206:Immigration Law for the In-house Practitioner

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Prior to joining PeopleSoft, Ms. Lee served as assistant district counsel for the United States Department of Justice, Immigration and Naturalization Service in the San Francisco office. While in that position, she represented the U.S. government in deportation and exclusion hearings in immigration court and before the Board of Immigration Appeals. She also represented the U.S. government in labor and employment issues brought before the Merit Systems Protection Board and the Equal Employment Opportunity Commission.

She is a member of the American Immigration Lawyers Association and coaches Special Olympics throughout the year.

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ACC'S 2004 ANNUAL MEETING

206 IMMIGRATION LAW FOR THE IN-HOUSE PRACTITIONER

PART II: NON-IMMIGRANT VISAS AND EMPLOYMENT-BASED IMMIGRATION

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DISCLAIMER: The information contained in this material is intended for general information purposes. This is not a "how to" manual for any attempt to include every detail of every procedure would result in a document with numerous volumes and thousands of pages. The information contained herein is not offered as advice, but is meant to provide a foundation or basis of understanding for the reader. The reader is cautioned to check the state of the law and seek professional advice from an immigration attorney for specifics on any topic covered in this document. While every effort was made to include the most-current state of immigration law, 2004 has been a year rife with changes – changes that occurred even as this document went to press. All liability is disclaimed with regard to the information provided as are any consequences of a person taking action, or omitting taking action, in reliance of information in this document.

I. INTRODUCTION AND GENERAL OVERVIEW OF VISA CATEGORIES

Just as the vast majority of countries do around the world, the United States has passed laws surrounding who may legally engage in lawful employment in its country. Typically, there are only two categories of individuals who enjoy the privilege of virtually unfettered employment within U.S. borders[1]: United States citizens ("USC") and lawful permanent residents ("LPR"). USCs obtain citizenship in any number of ways, including through birth within the country's borders, naturalization as the primary applicant, naturalization due to being under the age of sixteen at the time both parents are naturalized, birth outside the country to a parent who is USC and meets time-in-residence requirements. More information can be found at § 301 et. seq. of the Immigration and Nationality Act ("INA"), aka 8 U.S.C. § 1401 et. seq.

A third class of individuals is allowed to work in the United States because they have obtained temporary work authorization. These include persons holding certain types of non-immigrant visas, as well as those who are in the process of applying for adjustment of status to LPR by having filed form I-485 with the U.S. Citizenship and Immigration Service ("USCIS"), or who have been waiting for a prescribed period of time for their visa petition priority date to come current so that they can apply for LPR status (e.g. those who hold V-visa status). For purposes of this course, we will be focusing on this third category of workers. Primarily, the course and remaining material in this guide will relate to the most commonly used non-immigrant visas ("NIV") and the employment-based immigrant visa ("IV") process.

For purposes of immigration law, the U.S. defines all individuals seeking entry through its borders as an immigrant or intending immigrant *unless* the individual can show that he/she falls into an appropriate NIV class *and* that individual has been issued that NIV. Individuals without proper documentation may be subject to expedited removal proceedings or traditional removal proceedings depending on the circumstance presented.[2] Following is a chart of the different NIV classes available. Each has its own restrictions and requirements. Some of them do not allow the holder to engage in any productive work in the U.S. Others allow the holder to engage in employment under certain circumstances. Whenever employment is authorized, it is employer-specific. In other words, changing employers means an NIV holder must obtain a new visa or receive other permission from the CIS in the form of an amendment of status. For convenience, the most commonly-used categories for business organizations are shown in italics. These will also be given further discussion later. Due to limited time and space constraints, the less commonly used visa types are left to the reader for further research.

Visa		Description
A	INA § 101(a)(15)(A) / 8 USC 1101(a)(15)(A)	Diplomats, ambassadors and consular officers, and their immediate family members
B	*INA § 101(a)(15)(B) / 8 USC 1101(a)(15)(B)*	*Temporary visitors for business or pleasure*
C	INA § 101(a)(15)(C) / 8 USC 1101(a)(15)(C)	Aliens in transit

[1] I say "virtually" because the law clearly does not allow for illegal employment such as the selling and reselling of illicit narcotics, banned explosives and firearms, etc.

[2] Removal proceedings are not covered in this course or these materials. The reader is encouraged to seek the advice of an immigration professional if a situation arises where the issue of removal is raised.

D	INA § 101(a)(15)(D) / 8 USC 1101(a)(15)(D)	Crew members of ships and aircraft
E.	*INA § 101(a)(15)(E) / 8 USC 1101(a)(15)(E)*	*Treaty traders/treaty investors and their immediate family members*
F	*INA § 101(a)(15)(F) / 8 USC 1101(a)(15)(F)*	*Students in academic/language programs and their immediate family members*
G	INA § 101(a)(15)(G) / 8 USC 1101(a)(15)(G)	Representatives of foreign governments that have been recognized by the U.S. and that foreign government is a member of an international organization as defined under the International Organizations Immunities Act
H	*INA § 101(a)(15)(H) / 8 USC 1101(a)(15)(H)*	*Temporary workers (including skilled professionals/specialty occupation, health care/nurses, agricultural workers, and trainees in a bona fide training program)*
I	INA § 101(a)(15)(I) / 8 USC 1101(a)(15)(I)	Representatives of foreign media and their immediate family members
J	*INA § 101(a)(15)(J) / 8 USC 1101(a)(15)(J)*	*Exchange visitors coming for the purpose of teaching, instructing, lecturing, studying, observing, conducting research, receiving training and their immediate family members*
K	INA § 101(a)(15)(K) / 8 USC 1101(a)(15)(K)	Fiance(e)s of USCs and their minor children
L	*INA § 101(a)(15)(L) / 8 USC 1101(a)(15)(L)*	*Intracompany transferees and their immediate family members*
M	INA § 101(a)(15)(M) / 8 USC 1101(a)(15)(M)	Students in vocational or other recognized non-academic program and their immediate family members
N	INA § 101(a)(15)(N) / 8 USC 1101(a)(15)(N)	Parents and children of "special immigrants" (described in INA § 101(a)(27)(I) relating to foreign officers as described in INA § 101(a)(15)(G) who meet certain residence requirements)
NATO	Representatives of NATO member states and NATO officials and their immediate family members	
O	*INA § 101(a)(15)(O) / 8 USC 1101(a)(15)(O)*	*Aliens of extraordinary ability in the sciences, arts, education, business or athletics, their assistants, persons who are integral to the actual performance, and the alien's immediate family members*
P	INA § 101(a)(15)(P) / 8 USC 1101(a)(15)(P)	Aliens who are athletes, entertainers or artists and their immediate family members
Q	INA § 101(a)(15)(Q) / 8 USC 1101(a)(15)(Q)	Aliens participating in international cultural exchange programs

R	INA § 101(a)(15)(R) / 8 USC 1101(a)(15)(R) Aliens in religious occupations (must have been in member of religious denomination that has a bona fide nonprofit religious organization in the U.S. for two years immediately prior to application)
S	INA § 101(a)(15)(S) / 8 USC 1101(a)(15)(S) Alien in possession of, willing to supply or has supplied critical reliable information concerning a criminal organization or enterprise or terrorist organization, enterprise or operation
T	INA § 101(a)(15)(T) / 8 USC 1101(a)(15)(T) Alien who has been a victim of a severe form of trafficking in persons, is present in the U.S. because of such trafficking, has complied with request for assistance in investigation or prosecution of acts of trafficking)
TN/TD	*Visa category created by NAFTA. Visa available only to citizens of Canada and Mexico who are members of specific, enumerated professions, and their immediate family members*
U	INA § 101(a)(15)(U) / 8 USC 1101(a)(15)(U) Alien who has suffered substantial physical or mental abuse as a result of specific, enumerated crimes, including rape, torture, trafficking, incest, domestic violence, sexual assault, kidnapping, female genital mutilation, slavery, witness tampering, etc. Spouse and minor child may also be granted status under this category
V	INA § 101(a)(15)(V) / 8 USC 1101(a)(15)(V) Alien who is the beneficiary of an immigrant visa petition filed by a family member that has been pending for at least three years or was approved at least three years ago but the alien has been unable to become an LPR due to the long waiting list of applications[3]

Immigration law is forever changing in the U.S. It grows and expands or constricts as necessary to meet the needs of an ever-changing society and worldwide landscape. As means of providing illustration, note that categories T, U and V were added between 2001 and 2003 – very recent additions to the family of NIVs.

II. NON-IMMIGRANT VISAS – ALPHABET SOUP FOR EMPLOYERS

As mentioned above, this document is meant to provide a very broad brush-stroke painting of immigration law in the U.S. No attempt is made to exhaustively cover all visa categories or even all the nuances of each of the visa categories that are presented in greater depth. Instead, it is hoped that the reader will be given a foundation on which to build further in-depth knowledge, if desired, or a 30,000-foot-view topographical map of immigration law as it exists at the time this document went to press in 2004. Many of the visas that were outlined in the introduction are never encountered by the average employer. Some employers will find that they work mostly with one or two visa categories and never

[3] Although a separate section will not be covered for this visa category, employers should be aware that holders of V visas are eligible to engage in gainful employment in the U.S. by applying for, and obtaining, an Employment Authorization Document. This category is so new that few employers have encountered questions from their employees regarding this visa group, but as the V visa becomes more common, employers should become aware of the existence of this category, if only to field a "Can we hire this person?" question from the recruiting department.

have need for the others. For instance, a high-technology company with only U.S. offices will likely use H and TN visas, but have little need for an R or L visa, whereas a high-technology company with worldwide offices may find itself making substantial use of the L visa in addition to H, TN and perhaps an O visa, while on the other hand a church will never have use of any of the visas except the occasional B or R.

This section will delve into each individual visa that the majority of businesses in the U.S. rely in somewhat more detail than was presented in the introduction.

A. B-1/B2 Visitor Visas 8 CFR § 41.31

While the B-1 designation is for "visitors for business" and the B-2 designation is for "visitors for pleasure", for all intents and purposes they might as well be the same thing. The B-2 visa is often referred to in layman's terms as a "tourist visa" which is a very accurate representation of its purpose so no further explanation is necessary. However, the B-1 visa is not all that is appears to the layman to be. Visas stamped into passports often merely state "B" or they can specify "B-1" or "B-2" or, even more confusing, they can state "B-1/B-2". Because of the term "business" in the phrase "business visa" that is used to describe the B-1 status, this is the visa class most commonly abused by employers – both knowingly and unknowingly. Therefore, this category deserves some special attention.

The B-1 visa does *not* allow its holder to engage in gainful or productive employment while in the U.S. The visa itself may be issued for one entry or multiple entries for a period of one month to five or ten years. However, the length of each individual visit is restricted by the amount of time necessary to conduct business and any one trip may not have a stay exceeding one year (the longest an inspector will grant upon admission into the US is six months, but extensions may be sought later).

The B-1 visa holder may not be employed in the U.S. (no going to a client/customer site and implementing software!)
The B-1 visa holder may not be paid as an independent consultant while in the U.S.

The B-1 visa holder may attend conventions, meetings, seminars and conferences
The B-1 visa holder may participate in litigation (as a party, as a witness)
The B-1 visa holder may negotiate contracts
The B-1 visa holder may engage in commercial transactions

Rules:

- The B-1 applicant must demonstrate adequate financial means for the trip;
- must depart at the conclusion of the visit;
- must *not* intend to change to another visa category at a later date (i.e. should not be coming to the U.S. to look for "permanent" employment);
- must present documentary evidence of the purpose of the trip (e.g. itinerary, letter of invitation from U.S. entity)
- must present proof of continuing intent to return to home country (e.g. family remaining in home country, employment in home country, etc.)

The B visa should not be used as a "quick and easy" way to get someone into the U.S. so that the person may change status to the an employment-eligible visa category at a later date. While the law does not prohibit a change of status from B-1 to a work-eligible category after the individual is in the country, it would be disingenuous to knowingly engage in such a "strategy" since the requirement of intent to depart the country at the end of the visitor period is not met and, therefore, the original entry into the U.S.

involves misrepresentation. If the intent is to have the individual work in the U.S., use of the B-1 category is inappropriate.[4]

Note: Not all foreign nationals are required to obtain a visa prior to entry into the U.S. Nationals of countries designated for participation in the Visa Waiver Program (formerly known as the "Visa Waiver Pilot Program") are allowed to enter the U.S. for B-1/B-2 purposes for up to ninety days with a valid passport. See INA § 217; 8 USC 1187. A significant difference between entry on an actual B-1/B-2 visa and entry under the Visa Waiver Program is that persons who enter the U.S. under the Visa Waiver program may *not* change status at a later date. See INA § 248; 8 USC § 1258. The list of participating visa waiver countries is subject change at any time. For an up-to-date list of participating countries, the reader is invited to look at the Department of State website listed in section V of this document.

B. E Visas for Treaty Traders and Treaty Investors 8 CFR § 214.2(e)

E visas are relatively rare for U.S. employers to seek because most persons will fall neatly into other visa categories that do not require the question of existence of a treaty of commerce or navigation to be answered. Therefore, they are given only a brief review here.

The E visa (E-1 for the principal; E-2 for dependents) was designed to further the ability to conduct business of companies and individuals who are nationals of a treaty country. Treaty Traders are persons who engage in substantial trade (purchase/exchange/sale of goods/services) between the U.S. and their home country. Treaty Investors are persons who have invested a substantial amount of capital in a U.S. concern that is under the alien's direction and development. Before one even determines whether an E visa may be the appropriate type of visa, it must first be determined whether there is a treaty of commerce or navigation between the U.S. and the alien's home country. If such a treaty exists, then the next step of the analysis follows:

- The individual must be a national of the treaty country
- If working for a company, at least fifty-percent of the company must be owned by individuals in the U.S. who are nationals of the treaty country
- The individual must be a high-level executive, supervisor or someone with "essential" skills
- There must also be a parent-subsidiary relationship between the treaty country's concern and the U.S. concern

If the above conditions are met, the individual is eligible to apply for an E-1 visa. Generally, E-1 visas are valid for a maximum of two years. The visa may be extended in increments of two years.

Dependents may be granted E-2 visas. Spouses of E-1 visa holders are eligible to obtain an Employment Authorization Document ("EAD") based upon their status as an E-2 visa holder by filing an application on form I-765. EADs are issued in one-year increments and allow the holder to engage in lawful, productive employment in the U.S., generally without restrictions as to employer or type of work.[5]

[4] There may be an occasional situation where use of a special category known as "B-1 in lieu of H-1B" is called for, but these situations should be few and far between as the use of this category can become tricky. It will be given some attention in the H-1B discussion below.

[5] The EAD is generally restriction-free, but individuals may find themselves unable to work for state or federal agencies that may have citizenship or permanent residence requirements.

C. F Visas for Students 8 CFR § 214.2(f)

In order to be eligible to receive an F visa, an individual must have been admitted to a language or academic program at a CIS-approved school. Unlike other types of visas, F visas are issued to students in lengths of time sufficient to complete the full course of study. Upon admission to the U.S. F-visa holders are given an authorized period of stay of "D/S" which translates to "Duration of Status". In other words, as long as an F-visa holder is enrolled in school and pursuing the program to which he or she was accepted, the holder is in status. F-visa holders are *not* allowed to work while they are in the U.S. unless they have obtained an EAD pursuant to either curricular practical training ("CPT") or optional practical training ("OPT") programs. These EADs are typically issued for up to one year (either one full year outright or two six month periods) *after* completion of the program and must be authorized by the educational institution.

Rules:

- The educational institution must be approved by the CIS;
- The educational institution must issue Form I-20 to the student;
- The student must have sufficient monetary support for himself/herself for the duration of the program

Once the student has completed the program to which he/she was admitted, the student is expected to leave the U.S. unless he/she is qualified for, and has been admitted to, another educational program. The period of the F visa may be extended if the individual enters another qualified program.

There are no prohibitions to an F-visa holder seeking a change of status in terms of a foreign residence requirement, nor are they subject to the "no change of status rule" imposed on VWP entrants. Most commonly, F-visa holders seek employment as part of CPT or OPT and during the time of that employment, the employer will file a petition to change the F-visa holder's status to H-1B (or other appropriate category though H-1B tends to be the most commonly used), subject to the annual cap imposed on issuance of new H-1B visas.

D. H Visas for Temporary Workers 8 CFR 214.2(h)

H-4 visas may be granted for the dependents of any principal visa holder of the below classes.

i. H-1B Specialty Occupations

Widely used by corporations throughout the U.S., this category gets a lot of press time in the media, especially in recent times when the economy has been tight and companies have been engaged in reductions in force (i.e. layoffs, RIFs) across the country. It is not unusual for a company to face complaints of anti-American discriminatory practices when a RIF occurs. ("Company X laid off all the American workers and kept the H-1 visa holders because they're cheaper.") There are, however, a number of statutory and regulatory requirements in place designed to make H-1 hires *more costly* than a typical American hire, including prevailing wage requirements, public posting periods, and the temporary nature of the visa category (unless permanent residence is sought and applied for, which is also a costly expenditure).

The hiring of an H-1B worker is subject to an annual cap of 65,000.[6] The cap applies only to the issuance of a *new* H-1B visa, however, due to the passage of the American Competitiveness in the 21st Century Act ("AC-21"). Therefore, a company who seeks to hire a worker who already holds an H-1 visa through employment with another organization can file the request for the non-immigrant visa without regard to the quota issue. If a company wishes to hire an individual who holds any other class of visa, or is outside the U.S. and has never held an H-1 in the U.S. in the past, the company must either file the petition to change status before the H-1 quota for the year has been reached, or wait until the CIS announces they are accepting visa petitions for the following fiscal year.

H-1B workers subject to the annual cap cannot be hired/placed on payroll/employed until the H-1 petition to either change status (if in the U.S.) or be granted status (if outside the U.S.) has been approved. H-1B workers who currently hold H-1 status, however, are the beneficiaries of another piece of AC-21 that allows them increased "portability". In other words, upon the filing of a bona fide petition by the new employer, the H-1B worker is legally able to begin employment with the new employer.[7]

The H-1B application process involves three steps (two if the individual is already in the United States): 1) approval of a labor condition application by the Department of Labor ("DOL"), 2) filing of the request for the non-immigrant visa or extension of status by the employer, 3) application for the non-immigrant visa stamp (if the alien is outside the United States).

Rules:

- Person in a specialty occupation (generally defined as a professional and/or a field/occupation that requires a bachelor's degree or its equivalent), fashion models of distinguished merit or person providing service to the Department of Defense ("DOD") in a cooperative research or development project
- Employer must pay reasonable cost of return fare if employee is dismissed early
- Employee may not be "benched"
- Employer must begin paying stated wage within thirty days of entry into the U.S. or within sixty days of approval if the individual is already in the U.S.[8]
- Approval of an LCA does not mean H-1 will automatically be extended/granted
- Allows "dual intent".

Initial visa may be issued for a three-year period, extensions may be granted in three-year increments, but total time in the U.S. may not exceed six years (this includes time in any H status as well as time in L status) unless the alien has spent at least one year physically outside the U.S. Extensions beyond the six-year H-1 limitation may be obtained in one-year increments *provided that* the employee is the beneficiary of a labor certification that was filed at least 365 days prior.

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[6] The annual cap is subject to change at congressional will. During the dot-com boom, there was such a clamor for an increase in the quota due to a severe shortage of available American workers that Congress responded by raising the cap from 65,000 to 195,000. As with many congressional actions, however, by the time the cap was raised, the country was in the midst of the post-dot-com bust and the 195,000 quota was never used up during the two-year period it was raised. Fiscal year 2004 the temporary increase in the cap ended and the numbers reverted back to 65,000 – which was reached in February 2004.

[7] As a practical matter, however, it would be wise for an employer to wait until it receives the I-797 Notice of Action from the CIS showing that the CIS has received the visa petition otherwise, in the event of an audit, the employer will have nothing to prove the actual filing of the petition. In addition, without the I-797, it is questionable whether an I-9 form may be properly completed or whether it will result in a paper violation due to missing pertinent information.

