PROSKAUER ROSE LLP®

Immigration and Nationality

Law Update

A report for clients and friends of the Firm

November 2007

USCIS Publishes Long-Awaited Revised Form I-9: Transition Period Ends December 26, 2007

On November 7, 2007, USCIS announced that it published a revised and updated version of the Employment Eligibility Verification Form (Form I-9) along with an accompanying revised Handbook for Employers (Manual M-274). Employers and their attorneys have been awaiting this announcement for many years, as these revisions finally make the Form I-9 consistent with USCIS regulations. The most significant change to the Form I-9 is the removal of five documents from the list of acceptable forms of evidence of both identity and employment eligibility. USCIS's guidance on the revised Form I-9 instructs employers to begin using the new Form I-9 immediately. Recognizing that an immediate change may be difficult for many employers, the Department of Homeland Security (DHS) will afford employers a 30-day transition period, starting on November 26, 2007, during which it will not seek penalties for use of a prior edition of the Form I-9.

Background

Under the Immigration Reform and Control Act of 1986 (IRCA), every United States employer must verify the employment eligibility of its employees upon hire. The verification, which is accomplished through the proper completion of Form I-9, requires the employee to provide basic personal information and to attest as to his or her immigration status. The form also requires the employee to present, and the employer to review, certain original documents that confirm the new employee's identity and eligibility to work for the employer in the United States. In an effort to reduce fraud, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated a reduction in the list of acceptable documents. While the government issued regulations in 1997 implementing these changes, revisions were never made to the actual list of acceptable documents printed on Form I-9 or to the official Handbook for Employers. Now, ten years later, USCIS has finally issued a revised Form I-9 that not only brings the form in compliance with 1997 regulations, but also helps to relieve much of the confusion surrounding the completion of Form I-9.

What's New With the Form

As a quick review — the Form I-9 provides three different categories of acceptable documents to establish identity and employment eligibility. Specifically, List A documents establish both identity and employment eligibility; List B documents establish only identity; and List C documents establish only employment authorization.

The most significant change to the updated Form I-9 is the elimination of five documents from List A of acceptable documents: Certificate of U.S. Citizenship (N-560 or N-561), Certificate of Naturalization (N-550 or N-570), Alien Registration Receipt Card (I-151), Unexpired Reentry Permit (I-327), and Unexpired Refugee Travel Document (Form I-571). One document was added to the List A: Unexpired Employment Authorization Document (I-766).

In addition, the instructions for Section 1 regarding Social Security numbers were revised. The instructions now state that the employee does not have to provide a Social Security Number in Section 1 of the Form I-9, unless the employer participates in the USCIS Electronic Employment Eligibility Verification Program (E-Verify).

Other than these described changes and some other stylistic updates, such as font and grammar revisions, the basic form has not changed, and employers should continue to complete Form I-9 in the same manner as they have done with the previous Form I-9.

Revised Form I-9 Lists of Acceptable Documents:

LISTS OF ACCEPTABLE DOCUMENTS

LIST A Documents that Establish Both Identity and Employment Eligibility	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Eligibility
1. U.S. Passport (unexpired or expired)		1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		1. U.S. Social Security card issued by the Social Security Administration *(other than a card stating it is not valid for employment)*
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		2. Certification of Birth Abroad issued by the Department of State *(Form FS-545 or Form DS-1350)*
3. An unexpired foreign passport with a temporary I-551 stamp		3. School ID card with a photograph		3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B)		4. Voter's registration card		4. Native American tribal document
		5. U.S. Military card or draft record		5. U.S. Citizen ID Card *(Form I-197)*
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer		6. Military dependent's ID card		6. ID Card for use of Resident Citizen in the United States *(Form I-179)*
		7. U.S. Coast Guard Merchant Mariner Card		
		8. Native American tribal document		7. Unexpired employment authorization document issued by DHS *(other than those listed under List A)*
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor or hospital record		
		12. Day-care or nursery school record		

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

When Must Employers Begin Using the Revised Form I-9

The updated Form I-9 with a revision date of June 5, 2007 is available for immediate use. USCIS instructs employers to begin using this edition of Form I-9 for all new employees hired on or after November 7, 2007, and for re-verifying the employment eligibility of existing employees. Recognizing employers' need to transition to the amended form, DHS will not seek penalties from employers who use prior versions of the Form I-9 during a 30 day transition period that began on November 26, 2007, the date of publication of the Notice in the *Federal Register*. Employers who fail to use the revised Form I-9 on or after December 26, 2007 will be subject to all applicable fines and penalties provided under the Immigration and Nationality Act (INA).

If you have questions or concerns regarding the revised Form I-9 or the I-9 process in general, please do not hesitate to contact our offices.

