



Questions and Answers

**American Immigration Lawyers Association Verification and
Documentation Liaison Committee
Joint Meeting with USCIS Verification and ICE Homeland Security
Investigations
Washington, D.C.
May 3, 2016**

Overview

On May 3, 2016, the American Immigration Lawyers Association (AILA) Verification and Document Liaison Committee met with USCIS' Verification Division and U.S. Immigration and Customs Enforcement (ICE), Homeland Security Investigations to respond to questions, provide updates and address follow-up items. The questions and answers are provided below for the benefit of interested stakeholders.

Questions and Answers

Question Posed Jointly to USCIS Verification Division and ICE/HSI

1. Form I-9 – Changes and Proposed Revisions

Please provide an update regarding the review of public comments submitted in response to the proposed revisions to Form I-9 (80 Fed. Reg. 73200). In particular, please share any plans with respect to the publication of a 30-day notice.

The form and instructions, along with a supporting statement and an appendix of USCIS' responses to those comments, were posted in conjunction with a notice that was published in the Federal Register regarding this information collection on March 28, 2016. See 81 FR 17195. The public had 30 days to submit comments and the form is now under Office of Management and Budget review.

2. General I-9 Questions

I-9 Central has [a Q&A regarding U.S. training](#) that includes an ambiguous use of the word "employee" and the phrase "paying for training," as follows:

“Is my employee required to complete Form I-9 if he/she is attending training in the United States before starting his/her job in a foreign country?”

If your company is paying for training that is required for the job, Form I-9 should be completed. You must complete Form I-9 in this situation even if your employee will be attending the training in the United States only for one day.”

We agree that if a person will receive compensation from a U.S. employer, an I-9 is required. However, the phrase "paying for training" is not synonymous with the regulatory defined phrase "wages or other remuneration." See 8 CFR §274a.1(f).

In addition, the Q&A does not appear to address situations that involve B-1 business visitors who do not receive salary or other remuneration from a U.S. employer but who come to the U.S. for training. State Department guidance allows a B-1 to come to the U.S. for training as long as the person is customarily employed abroad and remains on the foreign payroll. The Foreign Affairs Manual, 9 FAM 402.2-5(F), does not allow a U.S. salary "other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay." In these circumstances, the person is not receiving wages or remuneration from the U.S. employer and does not meet the regulatory definition of employee (8 CFR §274a.1(f)). As such, an I-9 should not be required in these situations.

- a. Would USCIS consider expanding the I-9 Central guidance to include both situations with an explanation of the distinction?

The distinction lies in whether the U.S. company has a separate business enterprise abroad for which the individual is (or will be) customarily employed and whether the individual being trained receives remuneration from a foreign source for performing an eligible B-1 activity. USCIS will consider revising I-9 Central to reflect this distinction.

- b. Is an employer required to provide the Form I-9 to an employee who asks to review or obtain a copy of it? In the electronic I-9 context, we understand that the employer must provide a printout of the electronic signature transaction to the employee if requested. Does that obligation extend to a fully completed I-9 form?

Employers may choose to allow an employee to review his or her own completed Form I-9 and provide a copy upon request, but employers are not obligated to do so.

- c. May the Form I-9 be printed and/or completed on any color paper? Employers may wish to use different colored paper to differentiate between I-9s at different locations.

Form I-9 does not need to be completed on a specific color of paper. However, the information written on the form must be legible for the entire retention period of the form.

- d. Some Designated School Officials (DSOs) endorse Forms I-20 with only the dates of practical training, and not the employer name. May an employer accept such an I-20

(with the passport and I-94 card) for I-9 purposes without additional documentation, or must the employer obtain documentation listing the specific employer?

An acceptable Form I-20 for curricular practical training or optional practical training STEM extension (STEM OPT) should have all Employment Authorization fields completed. The Form I-20 Employment Authorization fields include: employment status, employment type, start and end date of employment, and the employer's name and location.

An acceptable Form I-20 for 12-month optional practical training (OPT) is not required to have all Employment Authorization fields completed but should indicate OPT recommendation or OPT approval. A foreign student in F-1 nonimmigrant status participating in OPT must receive Form I-766, Employment Authorization Document (EAD), from USCIS before he or she is authorized to work. He or she may not begin OPT until the date indicated on the EAD.

- e. If a foreign national enters the U.S. in B-1 in lieu of H-1B status, please confirm the circumstances in which the receiving entity must complete a Form I-9. Note that such a foreign national would generally not possess a Social Security number, so an E-Verify query would not be possible.

