and complete Section 1 when the SSN was received. We strongly encourage USCIS to continue with this guidance and not make the proposed change. The proposed instructions state that if a person has applied for but not yet received an SSN and the employer is in E-Verify, the employee needs to handwrite “Applied for- In Process” on the form after printing. We ask USCIS to reconsider this requirement as overly burdensome and confusing. If USCIS really feels that it is necessary, then there should be a way to enter this electronically (at least on the electronic version of the form) as employers and employees are unlikely to remember after printing the form to go back and write this information in, as suggested in the instructions. However, regardless, USCIS has not provided any guidance as to what to do once the SSN is received. Is the “Applied for- In Process” to be crossed-out with the SSN written in? Also, since E-Verify cannot be completed without the SSN, it seems unnecessary to write in this statement for only a few weeks and seems more efficient for an employee to leave this field blank until the SSN is available.

Prior versions of the Form I-9 contained boxes for each of the nine digits of an employee’s social security number. These useful guides helped ensure that employees accurately and legibly completed the field for the social security number. The proposed Form I-9 does not contain these boxes. We strongly encourage USCIS to restore this feature on the Form I-9 as a useful deterrent to sloppy or illegible numbering when the form is completed on paper by the employee. This feature was particularly helpful to employers enrolled in E-Verify as accurate numbers are essential to avoiding un-necessary and burdensome Tentative Non-Confirmation Notices in the E-Verify system as a result of bad handwriting.

In addition, in testing the fillable form, it appears that there are not safeguards to ensure compliance. For example, the system will allow a clearly false SSN to be entered (111-11-1111). In addition, it will allow for an ITIN to be entered in place of a SSN. We understand that the system is not designed to communicate with the Social Security Administration and cannot determine a valid SSN. Nevertheless, we suggest that USCIS review the system requirements to ensure that obviously false numbers not be accepted. Finally, if the employer is in E-Verify, there was no warning that the field could not be left blank. This would only come to light if the employee had a question and clicked on the helper text.

Employee’s Email Address – the proposed instructions state to enter N/A if this field is not used. As this is a voluntary field, we ask USCIS to reconsider this requirement as it is unnecessary and overly burdensome. In addition, we ask USCIS to clarify the sentence “The employer’s email address should not be used.” This implies that the employee should use a personal email address (for example, Gmail) rather than their work email address. Is that what USCIS means and if so, why? An employee should be able to list any email address that he uses and that he wishes to receive correspondence. If USCIS means to say that the employer/HR contact’s email address should not be used in this field, we request that USCIS make the guidance clearer.

Employee's Telephone Number - the instructions state to enter N/A if this field is not used. As this is a voluntary field, we ask USCIS to reconsider this requirement as it is unnecessary and overly burdensome. In addition, there should be a system in place to prevent obviously false phone numbers from being entered. While the system is not designed to confirm a specific number, it should not allow (as it currently does) for the phone number to be listed as 111-111-1111 or something similar.

Page 3 - Attesting to Your Citizenship or Immigration Status

4. Guidance on **An alien authorized to work** – we commend USCIS for providing this clarifying guidance which was lacking in the previous I-9 instructions.

Alien Registration Number/USCIS Number – the instructions state to enter N/A if this field is not used. As this is a voluntary field, we ask USCIS to reconsider this requirement as it is unnecessary and overly burdensome.

We would like to commend USCIS on making a change to the current additional requirements for those employees who check box 4, Alien authorized to work. Many stakeholders have been very vocal about the issues regarding delays and concerns surrounding the electronic I-94 cards and we appreciate that USCIS is no longer making that a mandatory requirement, but instead an option. However, because individuals are now being given an option to provide the A number/USCIS number or the I-94 admission number or the passport information number and country of issuance, we request that USCIS reconsider requiring an N/A to be listed in the other two options that are not used. If only one option is required, then it is enough to have one filled in and requiring the N/A is overly burdensome and unnecessary.