- **To access, the new Form I-9, please click here.**
  http://www.uscis.gov/files/form/I-9.pdf
- **To access, the Employer Handbook (M-274), please click here.**
  http://www.uscis.gov/files/nativedocuments/m-274.pdf
- **To access the USCIS Fact Sheet about the revised Form I-9, please click here.**
  http://www.uscis.gov/files/pressrelease/FormI9FS110707.pdf

DHS Temporarily Abandons Proposed "No Match" Rule

The Department of Homeland Security (DHS) has abandoned its attempt to enforce the proposed "no match" rule issued in August 2007. On November 23, 2007, DHS filed a motion in federal district court requesting that the legal proceedings challenging the new "no match" rule be suspended until March 2008. Instead of continuing to litigate the legal challenges under the current lawsuit, DHS proposes to issue a new rule that will pass legal muster. The court granted DHS' motion to stay proceedings until March 1, 2008, pending DHS' new rulemaking effort.

The lawsuit brought by immigrant and labor rights activists groups in August 2007 argued that DHS did not have the authority to implement the "no match" rule, and that the rule could harm U.S. and legal nonimmigrant workers whose Social Security numbers did not match with the Social Security Administration's (SSA) database. Under the proposed rule, an employer who received a "no match" letter would only have safe-harbor from a finding that it had "constructive knowledge" that an employee was unauthorized to work if it followed a strict series of steps to resolve the mismatch. In October 2007, the federal district court issued a preliminary injunction which prevented the government from implementing the rule until the court decides the case and determines whether or not the rule is, in fact, legal. Due to the lawsuit, SSA has also announced that it will not send "no match" letters to employers in 2007. As things will surely heat up on this front, we will keep you updated on developments regarding the "no match" litigation and DHS' new rulemaking.

Prepare Early for Holiday Travel

The holidays are often the most popular time for foreign nationals to travel home. We therefore recommend that all foreign nationals review their travel documents as soon as possible to determine if they will need to apply for new visas prior to returning to the U.S. Embassies and consulates are often deluged with requests for visa appointments from the end of November until after the new year, so it is important to make visa appointments as soon as possible. Renewing visas in Canada or Mexico, once a viable alternative to returning to an individual's home country, is becoming less feasible as wait times for visa appointments have become quite lengthy, and requests for expedited appointments are facing higher scrutiny.

Important Steps for Visa Processing:

1. **Review your visa status, and determine whether you need a visa to enter the U.S. after traveling abroad.** With some exceptions, most foreign nationals, who maintain non-immigrant statuses (i.e. H, L, O) in the U.S. will require a visa in addition to the petition approval.

2. **Schedule an interview appointment abroad.** Visit the website of the U.S. Embassy or Consulate (http://usembassy.state.gov/) where you will apply for your visa to find out how to schedule an interview appointment, pay fees, and any other instructions.

3. **Prepare necessary documentation and pay visa application fee.** While each consulate has a list of specific requirements, all visa applicants will need to complete Form DS-156 (Nonimmigrant Visa Application) online, provide two passport style photos, and present the original I-797 Approval Notice. We recommend that foreign nationals also carry a complete copy of the original petition filed with USCIS. Birth and marriage certificates

may also be required to demonstrate an applicant's familial relationship to the principal beneficiary.

4. **Ensure that you build time into your travel plans for the return of your passport and visa.** Once an application is granted, many consulates deliver passport by courier from 2–7 days after the initial appointment. Some consulates allow individuals to arrange pick up their passports and visa. Remember that the consulate has the discretion to require additional screening, which could result in substantial delays in the issuance of a visa.

USCIS Eliminates AOS Receipt Requirement for H and L Nonimmigrants

Under a new regulatory amendment published in the Federal Register on November 1, 2007, USCIS no longer requires H and L nonimmigrants who have applied for Adjustment of Status (AOS) to present an AOS receipt notice upon returning to the U.S. from travel abroad. Prior to this rule, immigration regulations required most returning H-1, H-4, L-1, and L-2 nonimmigrants who had pending AOS applications to present either an Advance Parole document or appropriate H or L admission documents together with an AOS receipt to avoid their AOS applications being deemed abandoned. While this change may be narrow, it eliminates an unnecessary and burdensome documentary requirement. In past practice, the receipt notice requirement, which lacks a clear rationale, has not been regularly enforced, leaving room for unpredictability and some confusion. Additionally, the requirement impacted foreign nationals' travel plans, as USCIS cannot guarantee timely issuance of receipt notices — particularly after this summer's unprecedented number of AOS filings. It is important to note that this rule only applies to AOS applicants who are in H or L status and have appropriate admission documents (i.e. visa and approval notice). AOS applicants who do not have H or L admission documents or are applying for admission in a different status must still wait for an Advance Parole document before traveling abroad to prevent abandonment of their AOS applications.