B-1 activities performed by individuals within the provisions of INA 101(a)(15)(B) who, therefore, are customarily employed abroad for a foreign firm that is paying the individual's salary, are not considered employment in the United States. Because B-1 activity is not considered employment, Form I-9 is not required for such activity.

3. Remote I-9s

Employers have received conflicting guidance from USCIS in regards to how an employer's authorized representative should complete his/her title, employer's business name, and address in section 2 for a remotely hired employees. Most employer will instruct the employer's representative to enter "Authorized Representative" (or something similar) in the title field and record the employer's name and the address where the employee will be working.

An authorized representative of the employer should write "Authorized Representative" in the Title field. In the "Employer's Business or Organization Name" and "Employer's Business or Organization Address" fields, the authorized representative should enter the employer's name and address for the employer location where the employee will be working.

4. Acceptable Documents

List C #8 on the List of Acceptable Documents allows "catch-all" documentation but does not specifically list acceptable documents. Thus, despite good intentions, an employer may reject acceptable documentation because they are not aware that there is a more complete list on I-9 Central.

- a. Would USCIS include the complete list of documentation that is acceptable under List C #8 on the List of Acceptable Documents or refer employers to I-9 Central for the complete list?

Because C#8 allows for DHS-issued evidence of employment authorization generally, there is no complete list of C#8 documents. Some examples of documents that may be considered under this category are provided on I-9 Central but that is not a complete list. USCIS recommends that employers contact us when they have a question about a possible C#8 document. For the next version of the Handbook for Employers, Guidance for Completing Form I-9 (Employment Eligibility Verification Form) USCIS will let employers know that there are examples of some C#8 documents on I-9 Central.

- b. Is an employer still required to refuse a laminated Social Security card if the card appears to be genuine and to relate to the employee but states “not valid if laminated” or “do not laminate”? USCIS previously provided guidance on this issue but it appears to have been removed.

An otherwise acceptable laminated SSA card is acceptable as a List C document even if it states “not valid if laminated” or “do not laminate.”

- c. Certain birth records from the state of Texas indicate that they are abstracts and are not valid for I-9 purposes. The records, however, meet the requirements of a List C document in that they are original or certified copies of birth certificates and are issued by a state or county. May employers accept these documents for I-9 purposes?

Although the federal government, through the Department of Health and Human Services, provides model standard forms and procedures to assist the states with the uniform registration of birth events, the federal government does not mandate what documents are considered birth certificates and does not maintain files or indexes of individual birth records. Birth records are filed permanently in a state vital statistics office, or in a city, county or other local office.

An abstract of a full birth record does not appear to be the equivalent of a birth certificate issued by a state as provided by DHS regulations. Questions regarding Texas birth abstracts and birth certificates should be directed to the document-issuing authority.

- d. Can USCIS clarify the documentation that must be reviewed and/or retained with the Form I-9 as proof of continued employment authorization in the context of a 240-day extension, a STEM automatic extension, and the portability context?

Portability & 240-Day Rule:

In the portability context, the M-274 states, on page 22, that the foreign passport and The I-94 card issued for the previous employer would be sufficient with an “AC-21” notification in the margin.

For a 240-day extension, the M-274 indicates, on page 22, that the employer need

only list “240-Day Ext.” on the Form I-9.

However, in both contexts, the M-274 refers the employer to the “Completing Form I-9 for Nonimmigrant Categories when Requesting Extensions of Stay” guidance. This guidance, on page 23, indicates that the employer “should retain the following documents with the employee’s existing Form I-9 to show that you filed for an extension of stay on the employee’s behalf:

- A copy of the new Form I-129;
- Proof of payment for filing a new Form I-129; and
- Evidence that you mailed the new Form I-129 to USCIS

After submitting Form I-129 to USCIS, you will receive a notice from USCIS acknowledging that your petition is pending, which you should retain with the employee’s Form I-9.”

[I-9 Central recommends similar documentation](#), but does not indicate that the receipt notice should be retained with the Form I-9. Instead of stating that the employer “should retain” the documents, “it is suggested that the employer retain” them.

- a. If the employer does not typically retain copies of the documents presented for I-9 purposes, must the employer keep copies in this context?

[In this situation, employers should retain documents showing an application for extension of status was filed on the employee’s behalf.](#)

Please confirm the list of documents that an employer is required to review and/or retain with the I-9 in this context. Is the receipt notice required?