[8] This requirement causes potential problems when combined with the Social Security Administration's new task of verifying status prior to issuance of a social security number. Please see Miscellaneous Thoughts for more details.

a. The Labor Condition Application

The labor condition application ("LCA") must filed by the employer prior to the filing of the visa petition. Jurisdiction over the approval of the LCA is held by the DOL. In the "old days" the LCA had to be filed by mail and approved by mail and the process could take as long as two weeks after figuring in mailing time. In the "enlightened era" the DOL began to accept LCA filings by facsimile, which shortened the turnaround to twenty-four hours (seventy-two hours if you were among the unlucky that day whose case was assigned to someone who worked a little slower than his cohorts). The DOL has gone "high tech" and today the LCAs are filed online with approval and certification within seconds of pressing the "submit" button.

Part of the requirements connected with the LCA process requires that the employer post a notice in an area generally accessible to other interested employees of its intent to seek approval of an LCA for the stated position. The notice must be posted in two different locations at the intended worksite and must be up for a ten-day period in a conspicuous location. Among the items that must be disclosed in the notice are geographic location of the position, job title, salary/wage rate, prevailing wage for that position and information as to where a complaint may be filed against the employer if the reader of the notice believes that the employer made any misrepresentations in the application or failed to pay the stated wage. Essentially, the notice must contain nearly all the information contained in the LCA that is actually filed. In addition, the LCA includes attestations by the employer that the working conditions provided for the H-1B worker will not adversely effect over similarly employed workers, that there is no strike or lockout in the occupational classification at the place of employment. More information may be found about the specific requirements of the posting at 20 CFR § 655.730 et. seq. A copy of the certified LCA must be provided to the H-1 worker on or before he arrives for work.

Filing of the LCA essentially commits and employer to paying the stated wage for the period of time shown on the LCA. Therefore, it is critical that the sponsoring organization file a notice to withdraw the H-1B visa petition with the appropriate service center upon termination of the H-1B visa holder's employment if it is sooner than the dates requested. Failure to comply with the terms of the LCA may result in a fine by the DOL (this ranges anywhere from $1,000 to $35,000 per violation) and the company may be prohibited from future approvals of *any* NIVs, IVs or AECs for a period of no less than one year, and as long as three years. 20 CFR § 655.800 et. seq. The employer is required to maintain public access files that must be readily available for not only government audits, but for review by members of the public who are "interested or aggrieved parties". The file must contain the instructions for filing the LCA, the benefits/benefits plan offered to the H-1 worker and to others in the company, an actual wage memorandum detailing how the salary paid to the H-1 worker was computed, the certified LCA, a copy of the prevailing wage determination or salary survey, and the notices that were posted (including the dates posted and locations where they were posted).

A note about prevailing wage: The employer is required to pay the *higher* of prevailing wage or actual wage to an H-1B worker. Prevailing wage is determined by the use of appropriate, independent salary surveys, the DOL's own online salary information or by obtaining a prevailing wage determination by the State Employment Security Agency ("SESA"). Opting to use the SESA requires submission of the description of the duties for the position for which the LCA is sought. Based on the information submitted, SESA will determine what the appropriate salary should be. The H-1 employer is required to pay at least 95% of the prevailing wage. If an employer opts to use an independent salary survey (such as Watson Wyatt or Radford), the number used for the prevailing wage must be the *weighted average* of all salaries reported for that class of position. Using the weighted average oftentimes means that the prevailing wage that a company is required to pay in order to employ a foreign worker in H-1 status is *higher* than that of the average American worker in a similar position. When combined with legal fees and filing fees for the H-1 process, the H-1 worker ends up costing a company *more* than it would cost to

hire an American worker. This is a built-in deterrent to employers and a means of not only protecting foreign workers from exploitation but also protecting American workers from losing jobs because of a salary differential.

b. The Non-Immigrant Visa Petition

Filing of a successful NIV petition for the H-1B category depends on a number of things, but generally relate to the eligibility of the alien (assuming the employer has cleared the LCA hurdle and met all the requirements for the LCA): number of years previously spent in H or L classification, educational background, work experience in the field/industry, prior negative immigration history. In addition to these requirements, the employer must show that the position is correctly classified as a "specialty" occupation, that the fashion model is of 'distinguished merit" or that the service is related to a DOD project.

Once it has been determined that the alien has available H-1B time left (either because the combined use of L-1, H-4, H-1B time is less than six years or because of the filing of a labor certification at least 365 days prior), the employer will need to determine whether there are negative immigration factors in the alien's background that require special attention. Once the prevailing wage and posting requirements have been met for the LCA, the greatest hurdle for H-1B employers is the determination of whether a position meets the criteria of a "specialty occupation".

A "specialty occupation" is defined at INA § 214(i)(1); 8 UCS § 1184(i)(1); 8 CFR §214.2(h)(4)(ii). The definitions, read together, have two requirements: 1) the position requires the theoretical and practical application of highly specialized knowledge and 2) entry into the occupation in the U.S. requires a bachelor's degree (or its equivalent, which can be a combination of work experience and education or, in some cases, work experience alone) or higher in the specialty. Regulations at 8 CFR § 214.2(h)(4)(iii)(A) state that a specialty occupation not only requires a bachelor's degree or its equivalent for entry into the position, but that the degree requirement must be common in the industry in parallel positions at similar companies, that the employer normally requires a degree or the equivalent or that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with attainment of such a degree. Members of certain professions have been defined as being in a "specialty occupation" through years of caselaw dating as far back as 1957 (accountant, *Matter of Doultsinos*, 12 I&N Dec. 153) to the more recent vocations in the 1990's (computer programmer, *Matter of Precision Programming, Inc.* EAC 92-202-51006 (AAU Apr. 22, 1993). In addition, if a position is listed in 8 USC § 1101(a)(32), it will automatically qualify as a "professional" position.

After proving that a position falls under the "specialty occupation" category, the employer must then prove that an alien has the credentials to perform the duties and responsibilities of the position. Under INA § 214(i)(2); 8 USC § 1184(i)(2), the prospective employee must have a license to practice (if a license is required for that occupation); completed the degree required for the occupation or experience in the specialty equivalent to the completion of the degree combined with recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

When an alien's educational background is from a country other than the United States, the employer is required to obtain an advisory opinion involving an in-depth educational analysis of the equivalency of the foreign education to that of a U.S. education at a regionally accredited institution. A combination of work experience and education may be used, or solely work experience, if necessary. In order to have work experience considered, submission of letters of employment from prior employers is generally required. The rule of thumb in this area is that three years of work experience are equal to roughly one year of college coursework. Although the opinion is strictly advisory and the CIS officer may

request additional information or reject the opinion, the vast majority of opinions are accepted by the CIS provided that the evaluation was obtained from a reputable education evaluation agency.

Also falling into the H-1B category are fashion models (8 CFR § 214.2(h)(4)(vii)); DOD Visas for Cooperative Research/Development/Coproduction; and Physicians (8 CFR § 214.2(h)(4)(viii)). The reader is invited to review the regulations with regard to these categories. Because they are not in as wide use as the specialty occupation sub-category, they will not be covered here. However, the regulations provide a good description of the individual requirements and elements to be met for approval of a visa in those professions.

ii. H-2A Temporary Agricultural Labor or Services

This category was developed so that individuals could enter the United States to perform temporary or seasonal agricultural labor and/or services. The work must meet definitions created by the U.S. Secretary of Labor in regulations or in IRC § 3121(g) and § 3(f) of the FLSA (aka 29 USC § 203(f)). Filing requirements are the same as H-2B, below, except that there is no return fare requirement and there is no annual cap amount.

iii. H-2B "Other Temporary Service or Labor"

This category is rather broadly defined as for individuals coming to the U.S. temporarily to perform "other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country". Obtaining an H-2B visa is a three-part process: 1) labor certification, 2) non-immigrant visa petition, 3) application for visa stamp by alien.

Due to the length of time it takes to process a labor certification, this category is not often used by employers and the cap has never been reached. However, in more recent years, as more and more employers turn to this category, numbers are increasingly used up. The DOL will also "pre-certify" positions from time to time thereby allowing employers to bypass having to file an individual labor certification for each position for which it has a need to fill. Note that the labor certification is considered an advisory opinion. While an approved labor certification request is likely to result in approval of the visa petition by the CIS, a denied labor certification does not necessarily mean that the visa petition will be denied. The CIS is charged with making an independent determination of the shortage of available U.S. workers.

H-2B visa holders may extend their stays in increments of up to one year, but cannot exceed three years in the U.S. Each request for an extension must have an accompanying labor certification determination from the DOL. Once the 3-year period has been reached, the alien may not change to a different H status, may not change to L status and may not re-enter the U.S. in either H or L status until they have been physically outside the U.S. for at least a six-month period.

The employer is responsible for paying the reasonable costs of transportation home for the alien *if* 1) the alien entered the U.S. in order to assume the employer's H-2B employment (i.e. prior entry to work for another employer and then changing employers does not count for this criteria), 2) the alien is involuntarily dismissed from employment prior to expiration of the status.

This category is not available to medical school graduates who intend to perform services in the medical profession, is subject to an annual cap of 66,000 and is a true non-immigrant visa in that the holder may not have "dual intent" to become a permanent resident of the U.S.

iv. H-3 Trainees

H-3 status allows an alien to enter the U.S. for the purpose of receiving training or instruction (other than graduate medical education/training – but medical externships and training in nursing is permitted). The program cannot be designed to "primarily provide productive employment" and must meet the following regulatory criteria: 1) training is not available in the alien's home country; 2) alien will not be placed in a position where a citizen or permanent resident is regularly employed; 3) there will be no productive employment *unless* it is incidental and necessary to the training and aids in pursuit of career *outside* the U.S.; and 4) training will benefit the alien in pursuit of a career outside the U.S.

Admission is for the length of the program, not to exceed two years. Once the two year period has been reached, no extensions, change of status or readmission is possible absent a six month absence from the U.S. As with the H-2 visas, this is a true non-immigrant visa in that the holder may not have "dual intent" to become a permanent resident of the U.S

Special note for special education exchange programs: limited to maximum eighteen-month stay and annual cap of 50 visas per year.

E. J Visas for Exchange Visitors 8 CFR § 514 et seq.

The J visa exchange program was created for bona fide trainees, students, professors and research scholars, foreign physicians, etc. (see 8 CFR § 514 et. seq. for complete list) to enter the U.S. in order to participate in an exchange visitor program that was been specifically designated by the Department of State ("DOS") (previously designated by the United States Information Agency ("USIA")) and the participation is for the purpose of teaching, studying, observing, conducting research, consulting or receiving training. Applicants must have sufficient funds to pay for their expenses while they are in the U.S. and have sufficient fluency in English as well as maintain medical insurance for accident and illness during their stay in the U.S.

A J visa holder is subject to a two-year foreign residency requirement if his/her participation was financed in whole or part by an agency of the government of the U.S. or by the government of the nationality or of last residence *and* was engaged in a field on the DOS skills list (printed in Federal Registers, changes constantly so it is best to look it up) *or* came to the U.S. or acquired J status after January 10, 1977 to receive graduate medical education or training. Any persons subject to a two year foreign residency requirement may not seek adjustment of status, an immigrant visa or change of status (except to A or G categories) until the person has fulfilled the foreign residence requirement. A waiver of the requirement may be obtained by obtaining a favorable recommendation from the DOS, a long four-part process. Acceptable reasons for a waiver: subject to persecution, exceptional hardship on a USC/LPR spouse or child, J country issues a no objection statement or a U.S. agency requests the waiver.

J-2 visa holders (dependents of J-1s) are subject to the same foreign residence requirement as the principal J holder.

F. L Visas for Intra-Company Transfers 8 CFR § 214.2(l); 22 CFR § 41.54

Commonly referred to as "the intra-company transfer visa", the L-1 visa category allows employers to move personnel from foreign subsidiaries, parent companies and affiliates to its U.S.-based operation to engage in temporary work. At the current time, there are no requirements as to the size of the parent/subsidiary/affiliate companies nor are there requirements as to prevailing wage. Payment of the alien's salary may be made by the U.S. organization or by the foreign entity and, insofar as wages are concerned, the consular officer is charged only with determining whether the alien might become a public charge.

The petitioning employer bears the burden of proving the qualifying relationship between the foreign and U.S. organizations. A number of factors help to determine whether a qualifying relationship exists, including common name usage, regular sharing and exchange of personnel, cross directorship, sharing of technical, financial and research skills and size and general recognition of the organization as a whole. An affiliate/subsidiary relationship cannot be proven by a mere contractual agreement. Affiliates need to show that they and the U.S. company are owned by a common group or individuals who own approximately the same share or proportion of each entity, that one entity is controlled by the other or that one entity owns a majority of the stock of the other entity.

Rules:

- Alien was continuously employed abroad for at least six months in the past three years by the parent, affiliate or subsidiary of the U.S. company prior to the application for admission
- Alien will enter the U.S. temporarily in order to continue work for the same employer or its affiliate, parent or subsidiary
- Work in the United States will continue to be managerial/executive in nature or of specialized knowledge (but does not have to be the same exact role as in the foreign entity)
- Allows dual intent

Initial L-1 visas are granted for up to a three-year period. L-1B holders may seek extensions up to a maximum of five years. L-1A holders may seek extensions in two-year increments up to a maximum of seven years. An L-1B holder may be transferred to -1A provided that the employee becomes a manager or executive at least six months prior to expiration of the five year period and the CIS approves the change in status. L-2 visas may be issued to dependents of L-1 holders. L-2 spouses may obtain an EAD by filing the appropriate application on form I-765.

i. L-1A Executive/Managerial Capacity

An alien who works in a managerial capacity abroad (defined at INA § 101(a)(44), 8 USC § 1101(a)(44), 8 CFR § 214.2(l)(1)(ii)(B)) who will be entering the United States to work in a managerial role may be eligible for an L-1A visa. An L-1A visa allows an alien to remain in the U.S. for a maximum of seven years. In order to be eligible for L-1A status, the alien must personally manage an organization, department, subdivision or function. In addition, he or she should supervise and control the work of other supervisory, professional or managerial employees (or manage an essential function within the organization)[9] with authority to hire or terminate or recommend other personnel actions. Finally, the

[9] Note that the "essential function" tack is a trickier argument to make and the advice of an experienced immigration attorney should be sought if this argument must be used.

alien must exercise discretion over day-to-day operations. Note that first-line managers are generally not considered to fit the criteria for an L-1A visa unless the employees managed are of a professional level.

"Executive capacity" is defined at 8 CFR § 214.2(l)(1)(ii)(C) and requires that the alien primarily directs management of the organization or a major component/function; establishes goals and policies; exercises wide latitude in discretionary decision-making and receives only general supervision from higher level executives, board of directors or stockholders.

ii. L-1B Specialized Knowledge

Unlike the specialized knowledge requirement for H-1B visa status, "specialized knowledge" as it relates to L-1 visas is defined to mean a person who has "special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company." INA § 214(c)(2)(B), 8 USC § 1184(c)(2)(B), 8 CFR § 214.2(l)(1)(ii)(D). The person should have an advanced level of proprietary knowledge of the employing organization's product, service, research, equipment, etc. of such a nature that it cannot be readily found in the U.S. labor market.

Employees meeting the specialized knowledge criteria will possess knowledge that is valuable to the employer's competitiveness in the marketplace. They will be uniquely qualified to contribute to the U.S. employer's knowledge of foreign operating conditions. Importantly, the employees will have been utilized as key employees abroad having received significant assignments with results that enhanced the employer's business position. Finally, the employees will possess knowledge that can be gained only through extensive prior experience with the employer.[10]

Up until the current time, off-site work has not precluded issuance of an L-1 visa. Employers have regularly brought foreign employees to the U.S. to engage in post-sales complex, implementation work at customer locations. Consular officers and CIS employees were directed to determine whether the alien had specialized knowledge first and then determine whether the petition would be controlling the alien's work or whether a third party would be in control. In the last year, many disgruntled American workers have argued that they have been displaced from their employment due to employers' preferences for lower-salaried H-1B workers (see discussion above regarding prevailing wage for H-1B workers) and the improper use of L-1 visa holders by foreign consulting companies. These rumblings have led to a number of proposed bills in Congress that are designed to place greater restrictions on the L-1 category and employers' use of L-1 workers. (Greater discussion about this subject in "Miscellaneous Thoughts" below.)

iii. Traditional L Petition vs. Blanket L Petition

If a petitioning employer has had an office in the U.S. for at least one year, has three or more domestic *or* foreign branches/subsidiaries/affiliates *and* has a combined annual U.S. sales of at least $25 million, a U.S. workforce of at least 1,000 and received approval of at least ten L petitions in the prior twelve-month period, the employer may seek approval of a Blanket L petition.

A traditional L petition requires the employer to file an NIV petition at the appropriate service center with jurisdiction over the geographic region where the employment will be based. While

[10] This is something of an outdated requirement considering the prior employment requirement was lowered from one year to six months in January 2002, but it is a requirement that continues to be in place nonetheless and petitioning employers must show that the sponsored employee has proprietary knowledge that could only be gained through employment with the foreign affiliate/subsidiary/parent.

processing times can vary from service center to service center, without premium processing, typical wait time is between three to five months. The employer may seek "premium processing" of the petition for an additional $1,000.00 filing fee that will guarantee adjudication within fifteen calendar days (assuming no Request for Evidence ("RFE") is issued). Once the visa petition has been approved, notification is cabled to the consular post that was designated on the NIV petition as the location where the employee would present his/her application for visa. Due to interview requirements at the consulates for visa issuance, the employee becomes subject to the mercy of the consulate's appointment calendar. Wait time for an interview can be as short as a few weeks or as long as several months. If the consular official elects to run a full fingerprint report, additional time is required.

If an employer has an approved blanket L petition, its employee need not wait through the service center processing. The entire NIV petition on form I-129S (with supporting documents) may be mailed to the employee who simply takes the entire packet to the consulate to make an appointment for the interview. Therefore, a blanket L petition significantly cuts down on the amount of time spent waiting for processing and a transfer may completed as quickly as passage of three or four weeks' time.

An additional benefit to having an employee enter the U.S. pursuant to a blanket L petition involves the circumstances when an employer is required to file an amended petition. For transferees holding traditional L visas, an employer must file amendments to the approved visa petition when there are any changes to the relationships between the qualifying organizations as well as when the transferee experiences a significant change in duties or transfer from one company to another within the same organization. In the case of a blanket L visa approval, however, a new or amended petition is only required when ownership of the company changes or where there is a merger of companies. No amendment is required if the employee changes job duties or transfers from one company to another.

A short note should be made at this point in relation to Canadian citizens seeking entry into the U.S. in L-1 status. Pursuant to the terms of the North American Free Trade Agreement ("NAFTA"), Canadians may present the visa petition for *either* an individual/traditional L-1 *or* a blanket L-1 at any Class A port of entry or pre-flight clearance facility. Thus, the processing time and procedures outlined above do not apply to Canadian citizens. During the pre-flight inspection at most international airports, Canadians may present their visa packet and be issued an I-94 bearing the appropriate L-1 visa classification. Back-end processing is completed for individual L-1 petitions later and the employer will be sent notification of the entry several months after the employee's first entry.

G. O Visas for Extraordinary Ability 8 CFR § 214.2(o)(1)(i)

An alien who has demonstrated extraordinary ability through sustained national or international acclaim in the sciences, arts, education, business or athletics may be eligible for an O-1A visa. The O category includes persons who are in motion pictures or television production (O-1B), but persons seeking an O visa in this field are required to show a record of "extraordinary achievement" that have been recognized in the field through extensive documentation.

"Extraordinary Ability" has been defined at 8 CFR § 214.2(o)(3)(ii) as a "level of expertise indicating that the person is one of a small percentage who have risen to the very top of the field of endeavor" (e.g. Nobel prize winner) or an artist who is "prominent in his/her field of endeavor" (e.g. internationally acclaimed dancer such as Mikhail Baryshnikov in his prime). Similarly, "extraordinary achievement" has been defined as a "very high level of accomplishment…evidenced by a degree of skill and recognition substantially above that ordinarily encountered" (e.g. Oscar winner).

In order to prove extraordinary ability in science, education, business or athletics, submission of documentation should meet at least three of the following criteria receipt of nationally or internationally recognized awards; proof of membership in organizations that require outstanding achievement; published materials in professional or major trade publications; acted in judgment of the works of others in the field; evidence of authorship of a scholarly work; evidence of employment at an organization of distinguished reputation; has commanded in the past and continues to command a high salary. 8 CFR § 214.2(o)(3)(iii).