We would also like USCIS to reconsider requiring the employee to complete a new field that specifies whether the employee is providing an Alien Registration Number or a USCIS Number in addition to listing the actual number. It appears from the proposed Form I-9 “pop-up” guidance and data validation features that this is only a requirement if the form is completed electronically. For example, the proposed Form I-9 now contains two lines for entries to the right of Alien Registration/USCIS Number for employees attesting to being a lawful permanent resident or alien authorized to work, but there is no reference in the instruction or on the form itself which specified that the employee needs to list whether the number provided is an Alien Registration Number or USCIS Number. Having different requirements based on the version of the form causes confusion for employees. If two lines are provided on the Form I-9 for this information, it doesn't make sense not to require it of employees who complete the form in paper. We suggest that this field either be removed or be required of all versions of the form, regardless of how the form is completed.

Page 4 – Date

Due to the requirement that the employee print the form and handwrite the date, the system then lacks a warning if the I-9 is completed late. The same issue will occur in Section 2 with the employer signature. We encourage USCIS to revise the system to allow for both electronic signature and date, to then provide these reminders/warnings. One of the biggest compliance issues is timely completion of the form, so adding this option will greatly assist in the goal of employer compliance.

Page 4- Completing the Preparer and/or Translator Certification

In our experience as attorneys, it is uncommon for there to be multiple preparers/translators. In fact, it is not that common to use the preparer/translator section in general. Therefore, we ask USCIS to reconsider requiring the employee to check the box stating that no preparer/translator was used. It is unnecessary and overly burdensome. If this section is blank, it can be assumed that one was not used. More importantly, this box is likely to be overlooked as the section states to only complete the section if a preparer/translator was used. If USCIS wishes to keep the box, it should be placed above the preparer/translator section.

In addition, we ask USCIS to provide further guidance regarding the new penalties for a preparer or translator. The failure for a preparer/translator to sign the form is currently a paperwork violation. However, under the new proposed instructions, it would be a criminal violation. While we understand the importance of wanting preparers/translators to take their job seriously, we are concerned that this added burden will discourage people from acting as preparers/translators and may cause employers to disallow its employees to act as the preparer/translator for other employees due to the added legal liabilities. In addition, we believe that a regulatory change would be required for this change.

Page 5 – Address (of preparer/translator)

It is not uncommon for a representative of the employer to act as a preparer/translator for the I-9 process if Section 1 is completed on the first day of work. We understand the need for information regarding the person acting as a preparer/translator. However, we ask USCIS to reconsider its new guidance requiring that the address listed on the form be that of the person’s residence. It is not uncommon, under current guidance, for the individual to list the employer’s address when they are working on behalf of the employer. The individual may not want their home address to be available to the employee and requiring this listing may dissuade a person employed by the employer (for example, an HR representative) to be willing to fill the role of preparer/translator.

Page 5 - Presenting Form I-9 Documents

We appreciate that USCIS has added additional information and clarification for employees. We ask USCIS to consider adding the following. In paragraph two, the last few sentences – it states “If you present List A documentation, you should not be asked to show List B or List C documentation. If you present a List B and a List C document, you should not be asked to show a List A document.” We agree with this guidance but it is not always a situation where the employer is asking for additional documents. It is a common occurrence where the employee provides documents in all three categories. Therefore, we suggest revising these sentences to read “If you present List A documentation, you should not be asked to show, and you should not provide, List B or List C documentation. If you present both a List B and a List C document, you should not be asked to show, and you should not provide, a List A document.”

Since USCIS is already providing guidance to explain an employee’s rights against over-documentation, we also suggest that USCIS add a sentence that states something similar to “Note that you should also not be asked to provide a document to confirm the box that you check in Section 1 regarding your citizenship or immigration status.” This is a good reminder for both the employer and the employee.

Page 6 – Receipts - There appears to be some additional information added to the instructions regarding reverification, which requires clarification. We understood from the prior guidance that the

employer must conduct reverification within 90 days after an employee presents an acceptable receipt. The use of a receipt often comes up with the initial completion of the I-9. However, the proposed instructions seem to say that in a case of reverification, the counting of the 90 days is from the expiration of the prior work authorization. Therefore, if the I-9 reverification is done in advance (ex. 30 days prior to expiration) then the employee actually has 120 days to provide the new document. Is this a correct understanding of the new guidance? We ask USCIS to clarify its guidance so that employers are able to calendar the correct dates and they are used to hearing about the use of a receipt for 90 days.

