



**AILA Verification and Documentation Liaison Committee
Joint Meeting with USCIS Verification Division and ICE Homeland Security Investigations
Washington, DC
Agenda
November 19, 2013**

On November 19, 2013 The American Immigration Lawyers Association (AILA) Verification and Documentation Liaison Committee met with the USCIS Verification Division and ICE Homeland Security Investigations in Washington, DC. The questions below were submitted by AILA and responses were provided by the USCIS Verification Division.

1. Impact of unavailable electronic I-94 records on I-9 completion: On July 1, 2013, USCIS posted guidance on I-9 Central concerning expectations for completing I-9 forms after CBP's roll-out of the electronic I-94 entry record. That guidance instructed employers that their obligations for timely completion of Sections 1 and 2 of Form I-9 were not changed in the electronic I-94 environment, even in cases where an employee's I-94 record was not accessible through no fault of the employee. The guidance instructed the employee to resolve the error in the I-94 record with CBP, even though such a remediation process often takes longer than the first day of work on which the employee is required to complete Section 1 of the I-9. AILA sought clarification about this guidance on June 6 and again on July 29, 2013 (see email correspondence attached). In the interim, the I-9 Central guidance on this issue no longer appears on the I-9 Central Website.

a. Was the deletion of the July 1, 2013 guidance deliberate?

USCIS Response: The guidance is available on the I-9 Central "What's New" page in "What's New – Archives." E-Verify routinely archives articles to limit the number of articles posted on the "What's New" webpage to the most current information.

b. Could Verification provide guidance for work authorized foreign national employees and their employers to comply with the I-9 completion requirements during the time that the employee works with CBP to access his/her electronic I-94?

USCIS Response: Is AILA still seeing issues with the CBP website? It is our understanding that there are no issues with the website. The requirement that new hires complete Section 1 no later

than the first day of employment has not changed. If the employee cannot complete Form I-9, which includes providing all required information, they may not work for pay.

c. AILA provides the following recommendations for guidance to employers and employees on this issue. We would request feedback from both USCIS and ICE/HSI on these recommendations.

- i. Where the employer sponsored the employee for a nonimmigrant visa, where the foreign passport shows the class of entry and a valid expiration date, permit the employee and employer to complete the I-9 without the missing I-94 information, and treat the missing I-94 information similarly to how USCIS treats receipts for lost or stolen documents.

USCIS Response: USCIS does not agree with this approach as it is not supported by the regulations. To be able to apply the receipt rule to this situation, USCIS would first need to amend the receipt regulations through rulemaking. The missing I-94 cannot be treated as a receipt.

- ii. Instruct employers and employees to document the I-94 fields on the I-9 with "I-94 not available" and attach or upload a screen shot of the CBP inquiry (including data entered into the CBP system).

USCIS Response: If an employee indicates that he or she is an "Alien Authorized to Work" either an A# or I-94 number must be provided to complete Section 1. A screen shot is not acceptable to complete Section 1.

- iii. Provide 90 days of work authorization (to be consistent with other receipt rules) and provide instruction to employers regarding proper entry of I-94 information once the employee obtains the form.

USCIS Response: To provide 90 days of work authorization as suggested would require rulemaking. The receipt rule is limited to situations involving lost, stolen or damaged documents, temporary I-551s on Form I-94 and Forms I-94 issued to refugees upon admission.

- iv. For E-Verify employers, advise the employer to postpone the E-Verify query until the employee presents I-94 documentation, similar to E-Verify's current guidance for handling queries where there is a delay in issuing a Social Security number to a work-authorized employee.

USCIS Response: If the employee cannot complete the Form I-9, the employer cannot create an E-Verify case.