Distinction in the arts includes nomination for significant international or national award/prize; lead in production having distinguished reputation; works have been subject of critical reviews in newspapers or trade journals; lead for organization with distinguished reputation; has a record of major commercial or critically acclaimed successes; has received significant recognition form organizations, critics, government agencies or other recognized experts in the field; commands or has commanded a high salary. 8 CFR § 214.2(o)(3)(iv).

O-2 visas are available for persons accompanying the O-1 artist or athlete for a specific event, but only if the person is an integral part of the actual performance or has critical skills and experience that are not of a general nature and cannot be performed by other individuals. O-3 visas may be granted to dependents of O-1 visa holders.

Rules:

- Must provide written advisory opinion from appropriate union or management group concerning achievements of the alien
- Allows dual intent
- Petition may be filed by U.S. employer or a U.S. agent in cases where persons are traditionally self-employed or if the employer is a foreign employer
- Petitioner and employer are jointly and severally liable for reasonable transportation costs home if alien is terminated before end of the requested visa period

Visa may be approved for such time as the CIS may specify to provide for the event, but in no event for more than three years. INA § 214(a)(2)(A); 8 USC § 1184(a)(2)(A); 8 CFR § 214.2(o)(6)(iii)(A).

H. TN Visas Under Provisions of NAFTA for Canadian and Mexican Citizens

NAFTA created a new class of NIV, referred to as the TN visa. (Dependents receive TD status.) The classification was created to promote trade between Mexico, Canada and the U.S. and is directed primarily at the employment of professionals, which it specifically designates. The list has been adopted at 8 CFR § 214.6(c) along with the absolute minimum qualifications that the applicant must meet to be granted TN status for that category.

Rules:

- Must be within a designated class of professionals
- Must meet criteria defined for each class
- Does *not* allow dual intent
- Cannot be self-employed in the U.S.

In some cases, this visa class may be preferable to an H-1 or an L-1 if the employee does not have any intent or desire to remain in the U.S. as a permanent resident, because there is not time limitation on the number of years a single individual may hold TN status. The drawback, however, is that TN status is issued in a maximum of one-year increments so long-term employment will require the filing of a new TN petition each year.

i. Procedures for Canadian Citizens

TN status for Canadians are not subject to an annual cap or quota[11] and, as with the NAFTA L-1 procedures, may be obtained at any Class A port of entry or pre-flight clearance facility in Canada. While many employers simply provide a letter detailing an offer of employment to the applicant and leave the prospective employee to navigate the waters of the TN application and inspection process on their own, it is not recommended that such a "shortcut" be taken. As a practical matter the employer should provide a letter that details not only the job title and salary, but also a description of duties to be carried out and locations where the beneficiary will be expected to work as well as the beneficiary's qualifications to assume the role and how the candidate meets the requirements for TN status. A packet of information should be supplied to the candidate, including information concerning the employer, the candidate's prior U.S. immigration history, a copy of the passport or Canadian birth certificate and copies of the diploma, degree or license. If the requested TN category requires experience in the field, objective evidence that the requirement has been met in the form of letters from prior employers should be provided. Resumes are considered self-serving documents and are generally given little weight when experience is a minimum requirement.

ii. Procedures for Mexican Citizens

Until January 1, 2004, TN visas for Mexican citizens are subject to an annual quota of 5,500. Procedures for obtaining a TN visa for a Mexican were also much more labor-intensive and time-consuming than for a Canadian and, it is suspected, had acted as something of a deterrent to employers since the quota had never been reached. In order to obtain a TN visa for a Mexican, the employer has historically been required to follow procedures that were nearly identical to that of an H-1B petition, right down to the LCA requirement. The petition had to be filed with the CIS in the US and then, after it was approved, notification would be wired to the US Consular post in Mexico that was designated, the candidate would make an appointment to appear for a visa interview and ultimately receive a TN visa stamped into his/her passport.

Post January 1, 2004 procedures very closely resemble the Canadian TN in that the employer is no longer required to file an NIV petition with the CIS, the annual quota was removed and the requirement of an approved LCA was dropped. However, Mexican applicants must still obtain a visa in their passports before they will be able to enter the US that requires them to appear for a consular interview and present their documentation for review by the consular officer.

[11] The US has retained the right to impose an annual quota for Canadians but has never done so. Likewise, Canada and Mexico have retained the right to impose a quota against Americans entering their countries under NAFTA but as yet have not done so.

III. Employment-Based Immigration – The Long and Winding Road to Permanent Residency in the United States (i.e. The Coveted "Green Card")

A. Stage One: Labor Certification

For the majority of workers in the United States, becoming an LPR is a multi-part process that begins with an employer filing an Application for Employment Certification ("AEC"), also referred to as the Labor Certification process. The AEC process involves an effort by multiple government agencies including the State Workforce Agency ("SWA") and the federal DOL. These agencies are charged with prevailing wage determinations, judging acceptable minimum skills requirements and deciding whether there are minimally qualified American workers available who meet the requirements of the position. Some categories of non-immigrants are able to by-pass the AEC stage and go straight to stage 2 of the LPR process: filing of the immigrant visa petition with the CIS. As with family-based immigration, employment based immigrant visa petitions fall into various preference categories. The final stage of the process involves either Adjustment of Status or a consular interview and final processing. The entire process may take several years to complete.

Classes of Aliens Exempt from AEC Processing

The following classes of aliens may by-pass the AEC process and file the ETA-750 form for AEC directly with the immigrant petition with the CIS: sheepherders who have been employed legally in an NIV capacity for thirty-three of the last thirty-six months; persons in occupations listed on Schedule A (20 CFR § 656.10), including registered nurses, physical therapists and "aliens of exceptional ability". While the "exceptional ability" category is difficult for aliens to fit into, employers have continued to utilize this category with some success. See "exceptional ability" discussion in the NIV process above.

Some other classes of aliens are not required to submit an ETA-750 at all. Employers are able to file an I-140 immigrant petition on behalf of these individuals without regard to the ETA-750 form. Aliens falling into this category include "aliens of extraordinary ability" (defined at 8 CFR § 204.5(h)(2)), "outstanding professors and researchers" (internationally recognized as outstanding in a specific academic field, having at least three years of experience and entering the US in a tenure or tenure-track teaching or similar research position at an institution of higher learning; 8 CFR § 204.5(i)(3)(ii)) and certain multinational executives and managers (basic requirements follow the L-1A intracompany transferee rules).

Traditional AEC

Employers begin the AEC process by filing a two-part application on forms ETA-750A and ETA-750B. The former provides information about the employer and the position offered while the latter provides information about the foreign national and his/her qualifications. The ETA-750A must be signed by the employer while the ETA-750B must be signed by the alien.

The application is initially filed with the SWA holding jurisdiction over the intended place of employment. This filing date establishes the alien's priority date for purposes of receiving an immigrant visa later. The SWA will review the application and make a prevailing wage determination. If there are no prevailing wage issues, the SWA will begin directed recruitment procedures. Under these procedures, the employer is required to test the labor market and submit a written report of recruitment results to the SWA after the close of a thirty-day recruitment period. The report must contain the recruitment source, the number of US workers responding, the names, addresses and resumes of US workers who were interviewed, the job title of the interviewer and an explanation why the US worker who was interviewed

was not hired. Due to significant backlogs in major metropolitan areas throughout the United States, this process alone can take several years.

If the SWA is satisfied, the AEC application is transmitted to the regional certifying officer for the DOL. Upon receipt by the DOL, the application is further reviewed for defects and deficiencies and the AEC is either certified (at which point the employer and the beneficiary may move to stage 2 of the LPR process) or a Notice of Findings ("NOF") is issued. A NOF provides an employer with thirty-five days to respond to the DOL's objection to the application. If the employer is unable to do so, it may either withdraw the application or the AEC will be denied.

Reduction In Recruitment AEC

Unlike traditional AEC procedures, Reduction in Recruitment ("RIR") procedures require the recruitment effort to be done up front, prior to the filing of the AEC. The benefit to RIR processing is that it gets expedited review. RIR is only a possibility when the employer can demonstrate there is little or no US worker availability for the occupation, that the application has no restrictive requirements, the job is offered at prevailing wage and that enough recruitment efforts were made in the immediate six month period prior to the filing of the application.

RIR applications are given priority processing and determinations were generally made within weeks or months when the process was still new. However, in recent times, even the RIR process has experienced heavy backlogs (RIR processing in California is nearly a three year wait!). The employer must submit evidence of all recruitment activity during the six-month recruiting period, an internally posted notice for ten business days containing information on the ETA-750A and detailed recruitment results, including the number of positions open, the number of applicants responding to the recruitment, the number of applicants interviewed, the number of applicants offered positions and the number of applicants hired. Some regions also require a summary of why other applicants who were interviewed were not hired. Resumes of applicants need not be submitted, but should be maintained in the event of a request for documentation from the SWA.

SWAs shy away from providing clear requirements for employers to meet and follow for RIR applications. The agencies look at the totality of evidence submitted to determine whether a "pattern of recruitment" has been established.

Labor Certification Substitution

In some cases, an employer may find itself with an approved AEC application and an employee who no longer requires the use of the AEC (either the employer has left the employ of the organization or has perhaps obtained LPR status through other means). The federal government allows a different individual to be substituted for the named individual (and the substituted individual is given the priority date of the original filing). See "Substitution of Labor Certification Beneficiaries" Immigration and Naturalization Service, Office of Examinations Memorandum, March 3, 1996, HQ 204.25-P, reprinted in 73 Interpreter Releases 444 (April 8, 1996).

This procedure allows an employer to significantly cut down the wait time for the LPR process because the request for labor certification substitution is filed directly with the CIS at the time of the filing of the I-140. The CIS will determine whether the substitution is appropriate. In general, it looks for a "match" between the proposed individual and the approved AEC. In other words, the substitution is allowed only if, on paper, the proposed beneficiary "looks and feels" like the original. In addition to the time savings, the substitution procedure is significant in terms of the AC-21 rules that allow employers to seek 7th and 8th and 9th year extensions to H-1B visas. Because AC-21 requires an individual to be the

beneficiary of a labor certification that was filed and pending for 365 days, an employer or individual who misses this deadline may find that there are no alternatives to a departure from the US at the end of the six years of H-1B eligibility *unless* a substitution can be made into an approved AEC with a priority date early enough that the alien will be eligible for the AC-21 one-year extension.

B. Stage Two: Immigrant Visa Petition

Immigrant visa petitions under employment-based petitions contain preference categories much like family-based petitions.

First preference, or EB-1, is reserved for those aliens who were able to by-pass the labor certification process entirely (i.e. were not required to file form ETA-750 at all). 8 CFR § 204.5(h-j).

Second preference, or EB-2, consists of petitions on behalf of members of professions holding advanced degrees or persons with exceptional ability in the sciences, arts or business. 8 CFR § 204.5(k). However, just because an alien holds an advanced degree does not mean that he or she fits into the EB-2 category. The petitioning employer must also prove that the *position* requires an employee with an advanced degree or the equivalent of an advanced degree (bachelor's degree + at least five years of progressive experience in the specialty). Memorandum by Michael D. Cronin, Acting Associate Commissioner, Office of Programs and William R. Yates, Deputy Executive Associate Commissioner, Office of Field Operations dated March 20, 2000.

Third preference, or EB-3, is comprised of skilled workers (at least two years of experience for the position), professionals (bachelor's degree required for the position) and other workers (less than two years experience required for the position). 8 CFR § 204.5 (l). Something of a catch-all, this is where the vast majority of workers will fall.

C. Stage Two and Three Merged

Concurrent filing of I-140/I-485

CIS Service Centers have historically separated the I-140 adjudication functions from the I-485 functions. Therefore, an employer had to file an I-140 and receive an approval of the I-140 before the employee was allowed to file for the I-485 Adjustment of Status (AOS). AOS is the application whereby the alien states that an immigrant visa number is available to him/her, that they are in the US, and they are requesting that the US government adjust their status from non-immigrant to immigrant. The government entered the 21st century with an eye towards expediting processing and giving immigrants some stability regarding their status (you can imagine how difficult it is to live in a foreign country for up years on end and have to wait as long as half a decade to a decade to obtain LPR status). The announcement that I-140 and I-485 forms could be filed concurrently caused quite a stir. It allowed applicants to obtain Advanced Parole and EADs without having to wait up to a year for the I-140 to be adjudicated. And, more importantly, it started the portability clock and allowed for portability much sooner (because the alien would have already received an EAD whereas under the old rules, the EAD would not be obtained until months after the I-140 was approved). Under the concurrent filing rules, as soon as the I-140 was approved, the alien was portable (because I-140 approvals generally take at least six months so the I-485 will have been pending the requisite period of time).

In May 2004, the California Service Center and the Nebraska Service Center announced pilot programs as part of the backlog reduction plan to concurrently adjudicate I-140 and I-485 applications that are filed together. California announced lofty goals to reach adjudication of the concurrently filed applications within ninety days of the filing of the applications for applications filed on or after April 1,

2004. At the time of printing, it is unclear whether those goals will be met and, if they are, what the fate will be of the applications filed prior to April 1, 2004 who do not fall within the parameters of the pilot program.

Upon approval of the I-485, the new immigrants appear for ADIT processing whereby they will receive a stamp in their passport, which is temporary evidence of LPR status. The actual "green card" will arrive six to twelve months later through regular US mail.

I-485 Portability

AC-21 at § 106(c) allows applicants with pending I-485 applications to change jobs/employers as long as the new job is in the same or similar occupational classification if the I-485 has been pending for at least 180 days. In order to become portable, however, the I-140 immigrant visa petition must have been approved. Portability rules provide the employee with increased flexibility in terms of career progression rather than leave the employee at the mercy of the sponsoring employer for years at a time.

D. Stage Three: Consular Processing

A number of employees may request consular processing under the assumption that processing through the consulate will be much faster than waiting for the CIS to adjudicate a request for Adjustment of Status. The main drawback to this procedure is that the employee can never become portable under the AC-21 guidelines so if the individual is laid off or otherwise terminates employment, he or she loses her place in line for LPR status. Consular processing involves the CIS sending the approved I-140 notification to the National Visa Center. The National Visa Center is then charged with forwarding the approval notice to the appropriate US consular post (which was designated in the I-140 by the petitioner). Once the notification is sent to the consular post, the consulate will send notification to the alien to appear for an interview and to submit medical and criminal clearance documents.

With the advent of the pilot programs, it is questionable whether consular processing will continue to be a faster process than AOS. Indeed, since the beginning of 2004, a slowdown in processing at the NVC has already been noted and it is gradually taking longer and longer before the approval notice is wired to the consular post.

E. PERM – Just a Myth?

For several years now, immigration practitioners have been teased with the idea of a "new and improved" AEC processing system. The new system boasts greater user-friendliness with significantly shorter processing times. The new system has been named Program Electronic Review Management System, or "PERM" for short. Each year the implementation of PERM has been pushed back, with the latest promise of "October 2004", due to comment periods, revisions, new proposals and other set-backs. The new process would allow the system to become computerized and such automation would shorten processing times by removing some of the human element from the review. PERM lays out specific recruitment steps that must be followed. Prevailing wage determinations have to be obtained prior to beginning recruitment. Employers would have to place two print ads meeting much more specific requirements with regard to content and placement (Sunday editions in papers of general circulation) and time (ads twenty-eight days apart at least thirty days before filing of the application but not more than 180). Employers would also have to place a job order with the state employment agency. Employers are then required to select three additional recruitment steps from a provided list if they are seeking to employ professionals. Documentation of the efforts and results would be maintained for an audit file.

Once the employer has followed all the required steps, attestations are made on a form that is then submitted directly to the DOL (by-passing the state offices). A computer would check the application and issue the certification. DOL would then randomly select applications for audit.

Employers would also be allowed to covert pending labor certifications to the PERM process and maintain the current priority date. While promising faster processing times, the new program also makes it much more difficult in some ways for employers to obtain an approved certification due to the heavy, and directed, recruitment requirements.

IV. Miscellaneous Thoughts and Pitfalls for the Unwary

A. NIV Pitfalls

Visas vs. I-94s

First, beware the difference between a visa and the I-94 period of authorized stay. A visa is what is stamped into the foreign national's passport.[12] It has the alien's picture, birthdate, nationality and "United States of America Visa" written on it. An I-94 refers to a white card that is typically stapled into the passport (or in the case of Canadians without a passport who prove citizenship with a birth certificate or naturalization document, just handed to them). The I-94 card has the alien's name, country of citizenship and birthdate on it. The inspector will add an entry date-stamp and a "valid until" date. While the "valid until" date is often the expiry date of the visa, there are times when this may not be the case: when a passport has a remaining validity period of less than the term of the visa, when an inspector makes a mistake or for other reasons.

The visa-holder as well as the employer must keep a close eye on the I-94 expiry date. The visa is only the invitation to the party. The I-94 governs how long a person may stay. Therefore, if an I-94 expires, the holder must leave the US even if the visa in the passport has a later date (that means the invitation to return to the party is still valid and often individuals will simply make a quick trip to Canada or Mexico and obtain a new I-94 upon re-entry). Failure to watch the expiry dates could result in a person falling out of legal status in the US. Overstays of more than 180 days but less than 365 days result in a three-year bar from the US. Overstays of more than one year result in a ten-year bar. Therefore, the consequences can be quite serious.

Working Dependents

Second, dependents of visa holders *cannot* work in the United States unless they have an employment-based visa of their own, or hold an EAD. Under no circumstances should an dependent be employed through the use of the principal's social security number!

Employment-Based Visas are Employer-Specific

Third, employment-based visas are employer-specific. This means that if an organization hires a TN visa holder who has a TN valid for another six months, the organization must *still* either file a petition to amend status with the CIS or else send the visa holder back to the border to make an application for a new TN visa. Just because there is time left on an employment visa does *not* mean another employer can

[12] Canadians are considered "visa exempt" and are not required to have a visa stamped into their passports, but are required to have the appropriate NIV status if they intend to engage in employment in the US. The status is evidenced by approval of a petition for extension of status on form I-797 or by a valid, unexpired I-94 card.

use that time. Each employer must obtain authorization for the employment of the foreign national on its own.

Beware Employment Discrimination

Fourth, while it is perfectly acceptable to have a company policy to *not* hire any person who requires sponsorship of an employment-authorizing non-immigrant visa, the employer must be careful how the information about the non-immigrant status is obtained and that the policy is applied consistently. Acceptable screening procedures include:

"Applicants must be presently authorized to work in the United States on a full-time basis. This company does not sponsor individuals for the purpose of obtaining H-1 status," and

"Are you legally authorized to work in the United States?" followed by: "Will you now or in the future require sponsorship for an employment authorizing status or visa?"

Once a foreign national has been hired, it is illegal to engage in any preferred status termination decisions. Therefore, reductions in force (RIF) must be immigration status-blind or the employer runs the risk of an Equal Employment Opportunity or Title VII complaint concerning its retention practices.

B. Permanent Residence Process Pitfalls

Lack of Sufficient Recruiting Evidence for an RIR Case

Employers need to ensure that they can withstand the scrutiny of an RIR AEC filing. Documentation should be ample and include advertisements in a variety of media, including online, job boards, newspapers and trade journals. A lack of evidence will likely result in an assessment notice.

Too Many Conditions/Requirements on the AEC Request

Employers are cautioned against filing an AEC with numerous "special requirements" and many "minimum requirements" for a position. When it begins to look like the AEC was created with a specific person in mind and the position's requirements were tailor-made for the subject alien, the DOL will ask the employer to defend its requirements and show that each person it employs in similar positions met all the requirements listed on the AEC at the time that they were hired.

Assumption that an L-1A Executive/Manager Can Always Bypass AEC

An L-1A executive/manager can generally bypass the AEC requirement and head straight to the I-140 stage of permanent residence processing. However, it would be dangerous for an employer to assume that all L-1A visa holders will be successful in this regard. Any time an employer wishes to bypass or shortcut through a process, it should consult an immigration attorney as some L-1A visa-holders do not have enough strength in their backgrounds to be able to bypass AEC.