We also strongly encourage USCIS to consider how it provides guidance on receipts and the use of that word. Using plain language, an employer or employee often believes that all “receipts” are the same. However, in the I-9 context, USCIS is often using the term “receipt” to mean a receipt issued for a lost, stolen or damaged document under the 90 day receipt rule. Employers are then very confused when they read in one place that receipts in other contexts are not allowed, but in another place to use the I-797 receipt for a 240 day extension, in the AC21 portability context, or in a cap-gap or STEM OPT extension scenario.

Page 7- Entering Employer Information from Section 1

We would like to ask USCIS to reconsider requiring the employer to fill in a new field that confirms the employee’s citizenship status from Section 1. It appears from the instructions that this is only a requirement if the form is completed electronically and if not, the field is to be left blank. Having different requirements based on the version of the form causes confusion for employers and it is likely that they will wind up completing the field anyway. Logistically, unless both Sections of the electronic form are done at the same time, the information will not be able to transition over from Section 1 regardless.

In addition, if the purpose of the new field is to remind employers of this status when reviewing the documents in Section 2, again it doesn’t make sense to not require it of employers who complete a paper form. We suggest that this field either be removed or be required of all versions of the form, regardless of how the form is completed.

Additionally, the term, “citizenship status,” is a legal term of art that is potentially confusing an employer. It is foreseeable that many employers will simply mark “None” in this box rather than list the numbers associated with one of the four categories (Citizen, Non-Citizen National of the United States, Lawful Permanent Resident, or Alien Authorized to Work), particularly when the employee has not attested to being a U.S. citizen. We strongly recommend USCIS remove this un-necessary field.

Page 8 – List of List A documents

We would like to commend USCIS for providing this helpful guidance to employers as to how to appropriately list documents on the I-9 form. We believe this will significantly reduce the number of errors made in Section 2. However, we would like to ask USCIS to consider providing some leeway and suggest that an employer may use similar language. While the tables of instructions prescribing “What to Enter on Form” are helpful, the guidance therein appears to be inflexible and somewhat inconsistent with prior USCIS guidance and ICE enforcement policy on acceptable abbreviations. The language in the proposed instructions need to be revised to accommodate these prior permissible practices of

abbreviation. There may also be other times when more than one document name is legally correct and we do not want penalize employers for using one over the other.

In addition, we would like to ask USCIS to reconsider whether employers should be required to write both the document name and the form number in Section 2. If someone presents an EAD, that should be enough to satisfy the I-9 requirements, and the employer should not also need to write “Form I-766.” The same logic applies to the use of a Permanent Resident Card and requiring the use of “Form I-551” in addition. To require both is confusing and overly burdensome to employers as they rarely, if ever, refer to documents by the form number. In addition, in the case of an older Permanent Resident Card, which may be called an “Alien Registration Card”, it appears that USCIS is suggesting that the term “Alien Registration Card” not be used. We request clarification on that point.

Page 9 – Expiration date

In the proposed instructions, USCIS is requiring that any time a document does not have an expiration date, N/A be written. The reasoning is that only unexpired documents may be accepted. However, for certain documents in List B or C where there is obviously no expiration date (ex. Birth certificate, Social Security card), we ask that USCIS reconsider requiring an employer to write N/A as it is overly burdensome and unnecessary.

Page 11 - List of List C documents

While we again commend USCIS for providing guidance, we would like to point out a few areas where we believe changes are required. For those providing a Social Security Card, we would like USCIS to reconsider requiring employers to write the word “unrestricted” in front of “social security card” on the I-9 form. This is overly burdensome and we believe, legally incorrect as the official document title is a social security card. As only an unrestricted card may be accepted, it is redundant to write that on the form and in fact, the official name of the document is a social security card.

We would also like to request that USCIS reconsider its guidance that several of the List C documents be listed by their form number, rather than their actual title. It is confusing and inconsistent with the way that other documents are listed on the I-9 based on the new proposed guidance. For example, if an employee provides a Certification of Birth Abroad, that should be what is written on the I-9 rather than requiring an employer to write only Form FS-545. If USCIS insists on using the form numbers, then we request that USCIS be consistent and require the document title and the form number, as it is doing with the List A documents. Being consistent is the best way to avoid confusion by employers.