December Visa Bulletin Update

On November 14, 2007, the Department of State (DOS) published the Visa Bulletin for December 2007. The most notable changes include significant retrogressions in the EB-2 category. For Chinese born applicants, DOS has listed a priority date of January 1, 2003, which last month was January 1, 2006. Additionally, for EB-2 applicants born in India, the new priority date is January 1, 2002, where last month's cut-off date was April 1, 2004. Other visa categories have shown minimal or no progression from November's bulletin. The DOS warns that if demand for visa numbers continues, it is possible that Chinese and Indian born applicants may experience further retrogression in the EB-2 category and, even, in the EB-1 category, which has thus far remained current for fiscal year 2008.

For those unfamiliar with the Visa Bulletin, by way of background, there are specific quotas for the number of immigrant visas (green cards) made available annually, by country, for each immigrant visa category. A category may become backlogged if there is more demand for immigrant visa slots than immigrant visas available. The priority date, the date on which the first application in the multi-part green card process was received by the government office, determines an individual's place in line for an immigrant visa. Each month, the DOS informs the public through its Visa Bulletin of the status of the wait lists for the various immigrant visa categories by listing the priority dates that have been reached in each category. Once an individual's priority date has been reached, she can apply for the final stage of the green card application process – adjustment of status to permanent residence or an application for an immigrant visa at a U.S. Consulate. At times, the demand for immigrant visas exceeds DOS' expectations and the published priority dates listed move back, rather than forward, from month to month. This phenomenon is known as "retrogression," and has occurred a number of times over the last two years.

Spotlight on Travel: Choosing Between H-1B and Advance Parole

With the recent flood of adjustment of status (AOS) applications filed in July and August of this year, many AOS applicants who are also in H or L status question immigration practitioners on whether they should enter the U.S. from travel abroad with their advance parole document (issued as a benefit as part of the AOS application) OR with an H/L visa. To answer this question, it is important to understand some of the regulatory background surrounding AOS applications and travel, as well as the advantages and disadvantages of using advance parole or an H/L visa.

Under the immigration regulations, an AOS applicant is considered to have abandoned his/her adjustment of status application when he/she leaves the U.S. without an advance parole document. In order to preserve the AOS application, the individual must apply for and receive an advance parole document before departing the U.S..

In a 1999 interim rule, the then Immigration and Nationality Service ("INS") relaxed this regulatory requirement for H and L nonimmigrants. Specifically under the interim rule, which is still in effect today, H and L nonimmigrants who have applied for AOS may be readmitted into the U.S. as parolees with an advance parole document OR as H/L nonimmigrants. In order to enter the U.S. in H or L status while an AOS application is pending, the individual must be coming to resume employment with their H or L employer and be in possession of a valid H or L visa and approval notice. In the spring of 2000, INS issued a memorandum further relaxing the rule. Under the guidance, which also is still in effect today, foreign nationals who were in H or L status, but who most recently left the U.S. and were readmitted pursuant to advance parole, may change back into and extend the H or L status, as long as the underlying H or L petitions have not expired.

While it is the foreign national's prerogative to present either a valid H/L visa or an advance parole document on re-entry to the U.S., it is imperative that the individual consider the implications of each option. If the foreign national chooses to maintain H/L nonimmigrant status, s/he must closely monitor the validity of the H or L visa stamp in their passport and apply for renewals at U.S. Consulates abroad when traveling out of the country. For some foreign nationals, applying for visas abroad can be difficult. One critical benefit, however, is that, in the event that the application for adjustment for status were to be denied, s/he would still be permitted to remain in the U.S. and would still be admissible as an H or L nonimmigrant by presenting a valid visa and approval notice when seeking re-entry to the U.S.

On the other hand, if the foreign national decides to re-enter the U.S. with advance parole, s/he will necessarily be subject to secondary inspection at the port of entry in the U.S., which entails a more detailed review of the status of the adjustment application documentation by the inspecting officer(s).

Thus, the decision of whether an AOS applicant should maintain H/L status and visa, or rely on advance parole, should be made carefully, on a case-by-case basis, taking into account all of the circumstances.

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Client Update

Proskauer Rose LLP counsels corporate clients and their employees in all areas of immigration, nationality and consular law. This includes obtaining work authorizations and visas to enable companies to hire aliens or transfer personnel between nations; compliance with and defense of anti-discrimination and unlawful immigration practices; and advice and appearances in special circumstance matters such, as asylum claims and removal proceedings. Much of the work involves obtaining appropriate non-immigrant or immigrant visas to enable corporations to transfer executives, managers, persons with specialized knowledge, or other key personnel temporarily or permanently to the United States.

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