C. Miscellaneous Thoughts

Trends – L-1 changes

Like a pendulum, the American economy has swung back and forth between grand moments of great prosperity to periods of depression and recession. During times of prosperity, immigration into the United States is typically a more freely swinging door than during recessive years. Recently, the economy has taken a downturn and, attendant with the downturn, came cries from the public that foreign workers were stealing jobs from Americans. In response to the public outcry, the summer of 2003 saw introduction of two bills in Congress geared towards restricting the use of non-immigrant L classifications. These bills include proposals to place an annual quota or cap on the number of L-1 visas that may be issued each year, wage attestations similar to the LCA requirement in an H-1B case and restricting a company from placing a transferee under the control of another employer (with attestations to that effect being required in the application). At this point, neither bill has been passed, but they are indicative of the greater concern and anti-foreign worker sentiment of the nation.

Filling the Gap – F-1 and J-1 Students Changing Status to H-1B

The return of the 65,000 H-1B cap effects employers seeking to hire persons who have never held H-1 status in the past. The cap for fiscal year 2004 was reached in February 2004, leaving no possibility of additional H-1 grants until fiscal year 2005 begins on October 1, 2004. For aliens who are outside the United States, the issue of the cap does not pose as great of a problem as for those who hold F-1 or J-1 status. For aliens in these two categories, upon expiration of their training period, they would have sixty days to effectuate a departure from the United States or fall out of authorized status. Therefore, if their training period should end more than sixty days prior to the beginning of October 1, they would normally be required to leave the U.S. and seek a new visa at a U.S. Consulate abroad. In recognition of this problem, the CIS has allowed the F-1 and J-1 statuses of students to be extended until the H-1 period begins on October 1, 2004. Students who fall into this category must have had their H-1 petition for change of status filed by July 30, 2004 *and* it must be approved by October 1, 2004. Unfortunately, this extension does not allow them to work during the gap period; it only allows them to effectuate a change of status without leaving the U.S.

Biometric Measurements

Various biometric measurements will be added to U.S. non-immigrant visas issued on or after October 25, 2004. Biometric measurements may include iris scans or fingerprints or other similar measurement. Due to the addition of these measurements, the Department of State ("DOS") office in the U.S. stopped accepting applications for visa revalidation on July 16, 2004 because it does not have the capability at this time to capture biometric measurements. Various immigrants rights groups and immigration lawyers have proposed a number of alternatives that are hoped will be adopted soon so that the DOS may resume this important service.

Machine-readable passports, US-VISIT and VWP

The Visa Waiver Program ("VWP") allows citizens of participating countries to enter the United States with only a valid passport. No prior stop at a US Consulate to obtain a visitor's visa is required. The Department of Homeland Security ("DHS") announced implementation of a registration program of foreign nationals that will require all foreign visitors to be identified by having their two index fingers scanned and a digital photograph taken upon entry into the US. Citizens from countries that are

participants in the VWP were originally to be exempt from this process because they were required to have machine-readable passports (which would contain biometric identifiers) by October 26, 2004. However, in early April 2004, DHS announced that it would extend the deadline for machine-readable passports for two years since many countries have indicated difficulty meeting the current deadline. Instead of the machine-readable passport requirement, VWP visitors will be subject to US-VISIT procedures beginning by September 30, 2004.

A list of countries participating in the VWP may be obtained at the DOS website.

Recapturing time

Employers often find that the time constraints surrounding H and L visa holders are just a little too restrictive. Sometimes, "a few more months" may be the difference between leaving the US for a year or being allowed to remain in the US pending the adjudication of a permanent residency application. In that case, it is sometimes possible to "recapture" time that was spent outside the US and add that to the expiry date of the H or L visa. However, in order to be able to recapture time, the absence from the US must be significant enough as to have effectuated a break in presence. Mere vacations are not enough to break presence. Employment in another country, residence in another country, etc., however, are generally enough. Recapturing time can be somewhat tricky and consultation with an expert is advised.

Interview requirements at US Consulates

Visa issuance at US Consulates now require in-person interviews. Many consulates have begun to require interviews for visa re-issuance as well.[13] This allows then the opportunity to take biometric measurements as well as assess the need for a full Federal Bureau of Investigation ("FBI") fingerprint check. Because of this change, employers who have employees who must obtain a new visa stamp abroad should allow for the possibility of an extended wait/absence from work of the employee. If an FBI fingerprint report is required, results could take up to eight weeks. Most US Consulates are booking appointments for visas several months away so employees should be advised to book the appointment and *then* schedule their vacation. Gone are the days of drop-boxes and walk-ins.

A Quick Word about International Immigration

International immigration, or US-outbound immigration, issues are much more complex than US-inbound issues because there is no set group of rules. Each country has its own set of laws. Income tax equalization and social tax payments must be considered, and these issues have tax treaty considerations. If you have a US citizen working for a foreign subsidiary who is a member of the US armed forces and is mobilized for duty, the foreign subsidiary is required to follow *US* laws with regard to job retention or the US entity could be penalized. Bottom line: contact an international immigration company or firm when you have an immigration issue outside the US because penalties and consequences can become very messy for the employer.

Social Security Administration Delays in SSN issuance

The Social Security Administration ("SSA") issues social security numbers for banking purposes, identification purposes and work purposes. In the past, when an individual applied for a new social security number ("SSN"), the SSA provided him/her with a phone number that could be used to obtain the SSN seventy-two hours after the application was submitted. The SSN on the official card would arrive about two weeks later. Within the last two years, the SSA has been charged with verifying an

[13] Interviews were routinely waived for persons who were seeking an extension of a visa type that was already held.

applicant's legal status in the US before issuance of a new SSN. While applicants are required to submit proof of eligibility to work in the US, the SSA is no longer allowed to accept the proof without confirmation from the CIS. Upon confirmation of the legal status, the SSN is issued. Unfortunately, the confirmation period has taken as long as twelve weeks in some cases. The average case takes roughly six weeks. This delay poses a problem for employers because most employers cannot pay an employee without a social security number due to tax reporting issues and payroll problems. At the same time, H-1 employers are required by law to begin paying an H-1 worker within thirty day of entry into the US or within sixty days of approval of the H-1 petition if the worker is already in the US. Legal and HR departments need to work in conjunction with payroll in such cases in order to find acceptable workarounds that will not fly in the face of tax and benefits laws or immigration laws.

LCAs for H-1B Holders who Travel – 20 CFR § 655.734 and 655.735

Remember the LCAs from the H-1B discussion above? Effective January 1, 2001, the DOL redefined "place of employment" to include any location where work will be performed. Under the new regulations, each time an H-1B holder is assigned to work at a location within the same geographic area as the LCA-designated worksite, new LCA posting notices must be displayed on or before the H-1B employee arrives at the new worksite.[14] If an H-1 holder is assigned to a work location outside the geographic area designated on the original LCA, the H-1B employer must either file a new LCA or follow "short-term placement rules". Short-term placement rules do not cover the way most consulting organizations work so consulting organizations will likely find that they have to file many new LCAs.

Short-term placement rules:

- Employer may temporarily place an employee outside the designated geographic area for up to thirty workdays in a given year
- Employer may temporarily place an employee outside the designated geographic area for up to sixty workdays in a given year *if* the employee actually continues to live within the designated LCA area and the employee maintains a permanent presence at the LCA-designated worksite.
- Short-term placement rules may not be used for an area where an employer has previously filed a separate LCA for that occupational classification

Premium Processing

Employers filing certain types of visa petitions may request expedited processing (known as "premium processing") of the visa petition for an additional fee. The request is filed on form I-907 and guarantees adjudication of the petition within fifteen calendar days (assuming no fraud, that the application is complete so no RFE is required, etc.). Not all petitions are eligible for premium processing. At the current time, the following petitions filed on form I-129 are accepted: E-1; E-2; H-1B; H-2B; H-3; L-1; O-1; O-2; P-1; P-3; Q-1; TN and R. Although there has been some discussion of premium processing being made available for petitions such as I-140's for immigrant visas, this purpose has not yet been approved. Premium processing requires the payment of an additional $1,000.00 fee.

[14] While this may not be difficult when a company moves its workers from office to office, it is particular onerous for consulting companies who move consultant employees from client site to client site. Clients are wary of posting notices for vendors, not to mention they have salary information contained on the form that clients may not want their own employees to see. The H-1B employer has no real muscle to enforce the posting since it does not own the building. The best it can do is write the requirement to comply into its contract for services or request a statement from the client that they are denying access to the bulletin boards for the post and then place that denial into the public access file.

Processing Times Online

The CIS is slowly joining the high-tech world. The latest addition allows people to check the status of their cases by entering the service center receipt number. Processing times for individual service centers and local offices can also be located at the website (links are provided in Section V below). Individuals can even register at https://egov.immigration.gov/cris/jsps/selectusertype.jsp;jsessionid=c5SBICUjuw95 for email notifications whenever some action is taken on their application.

Concurrent Processing of Concurrently-Filed I-140 and I-485 Applications

In a highly lauded backlog reduction plan, the California Service Center and the Nebraska Service Center have announced pilot programs wherein concurrently filed I-140 and I-485's will be concurrently adjudicated. The goal is to have them adjudicated within ninety days (California) and six months (Nebraska). Both service centers made the announcements in May with all applications filed on or after April 1, 2004 to be affected. These goals are very lofty and, as of the time of this writing, it remains to be seen whether they will be met by either service center. Assuming they are able to meet these new standards, the new procedure may obviate the need for advanced parole, employment authorization documents and AOS portability

Special Registration

As a direct result of the September 11, 2001 attack on the World Trade Center in the US, the DHS was formed with two different branches: CIS and Immigration and Customs Enforcement (ICE). One of the first major announcements made/actions taken by ICE was the institution of special registration for nationals of certain countries. Originally, the countries included those that were deemed to be state sponsors of terrorism, including Iran, Iraq, Libya, Sudan and Syria. The list has since been expanded to include Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. Nationals of these countries (including dual citizens) are required to be fingerprinted and photographed upon arrival in the United States, they are subject to re-registration through call-in procedures and they must depart only through designated ports.

Persons subject to special registration must report changes of address within ten calendar days of the move on form AR-11SR. All other aliens must report changes of address on form AR-11.

DV Lottery

The Diversity (DV) Lottery is another way for some employees to gain permanent resident status. It is a yearly lottery system available to educated citizens and nationals of countries that are "under-represented" in the US. This method is not discussed here because the DV lottery is unrelated to employment and individuals may also apply for entry into the lottery of their own accord, without help from their employers.

Marital and Familial Petitions

Another means of obtaining LPR status in the US is through marriage to a USC, LPR or through another familial relationship to a USC or LPR. As with the DV Lottery, this is not discussed here because this method of immigration is unrelated to employment.

Payment Agreements

As a general rule, employers may have payment agreements with alien employees for the employee to assume some of the cost of the processing of their visa or LPR applications. The American Competitiveness and Workforce Improvement Act, however, imposed an additional fee of $500.00 to $1000.00 (based upon situations as determined by answers to form I-129W) upon certain employers for hiring of H-1B workers and this fee was specifically *not* transferable to an employee. This provision sunset on September 30, 2003 and has not yet been revived by Congress.

Considerations an employer should look at before entering into payment agreements, however, involve conflicts of interest this may cause between the law firm the employer may use and the employer and the employee – especially if the employer elects to have the employee pay the law firm directly.

V. Recommended Websites for More Information

The following websites are useful for conducting more research or to obtain additional information or clarification of a particular subject. They are presented in no particular order. The reader may find it useful to visit each site to become familiar with its content layout so that when information is needed, it will be readily available.

http://uscis.gov/graphics/index.htm	Main US CIS Homepage
http://www.flcdatacenter.com/owl.asp	Salary Survey Data – by County, State and Occupation
http://www.state.gov/	Main DOS Home Page
http://usembassy.state.gov/	List of US Embassies/Consulates and their homepages
http://www.state.gov/travel/	DOS Travel Page – Good for visa forms, travel warnings, J waivers information, visa fees, visa reciprocity fee tables, visa bulletins
http://www.aila.org/	American Immigration Lawyers Association
https://egov.immigration.gov/cris/jsps/index.jsp	US CIS Case Status Online Information
https://egov.immigration.gov/cris/jsps/caseStat.jsp;jsessionid=eWWJttVnKoT9	Individual case status by using receipt number
https://egov.immigration.gov/cris/jsps/ptimes.jsp;jsessionid=eWWJttVnKoT9	Processing times and dates at different service, district and application service centers
http://www.census.gov/epcd/www/naics.html	NAICS codes
http://www.lca.doleta.gov/eta_start.cfm	DOL ETA site for filing online LCAs
http://www.dol.gov/	Main DOL Homepage
http://workforcesecurity.doleta.gov/foreign/perm.asp	DOLETA website for information concerning Labor Certification (AEC), processing times, procedures

VII. List of Acronyms

Acronym	Long Hand
AEC	Alien Employment Certification (aka Labor Certification)
AC-21	American Competitiveness in the 21st Century
CFR	Code of Federal Regulations
CIS/USCIS	U.S. Citizenship and Immigration Service
CPT	Curricular Practical Training
DHS	Department of Homeland Security
DOD	Department of Defense
DOL	Department of Labor
DOS	Department of State
DV Lottery	Diversity Lottery Program
EAD	Employment Authorization Document
ETA	Employment & Training Administration
FBI	Federal Bureau of Investigation
ICE	Immigration and Customs Enforcement
IV	Immigrant Visa
LCA	Labor Condition Application
LPR	Lawful Permanent Resident
NAFTA	North American Free Trade Agreement
NIV	Non-Immigrant Visa
OPT	Optional Practical Training
RIF	Reduction in Force
RIR	Reduction in Recruitment
SESA	State Employment Security Agency
SSA	Social Security Administration
SSN	Social Security Number
SWA	State Workforce Agency
USC	United States Citizen
USIA	United States Information Agency
VWP	Visa Waiver Program

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Portions of this paper were drawn from or based upon prior research prepared by Banta Immigration Law LTD and Sharon Floyd, formerly with Duke Energy Corporation. Thanks to Robert Banta of Banta Immigration Law LTD in Atlanta for his editorial assistance.

ACC's 2004 Annual Meeting

Immigration Law for the In-house Practitioner

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I. INTRODUCTION

Pursuant to the Immigration Reform and Control Act of 1986 ("IRCA"), it is unlawful for an employer to hire, recruit, or refer for a fee anyone who the employer knows is not authorized to work in the United States (8 CFR § 274a.2). IRCA has designated the Form I-9, Employment Eligibility Verification Form, as the form to be used in complying with the foregoing requirements. Employers are obligated to complete the Form I-9 for all individuals who are hired after November 6, 1986. If an employer discovers that it has hired an unauthorized alien, or if the alien becomes unauthorized during the employment period, the employer must terminate employment.

The United States Immigration and Customs Enforcement ("ICE") and the United States Department of Labor ("DOL") have the responsibility of auditing Form I-9 records. Historically, employers in industries that typically employ a high number of foreign workers such as construction companies, hotels, restaurants, food processing plants, companies which provide business and personal services, and garment and textile companies have been subject to increased scrutiny. Both ICE and DOL have begun to increasingly target employers in high risk industries such as businesses located in or near airports, employers with offices in famous or historical buildings, energy companies, labs, and universities.

As an employer, you must ensure that your company does not knowingly hire any person, or knowingly continue to employ a person, who is not authorized to work in the United States. You must also ensure that your company completes a Form I-9 for each employee hired after November 6, 1986 and that each employee's current employment authorization is verified when appropriate.

Employees with four or more employees are subject to IRAC and its prohibition against national origin and citizenship status discrimination. In order to avoid a charge of discrimination, you should have an I-9 policy which sets forth your I-9 process and which is applied consistently to all employees irrespective of national origin or citizenship status. Part 1 of this paper will provide you and your company with guidance on how to fill out the Form I-9 and Part 2 will address I-9 policies which should be implemented by your company to minimize the risk that your company will be fined during an audit or found to have discriminated against employees.

II. PART 1

What is Form I -9, Employment Eligibility Verification Form?
The Employment Eligibility Verification Form, form I-9 is a document that employers must use to verify an employee's identity and authorization to work in the United States. All employees, regardless of their national origin or status, hired in the United States after November 6, 1986, must complete a Form I-9.

Why must Form I -9 be completed?
Employers are required to complete a form I-9 for all employees to verify work authorization. The failure to complete the Form properly may subject the employer to civil and criminal penalties, debarment from procuring government contract for one year, as well as negative publicity.

Who must complete Form I -9?
All employees whether regular, temporary, full-time or part-time and regardless of citizenship or nationality, hired or transferred from any foreign subsidiary or affiliate to the company's U.S. operations after November 6, 1986 must complete a Form I-9. Citizens and nationals of the United States[1] although authorized to work in the United States must still complete a Form I-9.

Who does not have to complete a Form I-9?
- employees hired before November 7, 1986 who have been continuously employed by the same employer (this "grandfathering" status does not apply to employees who change employers within a multi-employer association);
- employees who provide sporadic, irregular, or intermittent domestic services in a private household; or
- those who are not employees such as independent contractors or employees of a temporary employment agency who are performing services for your company.

When must Form I-9 be completed?
Form I-9 must be completed by:

- the employee on or before the first day of employment;
- by the employer within three business days of the employee's first date of employment.

In addition, the form must be re-verified on or before expiration of the employee's current employment authorization. If the employment duration is less than 3 business days, the Form I-9 must be completed by both parties either at the time of the hire or when the employee begins work.

A job applicant should not be asked to complete Form I-9 prior to the offer of employment. If it does so, the company may subject itself to discrimination charges. Employers should require that all job applicants complete a Form I-9 at the same post-offer point in the hiring process.

[1] Citizens of the U.S. include those born in Guam, Puerto Rico, the U.S. Virgin Islands and the Northern Mariana Islands. Nationals of the U.S. include those born in American Samoa.

Which version of Form I-9 should be completed?

Use the most recent form, which was updated on November 21, 1991, with the phrase "Rev. 11-21-91" annotated on the bottom left or top right hand corner of the form. The reverse side of the form, Lists of Acceptable Documents, was updated October 4, 2000 and the phrase "(Rev. 10/4/00)" should be on the bottom left of the reverse side of the Form. Do not alter or create a form different from the official version of Form I-9. (See Exhibit 1)

You may use exact copies of this version only, in either a single or double sided format, but both pages must be copied in their entirety with the instruction sheet, which must also be made available to the employee.

What are the penalties for violations of Form I-9 procedures?

Employees may be subject to the following civil fines:

- "Paperwork" violations such as failure to properly complete, retain or make available for inspection Form I-9s may result in fines between $110 and $1,100 per person (8 CFR § 274 a.10(b)(2)).
- Knowingly hiring or knowingly continuing to hire unauthorized aliens may result in fines between $250 to $2,200 for each unauthorized alien. For employers, previously charged with a violation, the fine ranges from $2,000 to $5,500 per unauthorized alien, and the fines may be between $3,000 and $11,000 per unauthorized worker for subsequent violations (8 CFR § 274a.10(b)(1)).

Following an audit, the employer is typically provided 10 business days to correct Form I-9 errors. The government agency will take a number of factors into consideration when determining the size of the fine, including past history of violation(s), the seriousness of the violation(s), the good faith of the employer, the size of the employer and whether the individuals involved were authorized to work in the U.S.

Employers may be subject to criminal penalties for the following violations:

- Engaging in a pattern or practice of knowingly or continuing to employ unauthorized aliens (8 CFR § 274a.10(a)).
- Engaging in fraud, document forgery or making false statements or entries on the Form I-9.

What are the procedures for completing Section 1 of the Form I-9?

The employee must complete all parts of Section 1 either at the time of hire or on the day he or she begins work (but, in all cases, no later than the close of business on the first day of employment). The employer is responsible for ensuring that the employee completes Section 1.

Once the employee has finished completing the form, inspect the form carefully. If any information is missing, do not proceed until the Section is completed. If the employee has made corrections, have the employee immediately initial and date the correction.

You may not ask to inspect documents the employee listed in Section 1 unless the employee chooses to present the document as evidence of identity or work authorization in Section 2. The IRCA gives the employee the sole right to select the documents of identity and employment eligibility for presentation to the employer in complying with Section 2 of the Form I-9 requirements.

How do I correct errors I discover in Section 1?
The employee, not the employer should fill out Section 1. The employer should not make changes to Section 1 and certainly the employer should not correct the employee's signature, date, or status in the attestation section (the section with the 3 boxes). You may attach an audit slip (2 samples are attached to this at Exhibit 2) to the Form I-9, acknowledging the error.

