

# The I-9 Process and Antidiscrimination Protections in the INA

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## ■ Understanding the I-9 Process

Prior to 1986, it was not unlawful for an employer to hire “undocumented” workers—workers who lack authorization to work in the United States. As a result of the Immigration Reform and Control Act of 1986, however, it is unlawful for any employer to *knowingly* hire a worker who is not authorized to work in this country. To comply with the law, employers are required to verify the identity and employment eligibility of all employees hired after November 6, 1986, and to complete a special government form—the I-9 Employment Eligibility Verification Form, or “Form I-9” for short—for each new hire. This procedure is binding on all employers, regardless of size.<sup>1</sup>

## ■ Verifying Employment Eligibility

The law requires that the employer complete Form I-9 for all new hires, not just those the employer believes are non-U.S. citizens or undocumented.

To enable the employer to complete the form, workers must provide the employer with documents that prove both the worker’s *identity* and *eligibility to work*, as explained below. Workers generally must be allowed three business days *after* they are hired to produce documentation, and they should not be required to produce any documents until they have actually been hired for a position. If a worker has lost a document or documents necessary to establish identity or employment eligibility (or if the document is stolen or damaged), the worker can present a receipt for a

replacement document. The receipt can be for a document from List A, List B, or List C. An employer must give the worker up to 90 days from the date of hire to provide a valid original document.

Two other types of documents are also acceptable as receipts for completing the Form I-9. First, a worker may present a Form I-94 or Form I-94A containing a temporary I-551 stamp and a photograph of the individual, which is considered a receipt for the Permanent Resident Card (Form I-551). The individual must present Form I-551 by the expiration date of the temporary I-551 stamp, or within one year from the date of issuance of Form I-94 or I-94A if the I-551 stamp does not contain an expiration date. Second, a worker may present a Form I-94 or I-94A containing an unexpired refugee admission stamp. This is considered a receipt for either an Employment Authorization Document (Form I-766) or a combination of an unrestricted Social Security card and List B document. The employee must present acceptable documentation to complete Form I-9 within 90 days after the date of hire or, in the case of reverification, the date employment authorization expires.

The employer is required to keep completed Forms I-9 on file for three years or one year after a worker’s employment ends, whichever is later, and must make them available for inspection, if requested, by the U.S. Department of Homeland Security’s (DHS’s) U.S. Immigration and Customs Enforcement (ICE) bureau, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), or the U.S. Department of Labor (DOL). Employers who fail to complete the forms, or who continue to employ workers they know lack valid employment authorization, are subject to civil and criminal penalties.

<sup>1</sup> The definition of “employee” exempts certain persons from the I-9 requirement—for example, independent contractors, casual domestic workers, etc. For more information, see 8 C.F.R. 274a.1.



### LOS ANGELES (Headquarters)

3435 Wilshire Boulevard  
Suite 2850  
Los Angeles, CA 90010  
213 639-3900  
213 639-3911 fax

### WASHINGTON, DC

1444 Eye Street, NW  
Suite 1110  
Washington, DC 20005  
202 216-0261  
202 216-0266 fax

## ■ The Form I-9

Form I-9 is the document that the worker and the employer complete in order to verify the worker's authorization to work in the U.S. Form I-9 contains three sections, as well as a list of documents that may be used to prove an employee's identity and work eligibility. In April 2009, U.S. Citizenship and Immigration Services (USCIS) changed Form I-9, thereby modifying the number and type of documents that workers may present. The revised Form I-9 removes some documents and adds others to the list of acceptable documents for the employment eligibility process. ***The most significant change is that expired documents are no longer acceptable forms of identification or employment authorization.*** The current list of acceptable documents is provided at the end of this memo. On August 22, 2009, USCIS extended its approval of the current Form I-9 until August 12, 2012. As such, employers can use either the Form I-9 with the revision date of either (08/07/09) or (02/02/09) at the bottom of the form. There are no substantive changes in the August 2009 revision.

### Section 1

The first section of Form I-9 is to be completed by the worker and requires that he or she sign the form *under penalty of perjury*. The worker must supply his or her name, address, date of birth, and must check a box indicating whether he or she is a U.S. citizen, a noncitizen national, a lawful permanent resident, or an alien authorized to work in the United States. Workers who indicate they are a lawful permanent resident or alien authorized to work must also provide their "alien (or 'A') number" (assigned to them by DHS and listed on all documents the agency issues to them) and the expiration date of their authorization to work, if any. Note that asylees' and refugees' authorization to work does not expire. While there is a space on the form for the worker's Social Security number, a worker is not required to provide it unless the employer is using E-Verify. However, if the worker provides a Social Security card as proof of his or her work authorization, the employer will need to list that in Section 2. If a worker needs assistance in completing section 1 (i.e., due to limited English proficiency or because he or she is unable to write), someone can help the worker complete this section. That person would have to

sign that he or she prepared or translated this section for the worker.