- b. [To demonstrate that the employee’s employment authorization is continuing or has been extended, employers should retain all of the documents stated on page 23 of the M-274, : a copy of the new Form I-129, proof of payment for filing a new Form I-129, and evidence that the new Form I-129 was mailed, including Form I-797, Notice of Action, from USCIS acknowledging receipt of Form I-129.](#)
- c. Please confirm that the receipt notice from USCIS satisfies the “proof of payment” and “evidence that you mailed the new Form I-129” requirements if received prior to I-9 completion.

[Form I-797, Notice of Action, which bears the amount of the filing fee submitted and acknowledges USCIS’ receipt of the new Form I-129 petition, constitutes the proof of payment and evidence of mailing. Once the employer receives this notice, it is not necessary for the employer to use the copy of the Form I-129 application, proof of payment, and mailing receipt for Form I-9 purposes.](#)

STEM:

In the context of a STEM extension, the M-274 indicates, on page 21, that the endorsed Form I-20, together with the expired Employment Authorization Document, “are acceptable proof of identity and employment authorization.” [I-9 Central states](#) that the expired EAD “must be presented with Form I-20 endorsed by the Designated School Official recommending the cap-gap extension.” A [Q&A from 5/23/08](#) indicated that the USCIS receipt notice – if issued – was also needed to show that the I-765 had been submitted.

- a. Please confirm whether the I-20 is required to demonstrate a STEM 180-day extension or if proof of timely filing of the I-765 would be sufficient.

An unexpired Form I-766 or an expired Form I-766 with Form I-20 endorsed by the designated school official recommending the STEM extension are acceptable List A documents for Form I-9. *See Handbook for Employers (Rev. 03/08/2013)N, page 21.*

- b. Please confirm that the receipt notice for the I-765 is not required for Form I-9 purposes if the I-20 is presented.

There is no requirement for the Form I-765 receipt notice.

- c. Please confirm whether copies of these documents must be retained with the Form I-9 by an employer that does not otherwise retain copies of supporting documents for I-9 purposes.

There is no requirement to retain these documents after Form I-9 completion. However, USCIS suggests that these documents be retained with Form I-9 so that the employer can demonstrate the extended work authorization in case of a Form I-9 inspection.

- d. Is a school ID card from another country acceptable as a List B document? Various List B documents specify the document must be from the United States, but this is not the case for a school ID card. List B also specifies that a Canadian driver's license is acceptable, but there is no such specific limitation for a school ID card.

A school ID card from another country is not acceptable as a List B document. The documents from other countries that are acceptable, and in some cases the conditions that apply for their acceptance, are specifically named on the List of Acceptable Documents. Examples include foreign passports on List A and the driver's license issued by a Canadian government authority on List B.

5. Reverification

Nonimmigrants who are issued an L-1 visa under a blanket authorization receive an endorsed Form I-129S from the consular officer that indicates the dates of validity. However, CBP routinely admits these nonimmigrants and updates the I-94 system for an additional three years upon each entry, without regard to the expiration of the validity period on Form I-129S. This issue also arises when E-3 nonimmigrants are admitted by CBP for a two year period, without regard to an earlier expiring Labor Condition Application. As neither the I-9 instructions nor the Form I-9 call upon the employer to look beyond an I-94 that appears to relate to the position in question, must an employer re-verify when the I-129S validity period expires, or is it acceptable to wait until the expiration of the I-94?

The endorsement dates on Form I-129S define the period during which an employee is authorized to work in the United States. The end date of the endorsement period on Form I-129S is the date the employee should provide in Section 1 of Form I-9 to complete the “An alien authorized to work until” field. When there is a conflict between the date provided in this field and the document presented in Section 2 to verify employment authorization, in this case, Form I-94, the employer should use the earlier of the two dates to determine when reverification is necessary.

6. E-Verify

In prior meetings, we have discussed the fact that E-Verify and Right to Work posters must be placed where potential job candidates can see them. Available guidance doesn’t directly answer this question, and it appears that the practice varies among employers.

- a. Do the four posters (E-Verify and Right to Work, English and Spanish) need to be posted together (or next to each other) or can they be in two separate locations?

Employers are required to display the English and Spanish E-Verify Participation and Right to Work notices together in a prominent place that is clearly visible to prospective employees. Employers do have some flexibility if this is not feasible due to their business setup. If the notices cannot be displayed at the hiring location, the employer has the option to provide them in the employee’s job application materials either online or in hard copy.