If an employee presents “An employment authorization document issued by DHS – (List C #8), it is currently standard practice for the employer to write the name of the actual document being presented. For example, a Naturalization certificate. We ask USCIS to reconsider its guidance to write “Employment Auth. Doc (DHS)” on the I-9 form in this situation. If the employer does not copy documents for I-9 purposes, there is no way to tell in an audit what was actually presented and more importantly, if it appropriately fits within this category.

Page 11 – Additional Information

We would like to suggest that USCIS provide more guidance on the use of this field for the specific examples that USCIS is providing. For example, is this a suggested field or mandatory? May employers

still write in the margins if they prefer? What exactly should be written for the various scenarios listed? While USCIS is calling some of the scenarios “special circumstances” these are common every day occurrences for employers who have foreign worker employees. Therefore, clear guidance should be provided.

We do commend USCIS for coming up with a better solution than “writing in the margin” by adding this new field. However, we ask USCIS to reconsider the guidance that the E-Verify case number be listed there and allow employers to write the E-Verify number at the top of the I-9 form which is a common practice. Giving an employer the option to write the E-Verify number in this new section is fine, but it should not be a requirement. In addition, the current E-Verify guidance states that an employer either needs to write the E-Verify number on the I-9 form or attach the E-Verify printout. It is unclear if this new proposed requirement changes that E-Verify guidance.

Page 11- Entering Information in the Employer Certification

Employee’s First Day of Employment.

We noticed that the clarification added in the last version of the form, about staffing agencies, has been removed. Has USCIS changed its guidance about how to list a first day of work for those individuals? If an employer may still list the date that the employee became part of the work pool we request that this information be re-added to the instructions. If this guidance has been purposely removed, we ask that USCIS provide further clarification.

Page 12 – Employers Business or Organization address

USCIS appears to have added a significant change in this section. USCIS is now advising the employer with more than one location to use the “most appropriate address that identifies the location of the employer.” This is very confusing and we ask USCIS to provide further clarification as to what they are asking employers to do. Many employers list the main headquarters address of the employer on all I-9 forms and we are unclear if USCIS is now advising that this cannot be done.

Also, please see our comments below on Page 16 regarding another clarification to the Employer Address, which is not in the instructions.

Page 13- Block A- New Name

We appreciate that USCIS continues to provide guidance that the new name field is only necessary if Section 3 is already being used. However, we believe that adding an additional clarifying sentence similar to “For other notifications of a name change, unrelated to Section 3, an employer may, but is not required to, use this field.”

Block B- we ask that USCIS reconsider requiring employers to write N/A if Section 3 is being used but not for a rehire. It is overly burdensome and confusing for employers.

Page 14 – Photocopying Blank and Completed Forms I-9 and Retaining Completed Forms I-9

We notice that there is a new sentence regarding retention, which is not on the current I-9 instructions. It relates to agricultural associations or employers, or farm labor contractors that are a recruiter or referrer for a fee. The proposed instructions state that these employers must keep all I-9 forms for three years from date of hire and are not able to purge forms at the “one year from termination” mark.

Can USCIS please provide further clarification on this requirement for certain types of employers? In order to avoid confusion, we believe that all employers should be subject to the same retention requirements. If USCIS meant to refer to those employers with seasonal workers who may not terminate employees between seasons, this should be further clarified as many of those employers are not agricultural (for example, resorts, amusement parks, universities). If USCIS wishes to keep the language as is, we ask USCIS to provide a definition of an “agricultural employer” and whether these requirements then apply to all employees of that employer.

Page 15 - Paperwork Reduction Act

We find it ironic that the form has changed from a two-page form with six pages of instructions to a two-page form with fifteen pages of instructions. This is not a way to reduce paper or paperwork. Regardless, the time estimated to complete the form has not changed from the current form of 35 minutes, which includes reviewing the instructions. Considering that the instructions have almost tripled we find this to be highly unlikely and ask USCIS to provide justification as to how that can be a correct time estimate. We also ask USCIS to strongly consider whether the benefit of the added efficiencies outweigh the additional burden on employees and employers.

New Proposed Form I-9

To avoid confusion, we will not repeat those issues which were already addressed above regarding the instructions. However, we provide the following feedback regarding the new proposed form itself.