### Section 2

The second part of the form requires the employer to list the document(s) that were produced by the worker to verify his or her identity and employment eligibility. As explained below, there are three groups of documents from which a worker must choose. ***It is the worker's choice, not the employer's, as to which acceptable document or combination of acceptable documents to use.*** However, there is an exception for employers using E-Verify, which requires documents with a photograph.

"List A" documents are those that establish both a worker's **identity** (who he or she is) as well as **eligibility to work** (legal work papers). If a worker provides one document from List A, he or she is not required to provide any other document to complete Form I-9.

If a worker does not have, or chooses not to provide, a List A document to complete Form I-9, he or she must choose one document from List B and a second from List C to provide to the employer. List B documents establish a worker's **identity**. List C documents establish a worker's **employment eligibility**. Again, ***it is the worker's choice, not the employer's, as to which acceptable document or combination of acceptable documents to use.*** However, a Social Security card that contains the statement "*Not Valid for Work Without DHS Authorization*" is not a valid List C document.

The documents that currently are acceptable are listed at the end of this memo. This list of documents incorporates the recent changes USCIS made to Form I-9 in April 2009. All employers are required to use the new I-9 form (Rev. 02/02/09 or 08/07/09). However, ***employers are not required to complete new I-9 forms for workers who completed their I-9 forms using the prior version of the form.*** In addition, ***employers should not ask workers who presented documents that were acceptable under the prior version of the I-9 to present new documents just because those documents are no longer acceptable for completing the current version.*** It is important for workers and advocates to remember that the **worker**, not the employer, ***has the right to choose*** which of the

listed documents or combination of documents to show to satisfy the I-9 requirements. An employer's request for "more or different documents" than are required, or a refusal to accept certain documents that appear "reasonably genuine" and to relate to the worker presenting them may violate the Immigration and Nationality Act's (INA's) antidiscrimination protections. Such violations are referred to as "**document abuse**" and are discussed more fully below.

### Section 3

The third section of Form I-9 is entitled "Updating and Reverification." It is used by an employer to reverify the employment eligibility of employees who, when they first completed Form I-9, presented a document showing that their employment authorization would expire on a certain date. In most but not all cases, when a document showing a worker's employment authorization expires, the employer must reverify on Form I-9 that the employee is still work-authorized and must do so no later than the expiration date of the employee's work authorization. Please note that while the "green card" that lawful permanent residents often present bears an expiration date, an employer should NOT reverify a lawful permanent resident's authorization, because his or her authorization to work does not expire. In addition, some individuals who have temporary protected status (TPS) can continue to work with an expired employment authorization document when DHS publishes a notice in the Federal Register automatically extending their work authorization.<sup>2</sup> Finally, an employer should not reverify a List B identity document that expires.

### ■ E-Verify

Some employers also use E-Verify, a voluntary electronic employment eligibility verification system that is administered by DHS in partnership with the Social Security Administration (SSA). E-Verify requires an employer, after completing a worker's Form I-9, to submit an inquiry via the Internet that will compare the worker's informa-

tion from the Form I-9 against records in SSA's and DHS's databases.<sup>3</sup>

E-Verify modifies the I-9 procedure in three ways: First, a worker must provide his or her Social Security number in section 1 if his or her employer uses E-Verify. Second, an employer who uses E-Verify can accept only a List B identity document that contains a photo from a worker who chooses to present a List B document. Third, if a worker presents a Form I-551 (permanent resident card or "green card") or Form I-766 (employment authorization document or "work permit") to complete the Form I-9, the employer must make a photocopy of the document.

### ■ Understanding the Antidiscrimination Protections of the INA

The antidiscrimination provision of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1324b, provides protections to employees who may face discrimination based on national origin, citizenship status, or the documents presented to establish employment eligibility—or who may be retaliated against for asserting their employment-related rights under the INA.

#### TYPES OF DISCRIMINATION

**Citizenship status discrimination** is when individuals are rejected for employment or fired because they are or are not U.S. citizens or because of their immigration status or type of work authorization. The most common form of citizenship status discrimination is a U.S. citizen-only or permanent resident-only hiring practice. U.S. citizens, permanent residents, temporary residents, asylees (individuals granted asylum), and refugees are protected from citizenship status discrimination.

**National origin discrimination** is when individuals are rejected for employment or fired based on their place of birth, ancestry, native language, or accent, or because they are perceived as "looking or sounding" foreign. All work-authorized workers are protected from national origin discrimination.

