Proskauer

# The Department of Homeland Security Expands Flexibility With I-9 Forms During the Pandemic

**August 21, 2020**

I-765 Approval Notices from December 1, 2019 through August 20, 2020 Permitted for Form I-9

Citing the COVID-19 Pandemic, the United States Citizenship and Immigration Service (USCIS) announced on August 19, 2020 that employers are able to use the Form I-797, Notice of Action with a date on or after December 1, 2019 through August 20, 2020 to update the Form I-9, Employment Eligibility Verification, and show continued work authorization. USCIS has indicated that there is a significant delay between the issuance of the I-797 Approval Notices and the production of the Employment Authorization cards (EAD) due to the pandemic. As a result, USCIS is providing temporary flexibility in Form I-9 completion to minimize interruptions in employment authorization due to delayed card production.

Prior to August 19, 2020, the I-797 Notice of Action indicating that the I-765 Application for Employment Authorization had been approved was not accepted for completion of the Form I-9. Instead, the I-9 Form could only be completed with a valid Employment Authorization card. EAD cards are often granted for two year year periods. Since processing of the I-765 Application for Employment Authorization can take many months to adjudicate, foreign nationals relying on the EAD for eligibility to work had to be removed from payroll if the EAD card did not arrive before the expiration of their existing EAD. Notably, DACA (Deferred Action against Childhood Arrivals) recipients or “Dreamers” use the EAD for employment authorization as well as some spouses of nonimmigrants in H-1B, E and L status.

The expanded I-9 Form flexibility applies if the I-797 Notice of Action states that it is an approval of an Application for Employment Authorization (Form I-765). If so, it can be used as a List C documents, specifically #7 showing employment authorization even though the notice states that it is not evidence for employment authorization. This will be valid through December 1, 2020. At the time the employee receives the card, employers should update the I-9 Form. Failing that, employers should update the I-9 Form by December 1, 2020. The I-797 Approval notice is only evidence of employment authorization. As such a new employee is still required to present a document to establish identity from either List A or List B. Additional information regarding the I-9 Form and acceptable documents is available at: https://www.uscis.gov/i-9-central.

Remote I-9 Completion Extended through September 19, 2020

On August 18, 2020, United States Immigration and Customs Enforcement (ICE) announced that the March 19 guidance allowing remote completion of the Form I-9 would be extended for an additional 30 days. This guidance has been regularly extended during the COVID-19 pandemic. Proskauer provided a detailed overview of the requirements in our Advisory 1A: Completing Form I-9 Remotely – Permissible During Office Closures and Teleworking. Specifically, ICE is exercising prosecutorial discretion to defer the in person review of original documents while the COVID-19 pandemic has resulted in office closures and telework. However, this waiver of the in-person review only applies to offices that are operating remotely. If any employees have returned to the office, then the employer must comply with the standard Form I-9 requirements. Form I-9 guidance is available at: https://www.uscis.gov/i-9-central.

Please contact Proskauer's Immigration and Nationality Practice for additional guidance.