Page 1 - Stop signs and Employer Completes Next Page

Despite this added warning on the current form, employees still often complete parts of page two in order to be helpful. We suggest also adding a warning at the top of Page two stating that only the employer should be completing this section. With the electronic version of the form, we believe that the dangers are even higher that the employee will complete Section 2 so this additional warning would be helpful.

Page 1- Use of the “Start Over” Button

We would like to ask USCIS to clarify the use of this button on the electronic version of the form. We understand that the proposed form will not be electronically “submitted” to anyone. However, current guidance does not allow an employee (at least who completes section 1 of the form with the employer) to just throw out the form and start over. While we appreciate why USCIS has added this feature (as a convenience) we are concerned about its use in actuality.

There is also no safeguard regarding who may use the “start over” button. In the case of a preparer/translator (where they may not be liability), we ask that USCIS provide guidance over the use of this option.

Page 2 – Employee name from Page 1

Based on our discussions with employers, this is the most overlooked field on the current I-9 form. We strongly encourage USCIS to reconsider how it is proposing to revise the form. The fields are even less visible, fading into the overall text and will likely again be overlooked by employers. If the goal is compliance, we ask USCIS to place the fields in a clearly visible section of the form.

Page 2 - Employee citizenship status

According to the proposed instructions, this field is to be left blank if the form is completed manually. We suggest that this should be written on the form to avoid any confusion. Otherwise, an employer is likely going to complete this field. In addition, the instructions assume that the employee and employer are together when the form is completed and that the information from Section 1 will be automatically carried over.

Page 3 – List of Acceptable Documents

We would like to encourage USCIS to provide some examples of what can be used under List C, item 8. There is no official guidance in the instructions or in the M-274 this. Instead, examples are only suggested in an FAQ on I-9 central. This is especially important as the FAQs are subject to change and often do, without warning. For example: A Naturalization certificate is often presented by employees as a List A document (which is not acceptable) and it would be helpful for employers to know that it can be accepted as a List C document (according to the I-9 central FAQ). We are concerned about potential issues with Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) where employers fail to accept a document that may be considered valid until this option.

Use of the Fillable Form - Ensuring Compliance

We would also like to suggest that USCIS beta test the fillable form as both an employee and as an “HR representative.” All guidance, under all scenarios, should be attempted. As attorneys who represent employers in these matters, we found the system to be a bit confusing in some places. Since the ultimate goal is compliance and USCIS has already put certain safeguards into place, we believe that others need to be added.

The following are a few examples from a test of the fillable form:

1. The fillable form allowed for the use of a PO Box in the address field. If the employee had a question about his address, he would have clicked the helper text and found that a PO Box can't be used. However, if he didn't click the helper text, that PO Box address would have appeared on the form and would be non-compliant. This is a recurring issue throughout the form as there is an assumption that someone will click on the helper text. However, it is more likely that people don't know what they don't know (meaning that they won't click on the helper text because they have no reason to think what they are doing is incorrect).
2. Many of the fields have unlimited character limitations. At least for certain fields, for example, when listing an I-94 card number, the system should know when there are too many digits. This is helpful because sometimes, an employer will use a visa stamp number rather than an I-94 card number. While we appreciate the flexibility of unlimited character fields, we ask USCIS if this makes sense for particular fields.

3. As mentioned already above, the system allowed for obviously false Social Security Numbers and phone numbers.
4. The system allowed for an expiration date in Section 1 to not match the expiration date of the document in Section 2 (for example, an I-94 card). There should at least be a pop-up warning if this occurs so that the employer can double check the information being provided.

As attorneys, we found the search for the appropriate document in all drop-down menus to be a bit confusing due to the extensive number of items within the lists. We believe that employers will be confused as well. This was due to the addition of the all of the options for receipts for each specific document as well as the use of several acronyms. For example, while the List of Acceptable Documents mentions 6 List A options, the drop down contains 17 items. In addition, the names of the documents in the drop down don't exactly match the List of Acceptable Documents. For example, if an employee is in H-1B status and provides an unexpired foreign passport with Form I-94, that is what the company representative will be looking for in the drop down. Instead, they need to know to pick "Foreign Passport. Work authorized nonimmigrant." We urge USCIS to re-review the information in the drop down menus and make them as clear as possible. We also ask USCIS to consider a better way to account for the use of receipts for lost, stolen or damaged documents. As stated previously, the use of the word receipt is confusing to employers and as listed in the drop down menus, employers may accept receipts inappropriately.