What is the Preparer/Translator Certification?
Form I-9 is only available in English. If a preparer or translator assists the employee in completing Section 1 of the form, please ensure that the preparer or translator (as applicable) completes this section – the employee must still sign the certification block in Section 1. Although permissible, we recommend that employees should not ordinarily serve as preparers or translators (and the employee completing Section 2 for the company should never serve as preparer or translator).

What are the procedures for completion Section 2?
Employer must complete Section 2 of Form 1-9 within 3 business days of the employee's start date by describing and recording the types of documents that the employee presented as proof of identity and employment authorization. Do not allow the employee to complete Section 2 on the company's behalf. If an employee has completed Section 2 on your behalf, the employee must complete a new Form I-9.

When describing the documents presented by the employee, make sure to include the document title, document numbers (if applicable), the issuing authority or agency of the document, and any expiration date on documents. Do not abbreviate (i.e. "PP" for passport) or guess at the name of the issuing agencies. Make sure you indicate the actual start date of the employee's employment. For transferees from abroad, the start date is the first day of employment in the U.S.

If you make an error, do not use white out to delete the mistake. Instead, write the correct information next to the error in a different color of ink and initial and date the correction.

Ensure that Section 2 is filled out completely - failure to do so may subject the company to substantial fines. Over-documenting the Form I-9 or asking for more documents than are minimally required for Form I-9 purposes may subject the company to liability for "document abuse" charges, a form of employment discrimination, and fines.

The person signing Section 2 is attesting under penalty of perjury to the following:

> *1) that he has inspected the actual documents presented by the employee;*
> *2) that the documents appear to be genuine and to relate to the employee who presented them;*
> *3) that the employee began employment on the date noted in the Certification part of Section 2; and*
> *4) that, to the best of his knowledge, the employee is eligible to work in the United States.*

What are acceptable documents for Section 2?
The employee should be provided the official 'List of Acceptable Documents' on the reverse of Form I-9 and the employee must decide which documents to present to the employer within 3 business days of the employment date. Do not specify which documents the employee should present as proof of identity and/or work authorization, or request more documentation than is minimally necessary to comply with the Form I-9 requirements.

Remember: only 1 item from List A (establishes both identity and employment eligibility) is required or 1 item each from List B (establishes identity) and List C (establishes employment eligibility). No more, no less.

You must personally review the actual documents presented by the employee and you must meet face-to-face with the employee and confirm that the person appears to be the person shown in the document (such as a driver's license or passport) presented as proof of identity. You cannot delegate the duty to confirm identity to someone else in a distant location where the employee may be present, unless you authorize an agent at that location such as a notary public, accountant, attorney, or personnel officer to meet with the employee and complete Section 2 on behalf of the company. The company is responsible for the acts or omissions of its agent, so be sure that the agent has been trained in proper I-9 procedures. Remember the original documents must be reviewed and compared to the actual employee, so it is not acceptable for an employee at a remote location to fax or mail you copies of his or her supporting documents.

If the documents reasonably appear on their face to be genuine and to relate to the person presenting them, you must accept them. If the document presented does not appear to be genuine or relate to the person, you must refuse to accept it and ask that the employee present another acceptable document. If no acceptable documents are produced, you should terminate employment.

You are not expected to be a document expert and will be held to a reasonableness standard with respect to document review. Documents are acceptable only in their original form, with the exception of birth certificates, which may be presented in certified copy form. Hospital birth certificates are not acceptable (only state-issued birth certificates are acceptable.) All documents presented must be unexpired (with the exception of the U.S. passport in List A and documents establishing identity in List B). You should not accept, as evidence of employment eligibility, metal or plastic reproductions of Social Security Cards; Social Security Cards marked "NOT VALID FOR EMPLOYMENT;" or a laminated Social Security Card if the back of the card says "not valid if laminated." For a more detailed discussion of appropriate documents and the procedure for completing the Form I-9, please refer to the *Handbook for Employers, Instructions for completing Form I-9 (Employment Eligibility Verification Form*, U.S. Department of Justice (November 1991). (Exhibit 3)

What is the Receipt Rule?
The "Receipt Rule" for initial hires allows an employee to present a receipt as evidence of work authorization or identity, provided certain conditions are satisfied. If an employee, who indicates that he or she is authorized to work in the U.S., presents a receipt for an application to replace a lost, stolen or damaged document that evidences work authorization or identity

within 3 business days of hire, this is acceptable. However, the employee must provide the employer the original required document within 90 days of her or his hire. Remember that this Receipt Rule only applies when an employee is hired initially. At the time of re-verification, a receipt for either a new or a renewal application for work authorization is not acceptable.

If you are provided a receipt, in Section 2 write in the document title and "Receipt," and record the receipt number in the Document Number space. When the employee presents the actual document, cross out "Receipt" and insert the new document number from the actual document; initial and date the change.

"Green card" holders or an alien who has been granted permanent residence status in the U.S. will be issued documentation such as a Resident Alien Card, Permanent Resident Card, Alien Registration Receipt Card and Form I-551. Although this status is permanent, the documentation may have an expiration date. The expiration date does not affect current employment and the company may not seek to re-verify the employment authorization for employees who have presented such a document.

What documentation may be accepted from an employee on an H1-B Visa?
An individual in H-1B status who has portability (is changing employers) is authorized to begin working for the new employer as soon as that employer has filed a new H-1B petition on behalf of the employee. In this situation, the employee should complete Section 1, but leave the expiration date blank. In Section 2, employer writes "covered by H-1B portability". Once the petition is approved, the Form I-9 must be re-verified and updated. If the new petition is denied, employment must be terminated.

Should I copy the documents that are presented to me?
Although not required, you are permitted to photocopy the exact documents used to complete the form. If you choose to photocopy the documents, be sure to consistently apply this practice to all employees. Note that although Certificates of Naturalization (Forms N-550 and N-570) state on their face that they may not be copied, these certificates may be copied in this limited circumstance.

The advantages to copying the documents are you can confirm re-verification dates and in the event of an audit, you have copies of the documents on file and can make corrections without having to involve the employee. The disadvantages are that you will need more storage space; it will be easy for an auditor to note Section 2 violations; and in the event of an audit, you may provide the government access to sensitive employee information.

What do I do if I discover false documentation?
In situations where an employee initially produces false documentation, but later produces valid documents to satisfy Form I-9, the immigration laws do not require that the employee be terminated. Companies that routinely terminate applicants or employees who falsify company or government documents may terminate employment; despite the fact valid documents have been provided.

What is the 240-Day Rule?
Non-immigrant alien employees employed in authorized A-3, E-1. E-2, G-5, H-1B, H-2B, H-3, I, J-1, L-1, 0-1, O-2, P-1, P-2, P-3, R or TN status may continue employment with the company for a period of up to 240 days, beginning on the date of the expiration of the authorized period of stay, upon presentation of an Immigration and Naturalization Service ("INS") receipt (Form 1-797) verifying a timely application for an extension of stay in A-3, E-1. E-2, G-5, H-1, H-2, H-3, I, J-1, L-1, 0-1, O-2, P-1, P-2, P-3, R or TN status. However, if the INS adjudicates the application prior to the expiration of this 240-day period and denies the application for extension of stay, the employment authorization will automatically terminate upon notification of the denial decision.

What do I do if I discover an existing employee has never completed a Form I-9?
If you discover that an existing employee hired after November 6, 1986 has not completed a Form I-9, request that the employee do so immediately. However, do not backdate the form. If you discover that an employee who satisfactorily completes the Form I-9 is not actually authorized to work, you should question the employee and give the employee an opportunity to provide I-9 documentation. If the employee is unable to provide the documentation, employment should be terminated. Your immigration attorney should be consulted prior to retroactively completing Form I-9s for groups of employees to avoid allegations of discrimination.

What do I do if an employee cannot produce documents within 3 days?
If an employee fails to provide documents, or a receipt for replacement documents, necessary to complete the Form I-9 within 3 days after the employment date, you should terminate employment. It is a good idea to specify that an employment offer is conditioned on presenting proof of work authorization.[2]

What about Asylees and Refugees?
Individuals who have been granted asylum or refugee status are authorized to work on the date they are granted such status even if they have not obtained an Employment Authorization Document ("EAD"). Asylees and Refugees may use an EAD or an I-94 (an Arrival-Departure Record) showing Asylee or Refugee status as proof of work authorization.

What is Temporary Protected Status ("TPS")?
TPS is a temporary immigration status granted to individuals from certain countries (the current list includes, Burundi, El Salvador, Honduras, Liberia, Montserrat, Nicaragua, Sierra Leone, Somalia, and Sudan). Those with TPS must apply for an EAD in order to be authorized to work. The list of TPS countries is subject to change.

[2] You might consider including the following language in your offer letters: This offer is contingent upon verification of eligibility to work in the United States as required by the Immigration Reform and Control Act of 1986. Enclosed are the instructions and a sample Form I-9, along with a description of the acceptanbe documents. You must present acceptable documentation or a receipt demonstrating application for acceptable documentation, within the first 3 business days of your start date or this offer wil be revoked, and employment will be terminated.

When should I complete Section 3?
If an existing employee's work authorization is due to expire or the employee has a name change or a new form of work authorization, you must re-verify the employee's work authorization on or prior to the expiration date of the employee's current work authorization. You should tickle your file and remind your employee 120, 90, and 30 days before the expiration date that you will need to re-verify the employee's work authorization before the expiration date. You do not need to re-verify for US citizens or nationals. Form I-551 Green Cards (Alien Registration Receipt Cards) do not need to be re-verified, even if the card contains an expiration date. However, if an employee presents an unexpired foreign passport with an I-551 stamp confirming the grant of permanent resident status (valid List A documents), the expiration date on the stamp does need to be tracked for re-verification.

If you are rehiring an employee within 3 years of the date his/her original Form I-9 was completed and the original Form I-9 indicates that the employee is still authorized to work, you should complete Block B and the signature block of Section 3. If you are rehiring an employee within 3 years of the date his/her original Form I-9 was completed and his/her work authorization has expired, complete Block B, review the documents presented by the employee to demonstrate work authorization and record the document's title, number and expiration date (if any) in Block C, and complete the signature block.

Re-verification of Form I-9 may be done, at the option of the company; (a) by completing Section 3 of an existing Form I-9; or (b) by completing Sections 1 and 3 of a new Form I-9. If you choose to re-verify using Section of 3 of an existing Form I-9, note in Section 3 the title, number, and expiration date of the documents presented by the employee. The company in this case cannot require the employee to make attestation as to the employment eligibility documentation. If Section 3 has already been used for previous re-verification or update, a new Form I-9 may be used. In this case, the employee completes and signs Section 1 and the company completes Section 3 and retains the new form with the original. If Section 3 has not been used previously, but you decide to use a new Form I-9, be sure that you require new Form I-9s for all re-verified employees.

How long do I have to keep Form I-9s?
Completed Form I-9s are required to be maintained by the employer for the later of 3 years after the date of hire or 1 year after the date of termination of employment. Form I-9s may be stored at the employees' worksite or at a company's headquarters or other centralized location on original paper, or on microfilm or microfiche, but the Forms must be stored in a manner that allows for them to be transmitted to the worksite within 3 days of an official request for production of documents for inspection. Although not required, it is recommended that Form I-9s be maintained separately from personnel files. A bill is currently pending before the House Subcommittee on Immigration, Border Security, and Claims that would permit employers to store electronic versions of the Form I-9 and would permit the forms to be completed and signed electronically.

III. PART II

What if the company is audited?
ICE, DOL, or the Justice Department's Office of Special Counsel for Unfair Immigration-Related Employment Practice ("UNIREP") (which monitors and prosecutes most Form I-9 discrimination violations such as document abuse, national origin and citizenship status discrimination, and retaliation), may, with 3 days notice, inspect all Form I-9s subject to the retention requirements. Original I-9s may be made available or forms may be produced on microfilm or microfiche. Keep in mind that ICE or UNIREP may obtain a warrant based on probable cause for entry onto the premises of suspected violators with no advance notice.

There are a number of government agencies that may ask to see your Form I-9s as part of their audit including EEOC and OFCCP. ICE is the lead government agency with respect to Form I-9 compliance. An ICE audit may be initiated as a result of a tip, complaint or based on an ICE initiative.

In the event that your company is requested to participate in a government review of its Form I-9 documents and procedures, you should contact legal counsel immediately. Do not destroy or alter existing Forms I-9, as this may lead to a claim of obstruction of justice. You are entitled to 72 hours notice prior to an audit – DO NOT WAIVE THIS RIGHT. Do a self-audit during the 72 hour notice period, make corrections or suspend workers without proper verification, and be prepared to explain any issues. If you received a subpoena or search warrant, review the scope carefully. Typically, you will not be required to produce employees for interviews and should NOT give consent to the investigator to speak to employees. As with all audits, be sure the investigator is escorted at all times. Your company should prepare an accurate list of all post November 6, 1986 hires, including hire and termination dates. Have your attorney review all documents before producing them to the agency and do not consent to permitting original documents to be removed from the company by the investigator. Make copies of the documents you produce.

What do I do if I receive a Social Security "No-Match" for one of our employees?
The Social Security Administration ("SSA") sends a mismatch letter to employers and employees when W-2 information does not match SSA records. These letters are not evidence of unauthorized work status and employees should not be terminated solely on the basis of a mismatch letter, but an employer may be subject to liability under IRCA if it does not compare the employee's W-2 information against his or her employment records, request that the employee follow-up with SSA, and follow-up if the employee is not provided correct information.

What if there is an acquisition or divestiture?
A successor in interest is not considered a new employer for Form I-9 purposes, thus the predecessor's Form I-9s may be adopted by the new company (8 CFR § 274a.2(b)(1)(iii)(A)(7)). The new company will be responsible for any deficiencies in the Form I-9s so depending on the Forms and the size of the acquisition, the new company may wish to obtain updated Form I-9s for all employees.

How should we ensure that contractors are authorized to work in the U.S.?
Although you should only complete Form I-9s for your employees, your company may be subject to civil or criminal liability, and face negative publicity, if it is determined that the company knew contractors were unauthorized to work in the U.S. (8 CFR § 274a.5). Therefore, you should be sure that contracts with contractor/vendor companies explicitly state that it is the contractor company's obligation, as the employer, to comply with IRAC, complete Form I-9s, and verify work authorization. You may also require that the contractor verify to you that its employees have been I-9ed and are authorized to work in the U.S. prior to deployment. Many companies have started reviewing contractor Form I-9s while others will audit the Form I-9s on an annual basis or rely on the contracting company's attestation and contractual obligation.

Best Practices

Your company should have a written Form I-9 compliance policy. Your HR and staffing employees, and others who will be responsible for completing Forms I-9s on behalf of the company should be trained in proper Form I-9 procedures. Not only should proper training cut down on errors and help ensure a uniform process for all employees, but if mistakes are discovered by ICE during an audit, your policy can be used as a basis for a good faith defense.

In a large company, it may be helpful to have all of your Form I-9s centrally located and to have one person responsible for compliance, self-audits and identified as the subject-matter expert in the area. This person should routinely audit the I-9s and correct any errors. If such a procedure is established, each I-9 should be reviewed for errors upon receipt at the central location.

You should have a tickler system in place for all re-verification dates, and employees should be reminded of these dates and the fact that the company will be unable to employ them if updated documents are not presented prior to the expiration date on their Form I-9.

Discrimination

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination by employers of 15 or more employees who have worked more than 20 or more calendar weeks per year from employment discrimination based on an employee's race, color, religion, sex, national origin, opposition to practices which violate the Act, or participation in a Title VII proceeding. Title VII protects all U.S. workers regardless of citizenship status or country of origin, including aliens. Typically, Title VII protection is also afforded to foreign employees working in the U.S. and U.S. citizens working abroad for American companies. Under Title VII, national orgin discrimination means treating an individual less favorably because the individual (or his ancestors) is from a certain place (employment discrimination based on place of origin) or belongs to a particular national origin group (employment discrimination against a national origin group) or because the person is associated with an individual of a particular national origin. Under Title VII, an employer may not base employment decisions (including recruitment, hiring, promotion, transfer, compensation, work assignments, leave, training, discipline, and terminations) on national origin unless that characteristic is a *bona fide* occupational qualification. Title VII does not cover alienage discimination (discrimination due to lack of citizenship in the U.S.) per se, unless it has the "purpose or effect" of discriminating on

the basis of national origin. See, *Espinoza v. Farah Manufacturing Co*. 414 U.S 86, 92 (1973); 29 C.F.R. § 1606

In addressing issues associated with employment discrimination based on place of origin, the place typically will be a country or former country but in some situations the place has never had country status, rather it is a location closely associated with a group of people who share a commom language, culture, ancestery or other similar social characterists.

Employment discrimination against a national origin group may be against any size group of people sharing a common language, culture, ancestory, or other similar social characteristics. The types of groups covered may be as diverse as Hispanics, Kurds, Gypsies, American Indians in general or a particular indian tribe. This type of discrimination also includes discrimination based on: (i) ethnicity (belonging or not belonging to a particular ethnic group); (ii) physical, linguistic, or cultural traits closely associated with a national origin group; (iv) the perception, based on speech, mannerism, and appearance, that someone is a member of a particular ethnic group.

The EEOC website (http://www.eeoc.gov) provides links to the the following articles regarding national origin discrimination:

Compliance Manual Section on National Origin Discrimination and the accompanying Question and Answers.

EEOC's guidelines on national origin discrimination in the Code of Federal Regulations, at 29 C.F.R. Part 1606, or to the text of Title VII of the Civil Rights Act.

Other Federal Laws Prohibiting National Origin Discrimination in Employment, and Related Forms of Discrimination

Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs

When a Charge Is Filed Against Your Company

Information for Small Employers

In addition to Title VII, other federal laws, enforced by other federal agencies, protect workers against national origin discrimination under some circumstances.

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices enforces IRAC, which prohibits employers with between 4 and 14 employees from discriminating based on national origin in hiring, recruitment, referral or discharge. IRAC does not prohibit national origin discrimination where there is a bona fide occupational qualification reasonably necessary for the normal operation of the business. IRAC also prohibits discmination based on citizenship status for U.S. citizens and those intending to become U.S. citizens. One may not file a complaint pursuant to both IRAC and Title VII.

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces *Executive Order 11246*, which prohibits covered federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, or national origin, and requires affirmative action to ensure equal employment opportunity.

How can I avoid allegations of discrimination in the hiring process?
You should ask the same questions of all applicants;

You may ask candidates if they are legally entitled to work in the United States. If you choose to make the inquiry, you must ask each candidates this question;

You may hire an equally qualified citizen over a noncitizen **if citizenship is required** by law for the job or government contract;

Do not ask where the candidate was born, what her native language is, or where her parents live;

During the I-9 process, do not specify the document or type of document an employee should provide and if an employee presents apropriate documents, do not ask to see a different document; and

Be careful about making employment decisions based on lingusitic characteristics, accents, fluency in English, dress codes or adopting an English-Only Rule as these are a often components of, or related to one's national origin. See *EEOC Compliance Manual, Section 13: National Origin Discimination*, The U.S. Equal Employment Opportunity Commission (December 2, 2002).

Security Requirements
You may require that all applicants and employees be subject to security requirements, and some positions may require security clearance (i.e., NRC required security checks for those with unescorted access to a nuclear facility).

Pursuant to the USA PATRIOT Act, it is not a violation of Title VII for your company to release personnel records to law enforcement officials. *See*, USA PATRIOT Act of 2001, 50 U.S.C. **§§** 1861. It is recommended that you request that the law enforcement officials put their request in writing.

Inter-agency Coordination

The EEOC engages in coordination with other federal agencies that have joint responsibility for protecting workers against national origin discrimination. See, Memorandum of Understanding Between The Equal Employment Opportunity Commission and The Office of Special Counsel for Immigration Related Unfair Employment Practices, The U.S. Equal Employment Opportunity Commission http://www.eeoc.gov/policy/docs/oscmou.html and Joint Statement Against Employment Discrimination in the Aftermath of the September 11 Terrorist Attacks, The U.S. Equal Employment Opportunity Commission (November 6, 2001), http://www.eeoc.gov/press/11-19-01-js.html.