2. I-9 Central guidance on birth certificates: The M-274 makes clear that only birth certificates issued by government authorities can be accepted as List C documents. In reliance on this advice, most employers reject a hospital birth certificate as a List C document. Similarly, it is our understanding that at least some ICE auditors have cited an employer's acceptance of a hospital birth certificate as a substantive error. However, AILA noticed that advice recently published on I-9 Central is less absolute. I-9 Central provides the following question and answer:

Q. Is a birth certificate issued by a hospital an acceptable List C document?

A. In order to be acceptable for Form I-9 purposes, the document in question must be an 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. USCIS cannot comment on state law and the authority a hospital may have to issue birth certificates. Usually, a hospital does not have this authority. We suggest that the state be contacted to find out whether the hospital in question is authorized to issue birth certificate.

AILA respectfully requests that USCIS rephrase the I-9 Central guidance because it is confusing and impractical and fails to recognize that state laws on this issue may well have changed in the decades between birth certificate issuance and presentation to complete an employment I-9. AILA asks that the Verification Division clarify its guidance by moving the sentence “Usually, a hospital does not have this authority” to the beginning of the response and then specifying the states and timeframes for which hospital birth certificates are acceptable List C documents or providing more descriptive and specific language to describe the state authorities that would serve as resources in making determinations about hospital-issued birth certificates.

USCIS Response: USCIS will revise the Q&A published on I-9 Central to read:

Q. Is a birth certificate issued by a hospital an acceptable List C document?

A. In order to be acceptable for Form I-9 purposes, the document in question must be an 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. USCIS cannot comment on whether or not a particular hospital is authorized to issue a birth certificate that meets the regulatory requirements.

3. On-line approval notices as List C documents: At our April 2013 meeting, AILA requested that USCIS consider accepting on-line USCIS approvals as List C documentation. This would address the common situations where, for example, an Employment Authorization Document has been approved by USCIS but the actual card takes another week to arrive by mail. The electronic record of the approval could serve as the List C document, or it could serve for 90 days as a temporary I-9 document (similar to a receipt) after which the original document must be presented. At our previous meeting, USCIS told AILA that the agency was actively considering guidance that would allow for such documentation in certain circumstances. AILA members strongly urge USCIS to adopt this improvement. Can you please update us on the status of this guidance?

USCIS Response: USCIS is unable to adopt AILA’s suggestion. USCIS does not issue approval notices from the USCIS website. The notice that the question is referring to is a generic electronic notice informing the user that USCIS has mailed an approval notice for an Application for Employment Authorization. USCIS does not consider such electronic notification to be the equivalent of an employment authorization document under current regulations.

4. FNU/LNU protocols: At our April meeting, we discussed the appropriate protocol for situations where foreign national employees have only one name. We understood that USCIS

was in discussion with the Social Security Administration to develop a uniform approach to naming convention issues and that USCIS would consider providing additional guidance on this topic. Please provide us with an update on any forthcoming guidance to help employers resolve their confusion about naming conventions.

USCIS Response: The naming convention that we prefer is that the employer write “Unknown” in the First Name field and put the employee’s single name in the Last Name field.

5. Form I-9 bar code: Is there a current use for USCIS or ICE for the new bar code field on the current version of the Form I-9? What is the intended use of this field in the future?

USCIS Response: The 3-D barcode on Form I-9 is not currently being used. It is a placeholder for a possible future use.

6. I-9s for election judges and poll workers: It is our understanding based on legacy INS guidance that municipalities that employ U.S. citizens as poll workers and election judges or poll watchers on Election Day do not need to complete I-9s for these individuals. While municipalities have requirements such as U.S. citizenship and registration as a voter to qualify to serve as an election judge, requiring the municipalities to complete I-9s for Election Day services would be burdensome and contrary to the legacy INS Memo from John R. Schroeder, Assistant Commissioner, Employer and Labor Relations, dated February 18, 1988, which states that “exempt[s] governmental entities that employ citizens as election judges and poll workers from employment verification procedures or IRCA.” Do USCIS and ICE continue to view this policy as valid? Where are the definitions of the governmental entities that are exempted from this requirement located? Exactly which government entities are exempt from I-9 compliance and penalties?

USCIS Response: Yes, DHS continues to adhere to this policy. There are no definitions of the governmental entities that are exempted but it is clear in the memo that only entities employing poll workers and election judges are exempt.