- b. To lock a Social Security Number (SSN) through E-Verify Self Lock, a U.S. citizen would go into E-Verify to do so, and then would not likely need to go into the system again unless they needed to unlock their SSN. However, Self Lock requires everyone to go back into the system each year to relock their number, which seems unnecessary and places additional burdens on the individual. Please explain why the lock cannot remain in place once it is set and until the individual manually unlocks the SSN. Security features become less secure if one has to keep going into the system to lock the SSN, and unlocking it (if one does not respond to the email reminders), would seem to increase the risk of a security breach.

myE-Verify is a self-service portal focused on giving control over certain aspects of E-Verify to users who create their own accounts. In order for accounts to remain active, users are required to log in annually. Similarly, the Self Lock feature of myE-Verify requires an annual extension or renewal to ensure that users maintain access to their accounts and the ability to manage their information. The requirement that users need to take additional actions to keep SSNs in a locked state helps them to maintain access and control over their locks and avoid being locked out and unable to lock/unlock their SSNs when they choose to do so.

- c. E-Verify guidance indicates that when an employee presents a receipt for Form I-9 purposes, the E-Verify query should be held until an original document is presented.¹ Does this apply only to receipts in lieu of lost/stolen/damaged documentation, or does it also apply in the context of a 240-day extension, an automatic STEM extension, portability, and similar situations?

If the employee presents an acceptable receipt for Form I-9 showing that he or she applied to replace a document that was lost, stolen or damaged, the employer must set aside this employee's Form I-9 and wait to create a case in E-Verify. However, employers must create a case in E-Verify by the third business day after the employee is hired if the employee presents one of the following documents which are also considered receipts:

- The arrival portion of Form I-94/I-94A with a temporary I-551 stamp and a photograph of the individual.
- The departure portion of Form I-94/I-94A with a refugee admission stamp.

In the context of a 240-day extension, an automatic STEM extension, portability, and similar situations, the employer must set aside the employee's Form I-9 and create an E-Verify case once the actual document, either an approved petition or EAD, is received.

- d. If an employer receives TNC in E-Verify and recognizes that the I-9 and/or query contained an obvious employer error, may the employer terminate the query and run a new (corrected) query without needing to notify the employee of the TNC? The [MOU at Article II \(A\)\(12\)](#) seems to indicate that the employee must always be notified of the TNC, whereas the [E-Verify User Manual](#) (for example, at page 29) indicates that the query may be closed as invalid without necessarily requiring contact with the employee.

If an employer notices that an error was made when creating a case, the employer should close the case as invalid and create a new case. The employer does not need to notify the employee of the TNC as the case is not valid. Additionally, the Further Action Notice directs employers and employees to review the information to ensure the information is correct. If the information is not correct, the employer should close the case and create a new case.

¹ Page 12, M-775, E-Verify User Manual, March 2015

If the employer provided an email address for the employee, the employee will receive an email directing him or her to contact the employer for the Further Action Notice and additional information. If contacted by the employee, the employer should let the employee know that an error was made when creating the case and the employer closed the case as invalid.

- e. Please provide any updates on the proposed changes to the E-Verify system (published for comment on June 8, 2015) which called for a new Final Non-confirmation review; reverification process; and MOU updates. Does USCIS still anticipate releasing the first phase of the project (FNC review) in 2016?

The E-Verify Paper Reduction Act (PRA) remains under agency review. After USCIS completes agency review, the E-Verify PRA package will be submitted to the Office of Management and Budget and to the Federal Register to start the 30-day notice and comment period. USCIS cannot estimate when the first phase of the project will be released.

- f. In April of last year, USCIS released updated statistics on E-Verify Monitoring and Compliance activities from FY2011 through FY2014. When will FY2015 statistics be released? If possible, can USCIS provide preliminary estimates on the number of compliance activities?

[Fiscal Year 2015](#) statistics were released on November 19, 2015. USCIS is unable to provide preliminary estimates on the number of compliance activities for fiscal year 2016.

Compliance Activities FY12 through FY15

| | FY12 | FY13 | FY14 | FY15 |
|----------------------------------|---------------|---------------|---------------|----------------|
| Compliance Actions* | 69,552 | 77,388 | 86,934 | 113,571 |
| Interagency Actions | 180 | 443 | 991 | 965 |
| Total Compliance Activity | 69,732 | 77,831 | 87,925 | 114,536 |

*Compliance actions include emails, telephone calls, desk reviews, and site visits