<sup>2</sup> For more information, see NILC's "Reverification of Employment Eligibility: Frequently Asked Questions" ([www.nilc.org/immsemplymnt/ircaempverif/tpstoolkit/QA\\_reverification\\_2006-07.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/tpstoolkit/QA_reverification_2006-07.pdf)).

<sup>3</sup> For more information, see NILC's "Basic Information Brief: DHS Basic Pilot/E-Verify Program," available at [www.nilc.org/immsemplymnt/ircaempverif/e-verify\\_infobrief\\_2008-03-13.pdf](http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf).

**Document abuse discrimination** is when employers request more or different documents than are required to complete the Form I-9 or reject documents that reasonably appear to be genuine. Work-authorized noncitizens do not all carry the same documents. For example, not all immigrants who are authorized to work are issued “green cards.” As long as the documents are listed on the list of acceptable documents and appear to be genuine on their face and to relate to the person, the employer should accept them. Failure to do so constitutes illegal document abuse. Document abuse is the most common type of immigration-related unfair employment practice, and all work-authorized individuals are protected from it.

### ■ Filing a Charge of Discrimination

Workers who believe that they may have been discriminated against should get help right away. The deadline for filing most kinds of discrimination complaints is within 180 days of the discriminatory act.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the Department of Justice’s Civil Rights Division protects immigrants and other workers from employment discrimination based upon citizenship status, national origin, language, accent or similar

factors, and document abuse. The OSC has multilingual staff and attorneys ready to assist workers, employers, and the public on immigrant employment discrimination matters. For information or assistance in filing a charge of discrimination, workers may call the OSC’s toll-free hotline at 1-800-255-7688 or 1-800-237-2515 (TDD for hearing impaired). There is also an automated employer hotline at 1-800-255-8155 or 1-800-237-2515 (TDD).

**Charges of discrimination should be faxed to OSC at 1-202-616-5509. You can also write to the OSC at the following address:**

U.S. Department of Justice  
Civil Rights Division  
Office of Special Counsel for Immigration-Related Unfair Employment Practices  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
Website: <http://www.usdoj.gov/crt/osc>.  
E-mail Address: [oscrt@usdoj.gov](mailto:oscrt@usdoj.gov)

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### FOR MORE INFORMATION, CONTACT

Nora Preciado, Employment Policy Attorney  
[preciado@nilc.org](mailto:preciado@nilc.org) | 213.639.3900 x. 123

## List of I-9 Form Acceptable Documents

\*The I-9 Form may be revised at any time in the future. Visit [www.uscis.gov](http://www.uscis.gov) for the most current version.\*

**Workers can choose: *One document*** – One from List A – to establish both identity and eligibility to work *or*  
***Two documents*** – One from List B – to establish identity  
*and*  
 One from List C – to establish eligibility to work

**\*\*As of April 3, 2009 all documents presented during the I-9 process must be unexpired. If there is no expiration date, they are considered unexpired.\*\***

### List “A” Documents – Establish Identity and Employment Eligibility

1. U.S. Passport or U.S. Passport Card
2. Permanent Resident Alien Card or Alien Registration Receipt Card (Form I-551)
3. Foreign passport with temporary I-551 stamp or temporary I-551 printed notation on machine-readable immigrant visa
4. Employment Authorization Document that contains a photograph (Form I-766)
5. Foreign passport with Form I-94, bearing the same name as the passport and containing an unexpired endorsement of the person’s nonimmigrant status, if the proposed employment doesn’t conflict with any listed restrictions or limitations identified on the form
6. Passport from the Federal States of Micronesia or the Republic of the Marshall Islands with an unexpired Form I-94 or I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI

### List “B” Documents – Establish Identity<sup>4</sup>

1. Driver’s license or ID card issued by a state or outlying possession of the U.S., provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
2. ID card issued by federal, state, or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
3. School ID card with a photograph
4. Voter’s registration card
5. U.S. Military card or draft record
6. Military dependent’s ID card
7. U.S. Coast Guard Merchant Mariner Card
8. Native American tribal document
9. Driver’s license issued by a Canadian government authority

**For persons under age 18 who are unable to present a document listed above:**

<sup>4</sup> List B identity documents should not be reverified when they expire

10. School record or report card
11. Clinic, doctor, or hospital record
12. Daycare or nursery school record

### List “C” Documents – Establish Employment Eligibility

1. Social Security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Certification of Report of Birth Abroad issued by the Department of State (Form DS-1350)
4. Original or certified copy of a birth certificate issued by a state, county, or municipal authority or territory of the U.S. bearing an official seal
5. Native American tribal document
6. U.S. Citizen ID Card (Form I-197)
7. ID Card for use of Resident Citizen in the U.S. (Form I-179)
8. Employment authorization document issued by DHS