7. Impact of government shutdown: Please provide an update on any impact of the October government shutdown on E-Verify and other operations and functions of the Verification Division.

USCIS Response: E-Verify was unavailable during the partial government shutdown. The days where the government was shut down were not counted toward the amount of time an employee had to contest a TNC. Immediately after the government reopened, there were more calls than usual to our public hotline but our representatives were able to accommodate the increased number of calls. Regular operations have resumed.

8. October 22, 2013 E-Verify technical issue: On October 24, 2013, the E-Verify system notified users that a technical issue on October 22 caused U.S. passports and passport cards to trigger Tentative Non-Confirmations. Could you please explain what the technical issue was that caused this glitch? Approximately how many queries were affected? What steps has USCIS taken to ensure that this issue will not recur?

USCIS Response: A network problem external to USCIS caused all U.S. passport-based queries to fail, which resulted in the issuance of TNCs to individuals who presented a U.S. passport. This affected approximately 2600 companies and USCIS has taken appropriate steps to contact these companies to ensure that the employees' TNCs were resolved as appropriate.

9. Pre-MOU hire inquiries: At our April meeting, USCIS confirmed that the E-Verify system allows an employer to run a query for an employee whose hire date preceded the employer's enrollment in E-Verify, even if the employer is not a FAR-covered federal contractor. Does E-Verify monitor for these situations? Is this practice one that can lead to an OSC referral?

USCIS Response: Yes, E-Verify monitors' cases created where the Hire Date precedes the MOU Date. Non-compliance with suspected discrimination could lead to an OSC referral.

10. Roll-over of employer data: At recent meetings, USCIS has informed AILA that future releases of E-Verify would enable an employer who terminates its MOU (at least for reasons of merger or change in designated agent) to have continued access to its prior E-Verify records and allow transfer of historical data to the updated account. What is the status of this development? If an employer with a terminated MOU needs access to historical E-Verify information, what is the process for obtaining it?

USCIS Response: USCIS is currently developing a method and/or feature for the retention of historical E-Verify data. There is no tentative date set for this enhancement. Currently, once an account is closed, all access to the account and its associated records are terminated. In order to preserve the records from an E-Verify account, the employers and E-Verify Employer Agents (EEA – Previously known as the Designated Agent) should create and retain a complete user audit reports for themselves and/or for their clients.

11. E-Verify and re-hires: It appears that Verification recognizes that an E-Verify query is not always necessarily a rehire situation where the employer is allowed under I-9 regulations at 8 CFR §274a.2(c)(1)(i) to continue to rely on the re-hired employee's original I-9. The following guidance is posted in E-Verify FAQs:

Q. Do I need to create a case in E-Verify if my company rehires an employee?

A. If you rehire a former employee within three years of his or her previous hire date, you may rely on the information on his or her previous Form I-9.

If you rehire an employee for whom you never created an E-Verify case and the employee's and the employee's previous Form I-9 lists an expired identity document (List B), then you may either:

Complete Section 3 of the employee's previous Form I-9 and not create a new case for the employee in E-Verify or Complete a new Form I-9 for the employee and create a new case for the employee in E-Verify.

See the [Handbook for Employers: Instructions for Completing Form I-9 \(M-274\)](#) for more information on rehires.

The above guidance, however, does not address the proper way for an employer to treat employees in the most common rehire circumstances – (1) where the rehired employee was not subject to E-Verify at the time of the original hire; and (2) where a rehired employee was previously run through E-Verify and does NOT have an expired identity document. The current guidance suggests, but does not state explicitly, that an E-Verify query based on the rehire date is required in situation (1) and that an employer should not re-query the rehired employee in (2). We respectfully request that USCIS provide further clarification to the E-Verify rules for rehired employees and suggest the following amendment to the FAQ as follows:

An employer may rely on previous E-Verify queries for rehired employees in certain circumstances. If you rehire a former employee within three years of his or her previous hire date, you may rely on the ***original Form I-9 as long as the work authorization (List C) documentation originally presented by the employee is still valid.*** ***If the rehire date is more than three years from completion of the original I-9 or if the employee’s work authorization has since expired, you must complete a new I-9 and run a new E-Verify query using the rehire date as the date of hire.***