Web-based Resources

The following websites may also be helpful: U.S. Citizenship and Immigration Services http://uscis.gov; Department of Homeland Security http://www.dhs.gov; Equal Employment Opportunity Commission http://www.eeoc.gov; U.S. Immigration and Customs Enforcement http://www.ice.gov; U.S. Embassy and Consulate Information (DOS) http://travel.state.gov; Department of Labor http://www.dol.gov; Social Security Administration (SSA) http://www.ssa.gov; and I-9 Employer Handbook http://uscis.gov/graphic/lawsregs/handbook/hand emp.pde.

FORM I-9 "DOs and "DON'Ts"

DO	DON'T
1. Do copy both pages of Form 1-9 and the instruction sheet in its entirety.	1. Don't alter the Form I-9 or forget to copy the back of the form and the instruction sheet.
2. Do ensure that the employee completes Form 1-9 by the end of the first day of work.	2. Don't use the company address as the employee's address.
3. Do ensure that the employee selects one of the attestation boxes in Section 1 regarding alien or citizenship status.	3. Don't use white out to amend an error.
4. Do ensure that the employee completes Section 1 in its entirety, including signing and dating Form I-9.	4. Don't complete Section 1 on behalf of the employee, or make changes or corrections to Section 1.
5. Do correct errors by interlineating the errors and writing the correct information in a different color pen and initialing and dating the corrected information. Remember – it is always better to make a correction (even if it is not discovered immediately).	5. Don't specify which documents the employee should present as proof of identity and/or work authorization.
6. Do seek assistance from a preparer and/or translator if the employee is unable to complete Form 1-9 on his/her own.	6. Don't accept photocopies of employees' documents.
7. Do request that the employee to bring his/her choice of acceptable original documents to prove identity and work authorization within three business days.	7. Don't abbreviate when identifying documents in Section 2.
8. Do carefully inspect the documents.	8. Don't allow employees to complete Section 2 on your behalf.
9. Do photocopy the exact documents used to complete Form I-9.	9. Don't accept or photocopy more documents than are required to complete the Form I-9.
10. Do complete Section 2 within 3 business days of the employee's start date.	10. Don't write editorial comments on the Form I-9.
11. Do write down the document information, such as document title, issuing authority, document numbers, and expiration date, if applicable.	11. Don't serve as preparer/translator for an employee when completing Section 1.
12. Do indicate the actual start date of the employment in Section 2, including transferees from abroad.	12. Don't backdate the Form I-9.
13. Do ensure that every employee hired after November 6, 1986 who is still employed has a Form I-9 on file.	
14. Do calendar re-verification dates and re-verify employee's work authorization.	
15. Do purge Form I-9s subject to the retention guidelines.	

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136

Employment Eligibility Verification

INSTRUCTIONS

PLEASE READ ALL INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1 - Employee. All employees, citizens and noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

Preparer/Translator Certification. The Preparer/Translator Certification must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his/her own. However, the employee must still sign Section 1.

Section 2 - Employer. For the purpose of completing this form, the term "employer" includes those recruiters and referrers for a fee who are agricultural associations, agricultural employers or farm labor contractors.

Employers must complete Section 2 by examining evidence of identity and employment eligibility within three (3) business days of the date employment begins. If employees are authorized to work, but are unable to present the required document(s) within three business days, they must present a receipt for the application of the document(s) within three business days and the actual document(s) within ninety (90) days. However, if employers hire individuals for a duration of less than three business days, Section 2 must be completed at the time employment begins. **Employers must record: 1)** document title; **2)** issuing authority; **3)** document number, **4)** expiration date, if any; and **5)** the date employment begins. Employers must sign and date the certification. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. These photocopies may only be used for the verification process and must be retained with the I-9. **However, employers are still responsible for completing the I-9.**

Section 3 - Updating and Reverification. Employers must complete Section 3 when updating and/or reverifying the I-9. Employers must reverify employment eligibility of their employees on or before the expiration date recorded in Section 1. Employers **CANNOT** specify which document(s) they will accept from an employee.

- If an employee's name has changed at the time this form is being updated/ reverified, complete Block A.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee is still eligible to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee's work authorization has expired **or** if a current employee's work authorization is about to expire (reverification), complete Block B and:
  - examine any document that reflects that the employee is authorized to work in the U.S. (see List A **or** C),
  - record the document title, document number and expiration date (if any) in Block C, and
  - complete the signature block.

Photocopying and Retaining Form I-9. A blank I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed I-9s for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.

For more detailed information, you may refer to the INS Handbook for Employers, (Form M-274). You may obtain the handbook at your local INS office.

Privacy Act Notice. The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by officials of the U.S. Immigration and Naturalization Service, the Department of Labor and the Office of Special Counsel for Immigration Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

Reporting Burden. We try to create forms and instructions that are accurate, can be easily understood and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: **1)** learning about this form, 5 minutes; **2)** completing the form, 5 minutes; and **3)** assembling and filing (recordkeeping) the form, 5 minutes, for an average of 15 minutes per response. If you have comments regarding the accuracy of this burden estimate, or suggestions for making this form simpler, you can write to the Immigration and Naturalization Service, HQPDI, 425 I Street, N.W., Room 4034, Washington, DC 20536. OMB No. 1115-0136.

EMPLOYERS MUST RETAIN COMPLETED FORM I-9
PLEASE DO NOT MAIL COMPLETED FORM I-9 TO INS

Form I-9 (Rev. 11-21-91)N

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136

Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last	First	Middle Initial	Maiden Name

Address *(Street Name and Number)*	Apt. #	Date of Birth *(month/day/year)*

City	State	Zip Code	Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- ☐ A citizen or national of the United States
- ☐ A Lawful Permanent Resident (Alien # A_____
- ☐ An alien authorized to work until ___/___/___
  (Alien # or Admission #) _____

Employee's Signature	Date *(month/day/year)*

Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature	Print Name

Address *(Street Name and Number, City, State, Zip Code)*	Date *(month/day/year)*

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s)

List A	OR	List B	AND	List C
Document title: _____		_____		_____
Issuing authority: _____		_____		_____
Document #: _____		_____		_____
Expiration Date *(if any)*: ___/___/___		___/___/___		___/___/___
Document #: _____				
Expiration Date *(if any)*: ___/___/___				

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* **___/___/___ and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative	Print Name	Title

Business or Organization Name	Address *(Street Name and Number, City, State, Zip Code)*	Date *(month/day/year)*

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name *(if applicable)*	B. Date of rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title:_____ Document #: _____ Expiration Date (if any): ___/___/___

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Date *(month/day/year)*

LISTS OF ACCEPTABLE DOCUMENTS

LIST A

Documents that Establish Both Identity and Employment Eligibility

1. U.S. Passport (unexpired or expired)
2. Certificate of U.S. Citizenship *(INS Form N-560 or N-561)*
3. Certificate of Naturalization *(INS Form N-550 or N-570)*
4. Unexpired foreign passport, with *I-551 stamp or* attached *INS Form I-94* indicating unexpired employment authorization
5. Permanent Resident Card or Alien Registration Receipt Card with photograph *(INS Form I-151 or I-551)*
6. Unexpired Temporary Resident Card *(INS Form I-688)*
7. Unexpired Employment Authorization Card *(INS Form I-688A)*
8. Unexpired Reentry Permit *(INS Form I-327)*
9. Unexpired Refugee Travel Document *(INS Form I-571)*
10. Unexpired Employment Authorization Document issued by the INS which contains a photograph *(INS Form I-688B)*

OR

LIST B

Documents that Establish Identity

1. Driver's license or ID card issued by a state or outlying possession of the United States 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:

10. School record or report card
11. Clinic, doctor or hospital record
12. Day-care or nursery school record

AND

LIST C

Documents that Establish Employment Eligibility

1. U.S. 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 or Form DS-1350)*
3. 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
4. Native American tribal document
5. U.S. Citizen ID Card *(INS Form I-197)*
6. ID Card for use of Resident Citizen in the United States *(INS Form I-179)*
7. Unexpired employment authorization document issued by the INS *(other than those listed under List A)*

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

U.S. Department of Justice
Immigration and Naturalization Service
425 I Street, NW
Washington, DC 20536

Official Business
Penalty for Private Use $300

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Immigration & Naturalization Service
Permit No. G-78

M-274 (Rev. 11/21/91) N

Handbook for Employers

Instructions for Completing Form I-9

(Employment Eligibility Verification Form)

U. S. Department of Justice
Immigration and Naturalization Service

To United States Employers:

Thank you for your cooperation and assistance. For the past five years, you have worked with us to implement the employment eligibility verification and employer sanctions provisions of the Immigration Reform and Control Act of 1986. Your teamwork has made the law a success, ensuring fairness in applying the law and preserving jobs for those who are legally eligible to work -- citizens and nationals and aliens authorized to work in the United States.

Based on comments and suggestions received from the public and our experience in these first years, we have revised the *Employment Eligibility Verification Form* (I-9) and expanded this *Handbook for Employers*. We have sought to simplify and clarify.

This Handbook provides a step-by-step explanation of what you as an employer must do to meet your responsibilities under the law. It also explains the responsibilities and rights of employees in the hiring and verification process. We have included additional illustrations of documents that may be used to establish identity and employment eligibility. The Handbook also provides expanded information about how to avoid employment discrimination based on citizenship or national origin.

The Immigration and Naturalization Service thanks you for your compliance with these requirements, now an established part of our nation's laws. We are counting on your continued cooperation.

Gene McNary
Commissioner
Immigration and Naturalization Service

Contents

This Handbook is divided into eight (8) parts:

This Handbook includes two copies of the Form I-9. At the back, you will also find a list of INS offices for you to contact if you need more information.

United States Department of Justice
Immigration and Naturalization Service

November 1991

Part One

Why Employers Must Verify Employment Eligibility of New Employees

In recent years, Congress has worked to reform our nation's immigration laws. These reforms, the result of a bipartisan effort, preserve our tradition of legal immigration while closing the door to illegal entry. The employer sanctions provisions, found at Section 274A of the Immigration and Nationality Act, were added by the Immigration Reform and Control Act of 1986 (IRCA). These provisions further changed with the passage of the Immigration Act of 1990. References to "the Act" in this Handbook refer to the Immigration and Nationality Act, as amended.

Employment is often the magnet that attracts persons to come to or stay in the United States illegally. The purpose of the employer sanctions law is to remove this magnet by requiring employers to hire only persons who may legally work here: citizens and nationals of the United States and aliens authorized to work. To comply with the law, you must verify the identity and employment eligibility of anyone you hire, and complete and retain a Form I-9 like the one contained in this Handbook.

In addition, the law obliges you not to discriminate against individuals on the basis of national origin or citizenship, or to require more or different documents from a particular individual. (See Part 4.)

This law has been strongly supported by the public. Employers have joined, and continue to join, the effort to protect our heritage of legal immigration. This cooperation has made jobs available to American citizens and to aliens who are authorized to work in our country. In addition to being the law, it is good business practice for you to verify the identity and employment eligibility of your workers. The law deserves your support.

The Form I-9 was developed for verifying that persons are eligible to work in the United States. You should have completed a Form I-9 for everyone you have hired after November 6, 1986. The law requires you as an employer to:

- Ensure that your employees fill out Section 1 of the Form I-9 when they start to work;

- Review document(s) establishing each employee's identity and eligibility to work;
- Properly complete Section 2 of the Form I-9;
- Retain the Form I-9 for 3 years after the date the person begins work or 1 year after the person's employment is terminated, **whichever is later**; and
- Make the Form I-9 available for inspection to an officer of the Immigration and Naturalization Service (INS), the Department of Labor (DOL), or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) upon request. You will be given at least 3 days advance notice.

  NOTE: *This does not preclude the INS, the DOL, or the OSC from obtaining warrants based on probable cause for entry onto the premises of suspected violators without advance notice.*

If you are an agricultural association, agricultural employer, or farm labor contractor who employs people, or recruits or refers people for a fee, these requirements apply to you. (See Part 6.)

If you employ anyone for domestic work in your private home on a regular basis (such as every week), these requirements apply to you.

If you are self-employed, you do not need to complete a Form I-9 on yourself unless you are also an employee of a business entity, such as a corporation or partnership, in which case the business entity is required to complete a Form I-9 on you.

The instructions in this Handbook will help you assess your responsibilities for completing the form and complying with the law.

New Developments in the Law

The Immigration Act of 1990

On November 29, 1990, the President signed into law the Immigration Act of 1990 which amended the Immigration and Nationality Act. You should be aware of several provisions in this new law which affect your responsibilities as an employer.

New Anti-Discrimination Provisions

For the purpose of satisfying the employment eligibility verification requirements, an employer cannot request that an employee present more or different documents than are required. Also, an employer cannot refuse to honor documents which on their face reasonably appear to be genuine and to relate to the person presenting them. The new law makes these actions unfair immigration-related employment practices. (See Part 4.)

New Document Fraud Provisions

Under the new law, it is unlawful for anyone knowingly to engage in any of the following activities for the purpose of satisfying a requirement of the Act:

- To forge, counterfeit, alter, or falsely make any document;
- To use, attempt to use, possess, obtain, accept, or receive any forged, counterfeit, altered, or falsely made document;
- To use or attempt to use any document lawfully issued to a person other than the possessor (including a deceased individual); or
- To accept or receive any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with the employment eligibility verification requirements. (See Part 5.)

Where to Get the Form I-9

Two copies of the Form I-9 are included in this Handbook. If you need more forms, you can photocopy or print the forms, provided both sides are reproduced. The Instructions page must also be made available to both you and the employee during the completion of the form. You may obtain a limited number of copies from the INS or you may order them in bulk from the Superintendent of Documents at the following address:

Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402

Part Two

When You Must Complete the Form I-9

Every time you hire any person to perform labor or services in return for wages or other remuneration, you must complete the Form I-9. This requirement applies to everyone hired after November 6, 1986.

Ensure that the employee fully completes **Section 1** of the form at the time of the hire -- **when the employee begins work.**

Review the employee's document(s) and fully complete **Section 2** of the form **within 3 business days** of the hire.

If you hire a person for less than 3 business days, Sections 1 and 2 of the Form I-9 must be fully completed at the time of the hire -- when the employee begins work.

You **DO NOT** need to complete a Form I-9 for:

- Persons hired before November 7, 1986, who are continuing in their employment and have a reasonable expectation of employment at all times;
- Persons you employ for casual domestic work in a private home on a **sporadic**, **irregular**, or **intermittent** basis;
- Persons who are independent contractors; or
- Persons who provide labor to you who are employed by a contractor providing contract services (e.g., employee leasing).

  NOTE: *You cannot contract for the labor of an alien if you know the alien is not authorized to work in the United States.*

Part Three

How to Complete the Form I-9

Section 1

- Have your employees complete Section 1 at the time of the hire -- when they begin to work -- by filling in the correct information and signing and dating the form.
- If your employees cannot complete Section 1 by themselves or if they need the form translated, someone may assist them. The preparer or translator must read the form to the employee, assist him or her in completing Section 1, and have the employee sign or mark the form in the appropriate place. The preparer or translator must then complete the Preparer/Translator Certification block on the Form I-9.
- You are responsible for reviewing and ensuring that your employees fully and properly complete Section 1.

Section 2

- Employees must present to you an original document or documents that establish identity and employment eligibility within 3 business days of the date employment begins. Some documents establish **both** identity and employment eligibility (List A). Other documents establish **identity only** (List B) or **employment eligibility only** (List C). Employees can choose which document(s) they want to present from the lists of acceptable documents. These lists appear in Part 8 of this Handbook and on the back of the Form I-9.
- You must examine the original document or documents presented by the employee and then fully complete Section 2 of the Form I-9. You must examine one document from List A or one from List B and one from List C. Record the title, issuing authority, number, and expiration date (if any) of the document(s); fill in the date of hire and correct information in the certification block; and sign and date the Form I-9. You **must** accept any document(s) (from List A) or combination of documents (one from List B and one from List C) presented by the individual which reasonably appear on their face to be genuine and to relate to the person presenting them. You may not specify which document(s) an employee must present.

- If employees are unable to present the required document(s) within 3 business days of the date employment begins, they must present a **receipt** for the application for the document(s) within 3 business days. The employees **must** have indicated, by having checked an appropriate box in Section 1, that they are already eligible to be employed in the United States. When they provide you with a receipt showing that they have applied for a document evidencing that eligibility, you should record the document title in Section 2 of the Form I-9 and write the word "receipt" and any document number in the "Document #" space. The employee must present the actual document within 90 days of the date employment begins. At that time, you should cross out the word "receipt" and any accompanying document number, insert the number from the actual document presented, and initial and date the change.

- You must retain the Form I-9 for 3 years after the date employment begins or 1 year after the person's employment is terminated, **whichever is later**.

Future Expiration Dates

Future expiration dates may appear on the Form I-9 or on the employment authorization documents of aliens, including, among others, permanent residents, temporary residents, and refugees. INS includes expiration dates even on documents issued to aliens with permanent work authorization. The existence of a future expiration date:

- Does not preclude continuous employment authorization;

- Does not mean that subsequent employment authorization will not be granted; and

- Should not be considered in determining whether the alien is qualified for a particular position.

Consideration of a future employment authorization expiration date in determining whether an alien is qualified for a particular job may constitute employment discrimination. (See Part 4.) You will, however, need to reverify the employee's eligibility to work when any expiration date on the Form I-9 is reached.

Reverifying Employment Authorization for Current Employees

When an employee's work authorization expires, you must reverify his or her employment eligibility. You may use Section 3 of the Form I-9 or, if Section 3 has already been used for a previous reverification or update, use a new Form I-9. If you use a new form, you should write the employee's name in Section 1, complete Section 3, and retain the new form with the original. The employee must present a document that shows either an extension of the employee's initial employment authorization or new work authorization. If the employee cannot provide you with proof of current work authorization, you cannot continue to employ that person.

To maintain continuous employment eligibility, an employee with temporary work authorization should apply for new work authorization at least 90 days before the current expiration date. If the Service fails to adjudicate the application for employment authorization within 90 days, then the employee will be authorized for employment on Form I-688B for a period not to exceed 240 days.

You must reverify on the Form I-9 not later than the date the employee's work authorization expires.

Reverifying or Updating Employment Authorization for Rehired Employees

When you rehire an employee, you must ensure that he or she is still authorized to work. You may do this by completing a new Form I-9 or you may reverify or update the original form by completing Section 3.

If you rehire an employee who has previously completed a Form I-9, you may **reverify** on the employee's original Form I-9 (or on a new Form I-9 if Section 3 of the original has already been used) if:

- You rehire the employee within 3 years of the initial date of hire; and

- The employee's previous grant of work authorization has expired but he or she is currently eligible to work on a **different** basis or under a **new** grant of work authorization than when the original Form I-9 was completed.

To reverify, you must:

- Record the date of rehire;
- Record the document title, number, and expiration date (if any) of any document(s) presented;
- Sign and date Section 3; and
- If you are reverifying on a new form, write the employee's name in Section 1.

If you rehire an employee who has previously completed a Form I-9, you may **update** on the employee's original Form I-9 or on a new Form I-9 if:

- You rehire the employee within 3 years of the initial date of hire; and
- The employee is still eligible to work on the **same** basis as when the original Form I-9 was completed.

To update, you must:

- Record the date of rehire;
- Sign and date Section 3; and
- If you are updating on a new form, write the employee's name in Section 1.

In all of the situations described above with respect to rehired employees, you always have the option of completing Sections 1 and 2 of a new Form I-9 instead of completing Section 3.

Minors (Individuals Under Age 18)

If a minor -- a person under the age of 18 -- cannot present a List A document or an **identity** document from List B, the Form I-9 should be completed in the following way:

- A parent or legal guardian must complete Section 1 and write "Individual under age 18" in the space for the employee's signature;
- The parent or legal guardian must complete the "Preparer/Translator Certification" block;
- You should write "Individual under age 18" in Section 2, List B, in the space after the words "Document #"; and
- The minor must present a List C document showing his or her employment eligibility. You should record the required information in the appropriate space in Section 2.

Handicapped Employees (Special Placement)

If a person with a handicap, who is placed in a job by a nonprofit organization or as part of a rehabilitation program, cannot present a List A document or an **identity** document from List B, the Form I-9 should be completed in the following way:

- A representative of the nonprofit organization, or a parent or a legal guardian, must complete Section 1 and write "Special Placement" in the space for the employee's signature;
- The representative, parent, or legal guardian must complete the "Preparer/Translator Certification" block;
- You should write "Special Placement" in Section 2, List B, in the space after the words "Document #"; and
- The handicapped employee must present a List C document showing his or her employment eligibility. You should record the required information in the appropriate space in Section 2.

