

Immigration Alert: New Form I-9 Mandatory Starting Tomorrow, April 3, 2009

4/2/2009

As a follow up to our Client Alerts dated [January 6, 2009](#) and [February 2, 2009](#), the mandatory use of the new Form I-9 goes into effect tomorrow, April 3, 2009. [The new Form I-9](#) is dated 02/02/2009 and **no prior version of the Form I-9 may be used as of April 3, 2009.**

The United States Citizenship and Immigration Services (USCIS) has put out a [FAQ](#) on the use of the new Form I-9, including the following highlights:

- Requires that all documents presented during the verification process be **unexpired**;^{*}
- Eliminates from “List A”: Forms I-688, I-688A, and I688B (Temporary Resident Cards and out-of-circulation Employment Authorization Cards);
- Adds to List A: foreign passports with certain machine-readable immigrant visas (machine-readable immigrant visas, or MRIVs, issued by some consulates instead of the temporary I-551 stamps evidencing newly approved lawful permanent resident status), valid passports for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI), and Form I-94 or Form I-94A confirming nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI;
- Updates and revises some of the attestations executed by the employee, specifically adding a new category for employees to attest whether they are U.S. citizens or U.S. nationals (the current Form I-9 combines those statements).

We wish to remind clients that the [newly revised M-274 handbook](#) is extremely helpful in guiding employers through the I-9 process. Mintz Levin will be pleased to answer any questions you have regarding the I-9 process and the new Form I-9.

^{*}Please note that despite the new rule that all documents presented during the verification process must be ‘unexpired,’ there are several circumstances when expired documents may be used in the I-9 process, such as:

1. Asylee: an I-94 card marked with the word “Asylee” is evidence of indefinite work authorization, even if the I-94 card has an expiration date.
2. H-1B Cap Gap: an expired Employment Authorization Document (EAD) that was part of an employee’s Optional Practical Training (OPT) is automatically extended as part of the H-1B “cap gap” regulation as long as the employee can also show a timely filed Form I-765 as part of the STEM regulations (work extended up to the date the I-765 is adjudicated) or show a receipt for a cap-subject H-1B (work is extended up to the following October 1 or until the H-1B petition is denied, whichever is sooner).

3. H-1B Portability: if the same employer which is engaging in the I-9 verification has a receipt showing it filed an H-1B petition for an employee who on the date of the filing of the H-1B petition had an unexpired I-94 card in any status, and an expired or unexpired I-94 card indicating that he was in H-1B status in the past, then this is evidence of work eligibility up to the date USCIS makes a decision on the H-1B petition. (Employees may work pursuant to H-1B portability as long as they never previously worked without USCIS authorization.)
4. Timely filed extensions: if an employer timely files an extension of a work authorized nonimmigrant category (such as H-1B, L-1, O-1, P-1, TN), then the expired I-94 card and a receipt showing the timely filed extension is evidence of work eligibility until the extension is adjudicated, for up to 240 days from the date the I-94 card expired.
5. Temporary Protected Status: if an employee has an expired EAD granted under the Temporary Protected Status Program (TPS), then this may still be evidence of valid work authorization if there has been a publication in the Federal Register indicating that TPS for the employee's home country has been extended and EAD cards are automatically extended as well.
6. Conditional Permanent Residence: an I-551 card ("green card") that has a two-year expiration date is a Conditional I-551, and even if expired is automatically extended if the employee has a receipt from USCIS showing that a Form I-751 Application to Remove Conditional Status has been filed and the receipt states that work authorization is extended for one year.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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