For purposes of E-Verify, where the employer can rely on the original I-9 and the rehired employee was subject to an earlier E-Verify query, you may continue to rely on the earlier query. ***If the rehired employee was not previously subject to an E-Verify query and the employee’s identity document is still valid, you may run the E-Verify query based on the data in the original I-9, but using the rehire date as the E-Verify hire date.*** ***If, however, the rehired employee’s identity document (List B) has expired, you cannot run an E-Verify query as the system will not accept expired documents.*** ***In that case,*** then you may either:

Complete Section 3 of the employee’s previous Form I-9 and not create a new case for the employee in E-Verify or Complete a new Form I-9 for the employee and create a new case for the employee in E-Verify, ***using the rehire date as the E-Verify hire date.***

USCIS Response: E-Verify updated the rehire section in the newest version of the E-Verify User Manual and now provides the following guidance:

If you never created a case in E-Verify for the employee, you must have the employee complete a new Form I-9 and create a case in E-Verify.

If you previously created an E-Verify case, but did not receive an employment authorized result, you must have the employee complete a new Form I-9 and create a case in E-Verify.

If you previously created a case in E-Verify for the rehired employee and received an employment authorized result, complete Section 3 of the employee’s previous Form I-9 and do not create a new case for the employee in E-Verify. Alternatively, you may choose to complete a new Form I-9 and create a case for the employee in E-Verify.

Employers are reminded that if you rehire your employee within three years of the date that the initial Form I-9 was completed, you may complete a new Form I-9 for your employee or complete Section 3 of the previously completed Form I-9. If more than three years has elapsed since the initial Form I-9 was completed, employers must complete a new Form I-9 for a rehired employee and create a case in E-Verify for the rehired employee.

12. E-Verify postings: Can USCIS confirm that it continues to be permissible for employers to satisfy their E-Verify notice posting obligation by posting the E-Verify notices electronically, as long as all applicants and employees affected by E-Verify queries receive notification of the location and have access to the electronic postings? AILA members report that they have received advice that paper postings are required. For many employers whose entire application process is electronic, electronic posting is a much more appropriate and effective mechanism for notifying the affected individuals.

USCIS Response: Upon enrollment, employers are required to clearly display the ‘Notice of E-Verify Participation’ and ‘Right to Work’ posters in all languages provided by DHS. Employers should display the notices in a prominent place that is clearly visible to prospective employees and all employees that will have his or her employment eligibility verified with E-Verify. In addition, E-Verify recommends providing a copy of these posters with job application materials, either online or in hard copy.

Provided all of the information on the individual posters is unchanged and made available to the public, employers may display the posters either as individual posters or combined into a larger poster (s).

13. Verification and OSC liaison activity: Please provide an update on USCIS liaison and joint enforcement activity with the Office of Special Counsel (OSC). How often is there a referral from Compliance and Monitoring to OSC? Are there benchmarks for noncompliance that trigger/compel a referral for review? How often does a call center question result in a referral to OSC? How much coordination is there with OSC to prepare the videos and other employee rights related material posted on the USCIS website?

USCIS Response: The Monitoring and Compliance Branch (M&C) meets monthly with OSC staff. M&C makes referrals to OSC each month based upon information received through the M&C review process. Call center customer assistance questions do not result in M&C OSC referrals. M&C and OSC work together closely to inform employers and employees of what E-Verify policies and procedures are required by law and regulation, and what constitutes workforce discrimination.

14. Verification input on OSC Technical Assistance Letters: Is there any review by USCIS of the OSC Technical Assistance Letters (TALs)? Is there a discussion regarding the substance of the TAL guidance to employers? When a question is submitted to OSC that includes reference to E-Verify, does OSC request input and review from USCIS?

USCIS Response: Although USCIS does not formally review all Technical Assistance Letters (TALs), USCIS and OSC work together closely on E-Verify issues and frequently share information related to the analysis and discussions contained in OSC TALs.