Table of Changes – Instructions for Fillable Form

To avoid confusion, we will not repeat any of the issues previously addressed above. However, we are providing comments on the additional document provided by USCIS.

Page 1 – What is the Purpose of this Form?

We are requesting clarification as to why the information about the prior use of the CNMI form from 2009 to 2011 was removed. This information is helpful to employers, especially when conducting a self-audit to ensure that the correct form version was used.

Table of Changes- Fillable Form

To avoid confusion, we will not repeat any of the issues previously addressed above. However, we are providing comments on the additional document provided by USCIS.

We encourage USCIS to provide practical and logistical guidance as to on how the electronic form would be completed. For example, is an employee likely to complete Section 1 on their own at home or at the employer's place of business? If at home, where/how would they save the form in order for it to be available to complete Section 2? If the employee completes Section 1 at home and prints it out (in order

to sign it), can the employer just complete Section 2 without having a completed Section 1 in the same format? If the employee is using the electronic form, how would an employee know to stop completing the form at the end of Section 1? Will the system automatically advise the employee to stop after Section 1? The system seems to be set up with the assumption that the employee and the employer representative will complete the form together, so that information can flow from one page to the next (at least with the electronic version). Realistically, this situation is going to be quite rare.

More importantly, we wanted to ensure that USCIS was aware of how many employers handle the I-9 process. Many technology employers, for example, conduct the onboarding process in large groups and with the use of iPads/tablets or where the employees are accessing the I-9 forms/instructions using their smart phone. We want to make sure that this fillable form is available and usable with those types of devices and does not require a PC.

Page 12 – helper text for A Lawful Permanent Resident

The purpose of the “helper text” is to assist employees and employers with the form. We understand that “green card” and “green card holder” are not legal terms. However, many employees and employees do not understand what Lawful Permanent Residency is. As a result, many LPRs often check the “Alien Authorized to Work” box. Therefore, we suggest saying something in this helper text that says something similar to “Note that this status is often referred to as a green card holder.”

Page 13 – Alien Registration/USCIS Number Selection Drop-down

The A number and the USCIS number are currently the same, and this is confirmed in several places. Therefore, it is confusing to require a new field to confirm whether the number being entered is the A number or the USCIS number. We suggest USCIS remove this required field to avoid confusion. If USCIS does not agree with this suggestion, then we ask that USCIS state on the form that if the two numbers are the same, that the employee has the option whether to list it as an A number or as the USCIS number.

Page 17 - 3-D barcode

The proposed instructions state that the information entered on the I-9 form will be readable by employers or the government through the use of QR code technology. We would suggest that USCIS provide instructions to employers on how to do this, or at the very least, a link to where employers can find the information. It does not seem reasonable to expect employers to learn how to do this on their own.

In addition, as there will still be certain areas of the form that may contain handwritten information, we ask USCIS to clarify how the technology would work and exactly what information will and will not be readable.

Page 17 - (Passport) Country of issuance

The Drop-Down information contains “all current countries recognized by the Department of State.” We are requesting guidance for employers on how to proceed if someone has a passport from a country that was previously recognized but is not currently recognized. Is there a drop-down option of “Other”?

Page 29 – Documents

We wish to commend USCIS for designing the system to not allow an employer to list a document in columns A, B and C. However, we request some clarifications on this section.

The system is designed to limit the documents based on the citizenship designation listed in Section 1 of the I-9 form. We want to clarify whether this new revision has been run past OSC. OSC has previously issued guidance to private I-9 software vendors that strongly warns against these types of limitations/restrictions on which documents an employee may present. While we understand that USCIS has “jurisdiction” over the I-9 form, an employer must still be concerned about ICE and OSC, both of whom are involved in the employment verification process. Has USCIS discussed this feature of the system with OSC and received their blessing? Is there any way for an employer to override the system if the documents are not inconsistent with the status?

Also, it appears that at least for the use of the electronic I-9 form, an employer must use N/A in List A if they use a List B & C document (or use N/A for B & C if they use a List A document). Is that required for the paper version of the form? It is not listed in the instructions and is overly burdensome and unnecessary. As an employer may not request a List A, B and C document, it should be assumed that the blank sections are N/A. We ask USCIS to reconsider this requirement.