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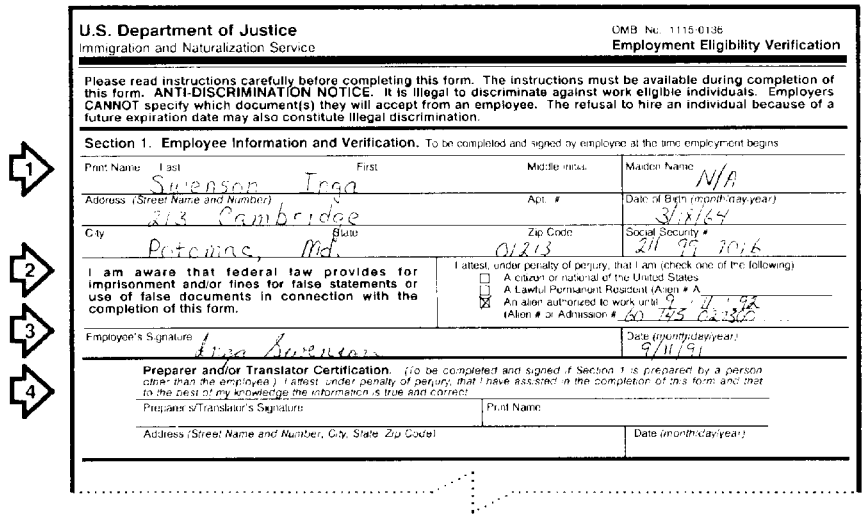
Section 1: To be completed by the **EMPLOYEE**

STEP 1
Fill in the personal information.

STEP 2
Check the box for work eligibility. Fill in other information if applicable.

STEP 3
Read, sign, and date.

STEP 4
(Preparer/Translator only)
Read, fill in information, sign, and date.



U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136
Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form. **ANTI-DISCRIMINATION NOTICE:** It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last: Swenson | First: Inga | Middle Initial: | Maiden Name: N/A
Address (Street Name and Number): 213 Cambridge | Apt. #:
City: Potomac | State: Md. | Zip Code: 01213
Date of Birth (month/day/year): 3/x/64
Social Security #: 211 [illegible] 1016

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
☐ A citizen or national of the United States
☐ A Lawful Permanent Resident (Alien # A
☒ An alien authorized to work until [illegible]
(Alien # or Admission #: 160 [illegible])

Employee's Signature: Inga Swenson | Date (month/day/year): 9/11/92

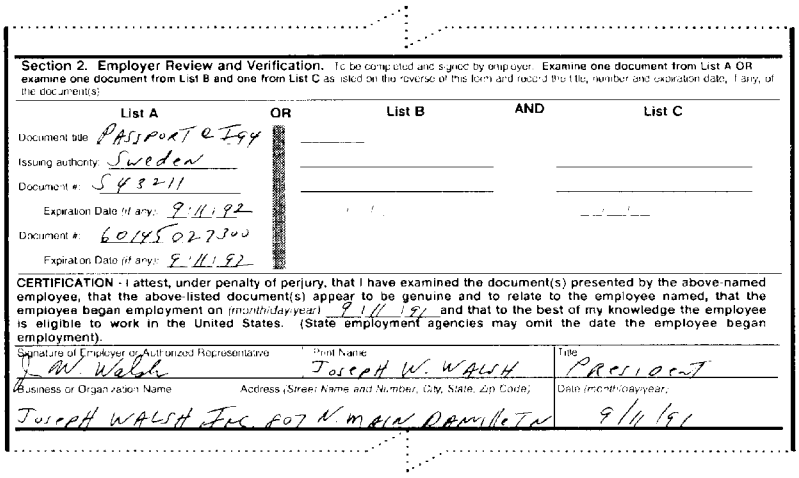
Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature | Print Name
Address (Street Name and Number, City, State, Zip Code) | Date (month/day/year)

Section 2: To be completed by the **EMPLOYER**

STEP 5
Examine the document(s) and fill in the document title, issuing authority, number, and expiration date (if any) in the space provided.

STEP 6
Read, fill in information (including the date employment begins in the certification), sign, and date.



Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C as listed on the reverse of this form and record the title, number and expiration date, if any, of the document(s).

List A	OR	List B	AND	List C
Document title: PASSPORT & I-94				
Issuing authority: Sweden				
Document #: S43211				
Expiration Date (if any): 9/11/92				
Document #: 60145027300				
Expiration Date (if any): 9/11/92				

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) 9/11/92 and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment).

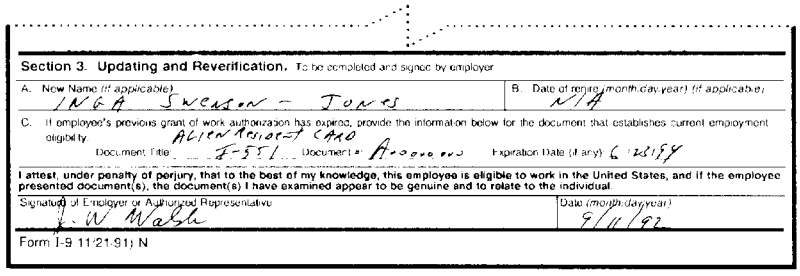
Signature of Employer or Authorized Representative: J. W. Walsh | Print Name: Joseph W. Walsh | Title: President
Business or Organization Name: Joseph Walsh Inc. | Address (Street Name and Number, City, State, Zip Code): 607 N. Main Hamilton | Date (month/day/year): 9/11/92

Section 3: To be completed by the **EMPLOYER**

STEP 7
Fill in the new name and/or date of rehire (if applicable).

STEP 8
Examine the document(s) and fill in the document title, number, and expiration date (if any) in the space provided.

STEP 9
Read, sign, and date.



Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name (if applicable): INGA Swenson - Jones | B. Date of rehire (month/day/year) (if applicable): N/A

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.
Document Title: Alien Registration Card | Document #: A [illegible] | Expiration Date (if any): 6/x/94

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative: J. W. Walsh | Date (month/day/year): 9/11/92

Form I-9 11/21/91) N

Part Three of this Handbook gives instructions for completing the Form I-9 for minors and handicapped individuals who are unable to present a List A document or a List B (**identity**) document. This example shows a completed Form I-9 in which a parent has attested to a minor employee's identity.

Section 1: To be completed by the **PARENT, LEGAL GUARDIAN, OR REPRESENTATIVE OF THE NONPROFIT ORGANIZATION**

STEP 1
Fill in the personal information.

STEP 2
Check the box for work eligibility. Fill in other information as required.

STEP 3
Read, then write "Individual under age 18" in the space for the employee's signature.

STEP 4
(Preparer/Translator)
Read, fill in information, sign, and date.

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. 1115-0136
Employment Eligibility Verification

Please read Instructions carefully before completing this form. The instructions must be available during completion of this form. ANTI-DISCRIMINATION NOTICE. It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last	First	Middle Initial	Maiden Name
Smith	Mary	E.	N/A
Address (Street Name and Number)		**Apt. #**	**Date of Birth (month/day/year)**
4502 Birch Lane			4/1/75
City	**State**	**Zip Code**	**Social Security #**
Danville	TN	37832	408 08 4503

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
- [X] A citizen or national of the United States
- [ ] A Lawful Permanent Resident (Alien # A
- [ ] An alien authorized to work until ____/____/____ (Alien # or Admission #

Employee's Signature: Individual Under Age 18 — Date (month/day/year):

Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature: John Smith — Print Name: John Smith

Address (Street Name and Number, City, State, Zip Code): 4502 Birch Lane, Danville TN 37832 — Date (month/day/year): 9/11/91

Section 2: To be completed by the **EMPLOYER**

STEP 5
Examine a List C document establishing employment eligibility. Fill in the document title, issuing authority, number, and expiration date (if any) in the space provided. Under List B, write "Individual under age 18" in the space provided for "Document #."

STEP 6
Read, fill in information, sign, and date.

Section 2. Employer Review and Verification. To be completed and signed by employer. **Examine one document from List A OR examine one document from List B and one from List C** as listed on the reverse of this form and record the title, number and expiration date, if any, of the document(s).

List A	OR	List B	AND	List C
Document title:				Social Security Card
Issuing authority:				U.S. Government
Document #:		"Individual Under Age 18"		408 08 4503
Expiration Date (if any): ___/___/___		___/___/___		/ /
Document #:				
Expiration Date (if any): ___/___/___				

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) 9/11/91 and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment).

Signature of Employer or Authorized Representative	Print Name	Title
J.W. Walsh	Joseph W. Walsh	President
Business or Organization Name / **Address (Street Name and Number, City, State, Zip Code)**		**Date (month/day/year)**
Joseph Walsh Inc. 207 N Main Danville TN		9/11/91

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name (if applicable) — B. Date of rehire (month/day/year) (if applicable)

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.
Document Title: ____ Document #: ____ Expiration Date (if any): ___/___/___

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative — Date (month/day/year)

Form I-9 11/21/91 N

Part Four

Unlawful Discrimination

General Provisions

The Immigration and Nationality Act, as amended, and Title VII of the Civil Rights Act of 1964, as amended, prohibit employment discrimination. Employers with 4 or more employees are prohibited from discriminating against any person (other than an unauthorized alien) in hiring, discharging, or recruiting or referring for a fee because of a person's national origin, or in the case of a citizen or protected individual, because of a person's citizenship status. Employers with 15 or more employees may not discriminate against any person on the basis of national origin in hiring, discharge, recruitment, assignment, compensation, or other terms and conditions of employment.

NOTE: *For the definition of a "protected individual," see Question #41 on Page 18 of this Handbook.*

In practice, this means that employers must treat all employees the same when completing the Form I-9. Employers cannot set different employment eligibility verification standards or require that different documents be presented by different groups of employees. Employees can choose which documents they want to present from the lists of acceptable documents. An employer cannot request that an employee present more or different documents than are required or refuse to honor documents which on their face reasonably appear to be genuine and to relate to the person presenting them. An employer cannot refuse to accept a document, or refuse to hire an individual, because a document has a future expiration date. For example, temporary resident aliens have registration cards and persons granted asylum have INS work authorization documents that will expire, but they are ordinarily granted extensions of their employment authorization and they are protected by law from discrimination.

Generally, employers who have 4 or more employees cannot limit jobs to United States citizens to the exclusion of authorized aliens. Such a limitation may only be applied to a specific position when required by law, regulation, or executive order; when required by a Federal, state, or local government contract; or when the Attorney General determines that United States citizenship is essential for doing business with an agency or department of the Federal, state, or local government.

On an individual basis, an employer may legally prefer a United States citizen or national over an **equally** qualified alien to fill a specific position. **However, an employer may not adopt a blanket policy of always preferring a qualified citizen over a qualified alien.**

Verification of identity and employment eligibility is not required until an individual actually starts work. The Form I-9 should be completed at the same point in the employment process for **all** employees. Different procedures should not be established based on an individual's appearance, name, accent, or other factors.

Procedures for Filing Complaints

Discrimination charges may be filed by an individual who believes he or she is the victim of employment discrimination, a person acting on behalf of such an individual, or an INS officer who has reason to believe that discrimination has occurred.

Charges of national origin discrimination against employers with 4 to 14 employees, and all charges of citizenship status discrimination against employers with 4 or more employees, should be filed with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) within the Department of Justice.

Discrimination charges must be filed with the OSC within 180 days of the discriminatory act. Upon receipt of a discrimination charge, the OSC will notify the employer within 10 days that the charges have been filed and that an investigation will be conducted. If the OSC has not filed a complaint with an administrative law judge within 120 days of receiving a charge of discrimination, it will notify the person making the charge of its determination not to file a complaint. The person making the charge (other than an INS officer) may file a complaint with an administrative law judge within 90 days after receiving the notice from the OSC. In addition, the OSC may still file a complaint within this 90-day period. The administrative law judge will conduct a hearing and issue a decision.

An employer is prohibited from taking retaliatory action against a person who has filed a charge of discrimination or who was a witness or otherwise participated in the investigation of another person's complaint. Such retaliatory action is a violation of the Act's anti-discrimination provision and of Title VII.

Additional Information

For more information about immigration-related discrimination, contact the Office of Special Counsel for Immigration Related Unfair Employment Practices, P.O. Box 65490, Washington, D.C., 20035-5490, or call 1-800-255-7688 or for the hearing impaired TDD 1-800-237-2515. In Washington, D.C., call (202) 653-8121 or TDD (202) 296-0168.

For more information on Title VII and policies and procedures of the Equal Employment Opportunity Commission, call 1-800-USA-EEOC.

Part Five

Penalties for Prohibited Practices

A. UNLAWFUL EMPLOYMENT

1. Civil Penalties

If an investigation reveals that an employer has knowingly hired or knowingly continued to employ an unauthorized alien, or has failed to comply with the employment eligibility verification requirements, with respect to employees hired after November 6, 1986, the INS may take action. When the INS intends to impose penalties, a Notice of Intent to Fine (NIF) is issued. Employers who receive a NIF may request a hearing before an administrative law judge. If a request for a hearing is not received within 30 days, the penalty will be imposed and a Final Order will be issued. When a Final Order is issued, the penalty is final and unappealable.

- Hiring or continuing to employ unauthorized aliens

  Employers determined to have knowingly hired unauthorized aliens (or to be continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) may be ordered to cease and desist from such activity, and pay a civil money penalty as follows:

  - First Offense. Not less than $250 and not more than $2,000 for each unauthorized alien;
  - Second Offense. Not less than $2,000 and not more than $5,000 for each unauthorized alien; or
  - Subsequent Offenses. Not less than $3,000 and not more than $10,000 for each unauthorized alien.

  After November 6, 1986, if an employer uses a contract, subcontract, or exchange entered into, renegotiated, or extended, to obtain the labor of an alien and knows the alien is not authorized to work in the United States, the employer will be considered to have knowingly hired an unauthorized alien. The employer will be subject to the penalties set forth above.

- Failing to comply with the Form I-9 requirements

  Employers who fail to properly complete, retain, and/or make available for inspection Forms I-9 as required by law may face civil money penalties of not less than $100 and not more than $1,000 for each employee for whom the Form I-9 was not properly completed, retained, and/or made available.

- Requiring indemnification

  Employers found to have required a bond or indemnity from an employee against liability under the employer sanctions laws may be ordered to pay a civil money penalty of $1,000 for each violation and to make restitution, either to the person who was required to pay the indemnity, or, if that person cannot be located, to the United States Treasury.

- Good faith defense

  If an employer can show that he or she has complied with the Form I-9 requirements, then the employer has established a "good faith" defense with respect to a charge of knowingly hiring an unauthorized alien, unless the government can show that the employer had actual knowledge of the unauthorized status of the employee.

2. Criminal Penalties

- Engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens

  Persons or entities who are convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens (or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) after November 6, 1986, may face fines of up to $3,000 per employee and/or 6 months imprisonment.

- Engaging in fraud or false statements, or otherwise misusing visas, immigration permits, and identity documents

  People who use fraudulent identification or employment eligibility documents, or documents that were lawfully issued to another person, or who make a false statement or attestation for purposes of satisfying the employment eligibility verification requirements, may be fined, or imprisoned for up to 5 years, or both.

B. UNLAWFUL DISCRIMINATION

If an investigation reveals that an employer has engaged in unfair immigration-related employment practices under the Act, the OSC or the EEOC may take action. An employer will be ordered to stop the prohibited practice and may be ordered to take one or more of the following steps:

- Hire or reinstate, with or without back pay, individuals directly injured by the discrimination;
- Lift any restrictions on an employee's assignments, work shifts, or movements;
- Post notices to employees about their rights and about employers' obligations;
- Educate all personnel involved in hiring and in complying with the employer sanctions and anti-discrimination laws about the requirements of these laws; and/or
- Remove a false performance review or false warning from an employee's personnel file.

Employers may also be ordered to pay a civil money penalty as follows:

- First Offense. Not less than $250 and not more than $2,000 for each individual discriminated against;
- Second Offense. Not less than $2,000 and not more than $5,000 for each individual discriminated against;
- Subsequent Offenses. Not less than $3,000 and not more than $10,000 for each individual discriminated against; or
- Unlawful Request for More or Different Documents. Not less than $100 and not more than $1,000 for each individual discriminated against.

Employers may also be ordered to keep certain records regarding the hiring of applicants and employees. If a court decides that the losing party's claim has no reasonable basis in fact or law, the court may award attorneys' fees to prevailing parties other than the United States.

C. CIVIL DOCUMENT FRAUD

If an investigation reveals that an individual has knowingly committed or participated in acts relating to document fraud (see Part 1), the INS may take action. When the INS intends to impose penalties, a Notice of Intent to Fine (NIF) is issued. Persons who receive a NIF may request a hearing before an administrative law judge. If a request for a hearing is not received within 30 days, the penalty will be imposed and a Final Order will be issued. When a Final Order is issued, this penalty is final and unappealable.

Individuals may be ordered to pay a civil money penalty as follows:

- First Offense. Not less than $250 and not more than $2,000 for each fraudulent document used, accepted, or created and each instance of use, acceptance, or creation; or

- Subsequent Offenses. Not less than $2,000 and not more than $5,000 for each fraudulent document used, accepted, or created and each instance of use, acceptance, or creation.

Part Six

Instructions for Recruiters and Referrers for a Fee

Under the Immigration and Nationality Act, as amended by the Immigration Act of 1990, it is unlawful for an agricultural association, agricultural employer, or farm labor contractor to hire, or to recruit or refer for a fee, an individual for employment in the United States without complying with the employment eligibility verification requirements. This provision applies to those agricultural associations, agricultural employers, and farm labor contractors who **recruit** persons for a fee and those who **refer** persons or provide documents or information about persons to employers in return for a fee.

This limited class of recruiters and referrers for a fee must complete the Form I-9 when a person they refer is hired. The Form I-9 must be fully completed within 3 business days of the date employment begins, or, in the case of an individual hired for less than 3 business days, at the time employment begins.

Recruiters and referrers for a fee may designate agents, such as national associations or employers, to complete the verification procedures on their behalf. If the employer is designated as the agent, the employer should provide the recruiter or referrer with a photocopy of the Form I-9. However, recruiters and referrers are still responsible for compliance with the law and may be found liable for violations of the law.

Recruiters and referrers for a fee must retain the Form I-9 for 3 years after the date the referred individual was hired by the employer. They must also make available Forms I-9 for inspection to an INS, DOL, or OSC officer after 3 days (72 hours) advance notice.

NOTE: *This does not preclude the INS, the DOL, or the OSC from obtaining warrants based on probable cause for entry onto the premises of suspected violators without advance notice.*

The penalties for failing to comply with the Form I-9 requirements and for requiring indemnification, as described in Part 5, apply to this limited class of recruiters and referrers for a fee.

NOTE: ***All recruiters and referrers for a fee*** *are still liable for knowingly recruiting or referring for a fee aliens not authorized to work in the United States.*

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Part Seven

Some Questions You May Have About the Form I-9

Questions About the Verification Process

1. **Q. Do citizens and nationals of the United States need to prove they are eligible to work?**

   A. Yes. While citizens and nationals of the United States are automatically eligible for employment, they too must present the required documents and complete an I-9. Citizens of the United States include persons born in Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands. Nationals of the United States include persons born in American Samoa, including Swains Island.

2. **Q. Do I need to complete an I-9 for everyone who applies for a job with my company?**

   A. No. You need to complete I-9s only for people you actually hire. For purposes of this law, a person is "hired" when he or she begins to work for you.

3. **Q. If someone accepts a job with my company but will not start work for a month, can I complete the I-9 when the employee accepts the job?**

   A. Yes. The law requires that you complete the I-9 only when the person actually begins working. However, you may complete the form earlier, as long as you complete the form **at the same point** in the employment process for **all** employees.

4. **Q. I understand that I must complete an I-9 for anyone I hire to perform labor or services in return for wages or other remuneration. What is "remuneration"?**

   A. Remuneration is anything of value given in exchange for labor or services rendered by an employee, including food and lodging.

