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# Compliance with Immigration Related Requirements: More Guidance for completing Form I-9 During COVID-19

**May 12, 2020**

**Advice to U.S. Employers: Immigration Insights Series during COVID-19 Crisis**

**A Series of Advisories**

Proskauer's Immigration Practice Group is advising clients on an array of challenges as companies find it difficult to comply with their Immigration Reform and Control Act (IRCA) obligations and maintain the legal status of the non-immigrant population during the Coronavirus pandemic.

We are publishing a series of alerts addressing the many issues that have been identified during the course of our representation to facilitate guidance to our clients and companies in general, given this ever-changing and challenging situation.

Our first alert related to the challenge of completing an I-9 form remotely, and was updated the next day as USCIS announced "flexibility" during the Coronavirus pandemic. The second alert reviewed compliance for telecommuting during the pandemic for H-1B and E-3 employees. In the third alert, we reviewed closings and changes the government is implementing during the pandemic. The fourth alert provided an overview of the limitations and compliance for H-1B employees when making personnel decisions regarding furloughs, reductions in hours and terminations. Our fifth alert provided a detailed explanation of the new Public Charge rule.

In this advisory, our sixth in this series, we provide guidance as to additional accommodations USCIS has made in completing I-9 forms and updates with reference to the Handbook for Employers: Guidance for Completing Form I-9 (M-274). We also provide an update on DHS' temporary policy regarding expired List B identity documents used to complete Form I-9.

As remote work continues to remain a factor for many employers and employees, simple processes such as document renewals and employer verification of documents remain a challenge. In this alert, we outline some of the guidance to assist with these practices. As always, our team is available to you to provide guidance and assistance in adapting to the challenges we face.

**Due to COVID-19, DHS is issuing a temporary policy regarding expired List B identity documents used to complete Form I-9.**

Beginning on May 1, 2020, identity documents found in List B set to expire on or after March 1, 2020 may be treated the same as if the employee presented a valid receipt for an acceptable document for Form I-9 purposes. Many states remain under stay-at-home orders due to COVID-19 and renewing certain documents remains a challenge. In consideration of these unprecedented circumstances, DHS is issuing a temporary policy regarding expired List B identity documents used to complete Form I-9. List B documents are those that establish identity, such as a driver's license. Please note, the employee will be required to present a valid, unexpired document within 90 days after the termination of this temporary policy.

Practical implementation of this temporary policy:

**When your employee provides an acceptable expired List B document that has not been extended you should:**

1. Record the document information in Section 2 under List B, as applicable;

   and,
2. Enter the word "COVID-19" in the Additional Information Field.

**When the employee later presents an unexpired document, you should:**

In the Section 2 Additional Information field:

1. Record the number and other required document information from the actual document presented;
2. Initial and date the change.

**New I-9 Form**

On May 1, 2020, the latest version of Form I-9 which was issued on October 21, 2019 must be used by employers for employees hired on or after May 1, 2020.

The new I-9 form lists additional countries in the "country of issuance" field in Section 1. This and other changes are relatively minor.

**I-9 authorized Representative**

Form I-9 is used to verify the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must properly complete Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. Both employees and employers (or authorized representatives of the employer) must complete the form. With so many employers currently functioning in a remote work environment, the completion of I-9 forms has become increasingly challenging.

On April 27, 2020, USCIS released an updated Handbook for Employers: Guidance for Completing Form I-9 (M-274). Given the current concerns in light of COVID-19, USCIS has now provided further clarification on the issue of who an employer can designate, hire, or even contract to handle the required administrative tasks of completing, updating or making any necessary corrections on the employers behalf to the Form I-9. Essentially, almost anyone will satisfy this requirement, including family or friend, however the employer will remain liable for any errors or violations made by the authorized representative. Employee's themselves, however, may not act as authorized representatives for their own Form I-9. Please see alert 1A at outlining the government's flexibility to allow remote completion of the I-9 form during the Covid 19 pandemic.

**The Handbook revision also contains new guidance on how to verify employment eligibility when temporary employment authorization is extended automatically and new documents for foreign students in the "Cap-Gap" before a change of status to H-1B.**

**F-1 "Cap-Gap" Students**

The Cap-Gap is a regulatory provision which extends an eligible F-1 student's status to bridge the gap between the end of F-1 status and start of the H-1B status, thereby allowing the student to remain in the U.S. during the "gap." For example, if a petition for an H-1B change of status is submitted prior to a student's Optional Practical Training (OPT) work permit expires and the petition is then selected in the H-1B lottery, the OPT is automatically extended while the petition is pending.

USCIS now clarifies for employers how best to complete a Form I-9 for F-1 students during the Cap-Gap period. Employers are instructed to record the student's expired F-1 optional practical training (OPT) EAD and the Form I-797 receipt notice for the H-1B cap petition in Section 2 of Form I-9. Previously, employers were advised to record the student's Form I-20 Certificate of Eligibility and their expired EAD in Section 2. Employers must still reverify the employment eligibility of F-1s in the cap gap by September 30.

**Reverification of Employees with Automatic EAD Extensions**

Certain categories of employees may be granted an automatic 180-day extension of their Employment Authorization Documents (EADs) if they filed the extension request in a timely fashion. Also, foreign nationals with Temporary Protected Status (TPS) may receive automatic extensions of their work permits if the TPS for their country is extended by the government. As a reminder, an EAD, or employment authorization document, is a document issued by USCIS that allows people who already hold a visa or other lawful status, to work legally in the U.S. Temporary Protected Status is a temporary status given to eligible nationals of designated countries who are present in the United States. The status, afforded to nationals from some countries affected by armed conflict or natural disaster, allows persons to live and work in the United States for limited times.

Previously, employees were instructed to cross out the employment expiration date in Section 1 of Form I-9 and replace it with the new expiration date. The updated I-9 handbook eliminates this procedure and now requires employers to update the employment expiration date in Section 2 of form I-9.

It remains a challenge in the near term to process I-9s while individuals are not physically in the office, although recent guidance does a little to alleviate some of the administrative burdens placed on employers.

Please contact the Proskauer Immigration Group for further guidance.