Page 31 – Issuing Authority

We commend USCIS for providing the drop-down options regarding the issuing authority of certain document. It will alleviate some of the common problems (one of which is for employers to write “U.S. government”). However, this does seem to be a change from the prior guidance regarding the issuing authority. For example, for a U.S. passport, current guidance allows an employer to list Department of State, DOS, or National Passport Office, or “specific city” passport agency. This guidance implies that USCIS is stating that now, only Department of State is acceptable; is that correct? At least on the paper version of the form, we ask that USCIS clarify that all four of the examples above would be acceptable.

Page 35 – Issuing Authority drop down menu

We suggest that USCIS be consistent with how it lists certain agencies throughout the system. For example, US DOJ INS should be spelled out as the other agencies are and as this particular agency is elsewhere.

We also suggest that USCIS have an option for a text field under issuing authority (and frankly for all drop down menus) to allow for those cases where the option may not fit the scenario presented. We are concerned about requiring an employer to pick an option when none of the options may be appropriate. When someone presents a Voter Registration card for example, the system has a blank text box that allows the company representative to write in the appropriate city and state. Therefore, the system is already set up to allow for this in certain fields so we are just suggesting that it be expanded to all fields.

Page 39- Issuing Authority List B

The helper text explains that for the electronic application, you would use the drop down menu to pick the actual state that has issued a driver’s license. This should be clarified for the paper version. Right now, the guidance seems to say that you would write “Driver’s license issued by state/territory” rather

than listing the actual state. That is confusing and an employer may not realize that they are still required to then list the state in the issuing authority box.

Page 41 – Document Title List C

Further clarification is needed for this field. If you pick “Employment Authorization Document” how does an employer note which specific document was used? We suggest additional guidance on the types of documents that would satisfy this category and also a text box to allow for input of the actual document title.

Page 43- Issuing Authority List C

Many of the older social security cards were issued by Department of Health, Education and Welfare (HE&W). We notice that this is not one of the options listed in the drop down menu. We request that USCIS consider adding that and if not, provide guidance to employers as to how to note the authority for a card issued by HE&W.

Page 43- Employer’s Business Address

The information here is inconsistent with the form instructions. We had previously noted that the information from USCIS on multiple locations was confusing. However, the information in the error messages column is new and is not provided elsewhere. This is a significant change and if USCIS would like employers to follow it, it needs to be mentioned in the instructions.

The error messages column states that an employer “should list as their address, the address of the location where the employee will perform his or her job in the field.” We strongly disagree with this guidance and ask USCIS to allow the employer to determine their address based on HQ or location where the employee reports. The following are examples of where listing an employee worksite as the employers address would be problematic and legally incorrect.

- a. Employee is a telecommuter and works from his home
- b. Employee is a roving employee and works from one or a number of various client sites, none of which are owned or controlled by the employer
- c. Employer is a contractor and employee is placed on a long term assignment of a third party, which may not be determined as of the date of the I-9 completion.

In addition, following the guidance of USCIS, there is no clarification as to whether an employer needs to continue to update the address on the I-9 if the employee worksite changes over time (or any time after the initial hire). We contend that the I-9 is about work authorization for a specific employer and not for a specific work location. In the case of an audit by ICE, we are concerned that listing the information by worksite will be inconsistent with payroll records which are likely to list an employee by reporting location.

We would also like to note that the fillable form (when beta tested) requires that the employer representative note N/A in the new name and rehire sections, before they are able to complete a reverification. We encourage USCIS to revise the form so that this is not required. It is confusing as well as burdensome for the employer.

Conclusion

We commend USCIS for using technology and working to ensure greater I-9 compliance, and thank you again for allowing ABIL to provide this feedback. We strongly urge USCIS to hold-off on a revision to the I-9 form until the capabilities are fully functional and in addition, until the various proposed and related immigration proposals are determined. Finally we ask USCIS to consider working with stakeholder groups to determine the actual impact of some of the proposed changes including the use of the fillable form.

Respectfully submitted,

Sharon Mehlman, Chuck Kuck, Vince Lau, Loan Huynh, Robert Loughran

on behalf of

ALLIANCE OF BUSINESS IMMIGRATION LAWYERS