5. **Q. Do I need to fill out an I-9 for independent contractors or their employees?**

   A. No. For example, if you contract with a construction company to perform renovations on your building, you do not have to complete I-9s for that company's employees. The construction company is responsible for completing the I-9s for its own employees. However, you must not knowingly use contract labor to circumvent the law against hiring unauthorized aliens.

6. **Q. What should I do if the person I hire is unable to provide the required documents within 3 business days of the date employment begins?**

   A. If an employee is unable to present the required document or documents within 3 business days of the date employment begins, the employee must produce a receipt showing that he or she has applied for the document. In addition, the employee must present the actual document to you within 90 days of the hire. The employee **must** have indicated on or before the time employment began, by having checked an appropriate box in Section 1, that he or she is already eligible to be employed in the United States.

   NOTE: *Employees hired for less than 3 business days must produce the actual document(s) and the I-9 must be fully completed at the time employment begins.*

7. **Q. Can I fire an employee who fails to produce the required documents within 3 business days?**

   A. Yes. You can terminate an employee who fails to produce the required document or documents, or a receipt for a document, within 3 business days of the date employment begins. **However, you must apply these practices uniformly to all employees.** If an employee has presented a receipt for a document, he or she must produce the actual document within 90 days of the date employment begins.

8. **Q. What happens if I properly complete a Form I-9 and INS discovers that my employee is not actually authorized to work?**

A. You cannot be charged with a verification violation. You will also have a good faith defense against the imposition of employer sanctions penalties for knowingly hiring an unauthorized alien, unless the government can show you had actual knowledge of the unauthorized status of the employee, if you have done the following:

- Ensured that employees fully and properly completed Section 1 of the I-9 at the time employment began;
- Reviewed the required documents which should have reasonably appeared to have been genuine and to have related to the person presenting them;
- Fully and properly completed Section 2 of the I-9, and signed and dated the employer certification;
- Retained the I-9 for the required period of time; and
- Made the I-9 available upon request to an INS, DOL, or OSC officer.

Questions About Documents

9. **Q. May I specify which documents I will accept for verification?**

A. No. The employee can choose which document(s) he or she wants to present from the lists of acceptable documents. You **must** accept any document (from List A) or combination of documents (one from List B and one from List C) listed on the I-9 and found in Part 8 of this Handbook which reasonably appear on their face to be genuine and to relate to the person presenting them. To do otherwise could be an unfair immigration-related employment practice. Individuals who look and/or sound foreign must not be treated differently in the hiring or verification process.

10. **Q. If an employee writes down an Alien Number or Admission Number when completing Section 1 of the I-9, can I ask to see a document with that number?**

A. No. Although it is your responsibility as an employer to ensure that your employees fully complete Section 1 at the time employment begins, there is no requirement that employees present **any** document to complete this section.

When you complete Section 2, you may not ask to see a document with the employee's Alien Number or Admission Number or otherwise specify which document(s) an employee may present.

11. **Q. What is my responsibility concerning the authenticity of document(s) presented to me?**

A. You must examine the document(s) and, if they reasonably appear on their face to be genuine and to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice. If the document(s) do not reasonably appear on their face to be genuine or to relate to the person presenting them, you must not accept them.

12. **Q. Why are certain documents listed in both List B and List C? If these documents are evidence of both identity and employment eligibility, why aren't they found in List A?**

A. Three documents can be found in both List B and List C: the U.S. Citizen ID Card and the ID Card for use of Resident Citizen in the U.S. -- acceptable as ID Cards in List B -- and a Native American tribal document. Although these documents are evidence of both identity and employment eligibility, they are not found in List A because List A documents are limited to those designated by Congress in the law. An employee can establish both identity and employment eligibility by presenting one of these documents. You should record the document title, issuing authority, number, and expiration date (if any) for that document in the appropriate spaces for **both** List B and List C.

13. **Q. Why is a Canadian driver's license acceptable as a List B document and not a Mexican driver's license?**

A. The United States-Canada Free-Trade Agreement and other reciprocal agreements between these 2 countries form the basis for accepting a Canadian driver's license as a List B identity document. No such reciprocal agreements currently exist between the United States and Mexico that would allow or permit the use of a Mexican driver's license as a List B identity document.

14. **Q. May I accept an expired document?**

A. You may accept an expired United States Passport. You may also accept an expired document from List B to establish identity. However, the document must reasonably appear on its face to be genuine and to relate to the person presenting it. You cannot accept any other expired documents.

15. **Q. How can I tell if an INS-issued document has expired?**

A. Some INS-issued documents, such as previous versions of the Alien Registration Receipt Card (I-151 and I-551), do not have expiration dates and are valid indefinitely. However, the 1989 revised version of the Alien Registration Receipt Card (I-551), which is rose-colored with computer readable data on the back, features a 2-year or 10-year expiration date. Other INS issued documents, such as the Temporary Resident Card (I-688) and the Employment Authorization Card (I-688A or I-688B) also have expiration dates. These dates can be found either on the face of the document or on a sticker attached to the back of the document.

16. **Q. Some people are presenting me with Social Security Cards that have been laminated. May I accept such cards as evidence of employment eligibility?**

A. You may not accept a laminated Social Security Card as evidence of employment eligibility if the card states on the back "not valid if laminated." Lamination of such cards renders them invalid. Metal or plastic reproductions of Social Security Cards are not acceptable.

17. **Q. Some people are presenting me with printouts from the Social Security Administration with their name, Social Security Number, date of birth, and their parents' names. May I accept such printouts in place of a Social Security Card as evidence of employment eligibility?**

A. No. Only a person's official Social Security Card is acceptable.

18. **Q. What should I do if persons present Social Security Cards marked "NOT VALID FOR EMPLOYMENT," but state they are now authorized to work?**

A. You should ask them to provide another document to establish their employment eligibility, since such Social Security Cards do not establish this.

19. **Q. What should I do if one of my employees tells me that his or her Social Security Number is invalid?**

A. You should tell the employee to get a proper Social Security Number by completing a Form SS-5. This form is available from the Social Security Administration. You do not need to amend your employment tax returns. However, when the employee gives you the new number, you should file a Form W-2C with the Social Security Administration for the years in which you reported income and withholding under the incorrect number. You will not be penalized or fined for the years during which you reported employees under incorrect numbers.

You should also be aware that any Social Security Number starting with a "9" is not a valid Social Security Number. Employees who are using such numbers should be instructed to get a proper Social Security Number using a Form SS-5.

20. **Q. May I accept a photocopy of a document presented by an employee?**

A. No. Employees must present original documents. The **only** exception is that an employee may present a **certified** copy of a birth certificate.

21. **Q. I noticed on the Form I-9 that under List A there are 2 spaces for document numbers and expiration dates. Does this mean I have to see 2 List A documents?**

A. No. One of the documents found in List A is an unexpired foreign passport with an attached INS Form I-94. The Form I-9 provides space for you to record the document number and expiration date for both the passport and the INS Form I-94.

22. **Q. When I review an employee's identity and employment eligibility documents, should I make copies of them?**

A. The law does not require you to photocopy documents. However, if you wish to make photocopies, you should do so for **all** employees, and you should retain each photocopy with the I-9. Photocopies must not be used for any other purpose. Photocopying documents does not relieve you of your obligation to fully complete Section 2 of the I-9 nor is it an acceptable substitute for proper completion of the I-9 in general.

NOTE 1: *Although a Certificate of Naturalization (INS Forms N-550 and N-570) provides across the face of the document that it may not be copied, such certificates* ***may be copied*** *in this limited situation.*

NOTE 2: *Copies of documents retained by Federal government employers must be kept separately from an employee's official personnel folder.*

Questions About Completing and Retaining the Form I-9

23. **Q. When do I fill out the I-9 if I hire someone for less than 3 business days?**

A. You must complete **both** Sections 1 and 2 of the I-9 at the time of the hire. This means the I-9 must be fully completed when the person starts to work.

24. **Q. What should I do if I rehire a person who previously filled out an I-9?**

A. You do not need to complete a new I-9 if you rehire the person within 3 years of the date that the I-9 was originally completed, and the employee is still eligible to work. You should review the previously completed I-9, and if the employee's work authorization has not expired, note the date of rehire in the Updating and Reverification Section on the I-9 (Section 3), and sign in the appropriate space. If the employee's work authorization has expired, you also need to examine a document that reflects that the employee is authorized to work in the U.S., and record the document title, number, and expiration date (if any) in Section 3.

25. **Q. What should I do if I need to update or reverify an I-9 for an employee who filled out an earlier version of the form?**

A. You may line through any outdated information and initial and date any updated information. You may also choose, instead, to complete a new I-9.

26. **Q. Do I need to complete a new I-9 when one of my employees is promoted within my company or transfers to another company office at a different location?**

A. No. You do not need to complete a new I-9 for such promoted or transferred employees.

27. **Q. What do I do when an employee's work authorization expires?**

A. You will need to reverify on the I-9 in order to continue to employ the person. Reverification must occur not later than the date that work authorization expires. The employee must present a document that shows either an extension of the employee's initial employment authorization or new work authorization. You must review this document and, if it reasonably appears on its face to be genuine and to relate to the person presenting it, record the document title, number, and expiration date (if any), in the Updating and Reverification Section on the I-9 (Section 3), and sign in the appropriate space. You may want to establish a calendar call-up system for employees whose employment authorization will expire in the future.

NOTE: *You cannot refuse to accept a document because it has a future expiration date. You* ***must*** *accept any document (from List A or List C) listed on the I-9 and in Part 8 of this Handbook which on its face reasonably appears to be genuine and to relate to the person presenting it. To do otherwise could be an unfair immigration-related employment practice.*

28. **Q. Can I avoid reverifying the I-9s by not hiring persons whose employment authorization has an expiration date?**

A. You **cannot** refuse to hire persons solely because their employment authorization is temporary. The existence of a future expiration date does not preclude continuous employment authorization for an employee and does not mean that subsequent employment authorization will not be granted. In addition, consideration of a future employment authorization expiration date in determining whether an alien is qualified for a particular job could be an unfair immigration-related employment practice.

29. **Q. As an employer, do I have to fill out all the I-9s myself?**

A. No. You may designate someone to fill out the I-9s for you, such as a personnel officer, foreman, agent, or anyone else acting in your interest. However, you are still liable for any violations of the employer sanctions laws.

30. **Q. Can I contract with someone to complete the I-9s for my business?**

A. Yes. You can contract with another person or business to verify employees' identity and work eligibility and to complete the I-9s for you. However, you are still responsible for the contractor's actions and are liable for any violations of the employer sanctions laws.

31. **Q. As an employer, can I negotiate my responsibility to complete the I-9s in a collective bargaining agreement with a union?**

A. Yes. However, you are still liable for any violations of the employer sanctions laws. If the agreement is for a multi-employer bargaining unit, certain rules apply. The association must track the employee's hire and termination dates each time the employee is hired or terminated by an employer in the multi-employer association.

32. **Q. What are the requirements for retaining the I-9?**

A. If you are an employer, you must retain the I-9 for 3 years after the date employment begins or 1 year after the date the person's employment is terminated, **whichever is later**. If you are an agricultural association, agricultural employer, or farm labor contractor, you must retain the I-9 for 3 years after the date employment begins for persons you recruit or refer for a fee.

33. **Q. Will I get any advance notice if an INS, DOL, or OSC officer wishes to inspect my I-9s?**

A. Yes. The officer will give you at least 3 days (72 hours) advance notice before the inspection. If it is more convenient for you, you may waive the 3-day notice. You may also request an extension of time in which to produce the I-9s. The INS, DOL, or OSC officer will not need to show you a subpoena or a warrant at the time of the inspection.

NOTE: *This does not preclude the INS, the DOL, or the OSC from obtaining warrants based on probable cause for entry onto the premises of suspected violators without advance notice.*

Failure to provide the I-9s for inspection is a violation of the employer sanctions laws and could result in the imposition of civil money penalties.

34. **Q. Do I have to complete an I-9 for Canadians who entered the United States under the Free Trade Agreement?**

A. Yes. You must complete an I-9 for all employees. Canadians must show identity and employment eligibility documents just like all other employees.

35. **Q. If I acquire a business, can I rely on the I-9s completed by the previous owner/employer?**

A. Yes. However, you also accept full responsibility and liability for all I-9s completed by the previous employer relating to individuals who are continuing in their employment.

36. **Q. If I am a recruiter or referrer for a fee, do I have to fill out I-9s on persons whom I recruit or refer?**

A. No, with three exceptions. Agricultural associations, agricultural employers, and farm labor contractors are still required to complete I-9s on all individuals who are recruited or referred for a fee. However, **all** recruiters and referrers for a fee must still complete I-9s for **their own employees** hired after November 6, 1986. Also, **all** recruiters and referrers for a fee are still liable for knowingly recruiting or referring for a fee aliens not authorized to work in the United States.

37. **Q. Can I complete Section 1 of the I-9 for an employee?**

A. Yes. You may help an employee who needs assistance in completing Section 1 of the I-9. However, you must also complete the "Preparer/Translator Certification" block. The employee must still sign the certification block in Section 1.

38. **Q. If I am a business entity (corporation, partnership, etc.), do I have to fill out I-9s on my employees?**

A. Yes, you must complete I-9s for all of your employees, including yourself.

39. **Q. I have heard that some state employment agencies can certify that people they refer are eligible to work. Is that true?**

A. Yes. State employment agencies may elect to provide persons they refer with a certification of employment eligibility. If one of these agencies refers potential employees to you with a job order or other appropriate referral form, and the agency sends you a certification within 21 business days of the referral, you do not have to check documents or complete an I-9 if you hire that person. However, you must review the certification to ensure that it relates to the person hired and observe the person sign the certification. You must also retain the certification as you would an I-9 and make it available for inspection, if requested. You should check with your state employment agency to see if it provides this service and become familiar with its certification document.

Questions About Avoiding Discrimination

40. **Q. How can I avoid discriminating against certain employees while still complying with this law?**

A. You can avoid discriminating against certain employees and still comply with the law by applying the employment eligibility verification procedures of this law to **all** newly hired employees and by hiring without respect to the national origin or citizenship status of those persons authorized to work in the United States. To request to see identity and employment eligibility documents only from persons of a particular origin, or from persons who appear or sound foreign, is a violation of the employer sanctions laws and may also be a violation of Title VII of the Civil Rights Act of 1964. You should not discharge present employees, refuse to hire new employees, or otherwise discriminate on the basis of foreign appearance, accent, language, or name.

41. **Q. I know that the Act prohibits discrimination on the basis of citizenship status against "protected individuals." Who are protected individuals?**

A. Protected individuals include citizens or nationals of the United States, lawful permanent residents, temporary residents, and persons granted refugee or asylee status. The term does not include aliens in one of those classes who fail to make a timely application for naturalization after they become eligible.

42. **Q. Can I be charged with discrimination if I contact the INS about a document presented to me that does not reasonably appear to be genuine and relate to the person presenting it?**

A. No. The anti-discrimination provisions of the Act only apply to the hiring and discharging of individuals. While you are not legally required to inform the INS of such situations, you may do so if you choose to.

Questions About Employees Hired Before November 6, 1986

43. **Q. Does this law apply to my employees if I hired them before November 7, 1986?**

A. No. You are not required to complete I-9s for employees hired before November 7, 1986. However, if you choose to complete I-9s for these employees, you should do so for **all** your current employees hired before November 7, 1986.

NOTE: *This "grandfather" status does not apply to seasonal employees, or to employees who change employers within a multi-employer association.*

44. **Q. What if an employee was hired before November 7, 1986, but has taken an approved leave of absence?**

A. You do not need to complete an I-9 for that employee if the employee is continuing in his or her employment and has a reasonable expectation of employment at all times. However, if that employee has quit or been terminated, or is an alien who has been removed from the United States, you will need to complete an I-9 for that employee.

45. **Q. Will I be subject to employer sanctions penalties if an employee I hired before November 7, 1986, is an illegal alien?**

A. No. You will not be subject to employer sanctions penalties for retaining an illegal alien in your workforce if the alien was hired before November 7, 1986. However, the fact that an illegal alien was on your payroll before November 7, 1986, does **not** give him or her any right to remain in the United States. Unless the alien obtains permission from the INS to remain in the United States, he or she is subject to apprehension and removal.

Questions About Federal Income Tax Obligations

46. **Q. What advice should I give to my employees applying to legalize their status concerning their Federal income tax obligations?**

A. You can advise employees that when they apply to INS for permanent resident status, they will be given an IRS publication explaining requirements for filing Form W-4 or W-4A to insure correct withholding of tax records (if an invalid social security number was used) and other guidelines relating to tax benefits.

47. **Q. What advice should I give to newly-hired employees who ask about their Federal income tax obligations?**

A. First, you can tell them it is important to have a valid social security number and to properly complete a W-4 or W-4A so that the employer can withhold the proper amount for income tax. Second, you can encourage employees to apply for social security numbers for their dependent children who will be five years old or older by the end of the year. Since 1987, such numbers have been required to be provided for dependents claimed on tax returns.

Part Eight

Acceptable Documents for Verifying Employment Eligibility

The following documents have been designated for determining employment eligibility by the Act. A person must present a document or documents that establish identity and employment eligibility. A comprehensive list of acceptable documents can be found on the next page of this Handbook and on the back of the Form I-9. Samples of many of the acceptable documents appear on the following pages.

To establish **both identity and employment eligibility**, a person can present a passport, an Alien Registration Receipt Card, or one of the other documents from List A.

If a person does not present a document from List A, he or she must present one document from List B which establishes identity **and** one document from List C which establishes employment eligibility.

To establish **identity only**, a person must present a document from List B, such as a state-issued driver's license, a state-issued identification card, or one of the other documents listed.

To establish **employment eligibility only**, a person must present a document from List C, such as a Social Security Card, a United States birth certificate, or one of the other documents listed.

If a person is unable to present the required document(s) within 3 business days of the date employment begins, he or she must present (within 3 business days) a receipt showing that he or she has applied for the document. The person then must present the actual document within 90 days of the date employment begins. The person must have indicated on or before the time employment began, by having checked an appropriate box in Section 1, that he or she is already eligible to be employed in the United States.

LIST A
Documents That Establish Both Identity and Employment Eligibility

- United States Passport (unexpired or expired)
- Certificate of United States Citizenship (INS Form N-560 or N-561)
- Certificate of Naturalization (INS Form N-550 or N-570)
- Unexpired foreign passport which:
  - contains an unexpired stamp which reads "Processed for I-551. Temporary Evidence of Lawful Admission for permanent residence. Valid until _____. Employment authorized;" or
  - has attached to it a Form I-94 bearing the same name as the passport and containing an employment authorization stamp, so long as the period of endorsement has not yet expired, and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

    NOTE: *For more detailed information concerning the Form I-94, see page 23 of this Handbook.*
- Alien Registration Receipt Card (INS Form I-151 or I-551) provided that it contains a photograph of the bearer
- Unexpired Temporary Resident Card (INS Form I-688)
- Unexpired Employment Authorization Card (INS Form I-688A)
- Unexpired reentry permit (INS Form I-327)
- Unexpired Refugee Travel document (INS Form I-571)
- Unexpired Employment Authorization Document issued by the INS which contains a photograph (INS Form I-688B)

LIST B
Documents That Establish Identity

For individuals 18 years of age or older:

- Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address
- 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, sex, height, eye color, and address (including U.S. Citizen ID Card [INS Form I-197] and ID Card for use of Resident Citizen in the U.S. [INS Form I-179])
- School identification card with a photograph
- Voter's registration card
- United States military card or draft record
- Military dependent's identification card
- United States Coast Guard Merchant Mariner Card
- Native American tribal document
- Driver's license issued by a Canadian government authority

For individuals under the age of 18 who are unable to present one of the documents listed above:

- School record or report card
- Clinic, doctor, or hospital record
- Day-care or nursery school record

LIST C
Documents That Establish Employment Eligibility

- U.S. Social Security Number Card other than one which has printed on its face "NOT VALID FOR EMPLOYMENT"

  NOTE: *This must be a card issued by the Social Security Administration; a facsimile (such as a metal or plastic reproduction) is not an acceptable document.*
- Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
- 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
- Native American tribal document
- U.S. Citizen ID Card (INS Form I-197)
- ID Card for Use of Resident Citizen in the U.S. (INS Form I-179)
- Unexpired employment authorization document issued by the INS

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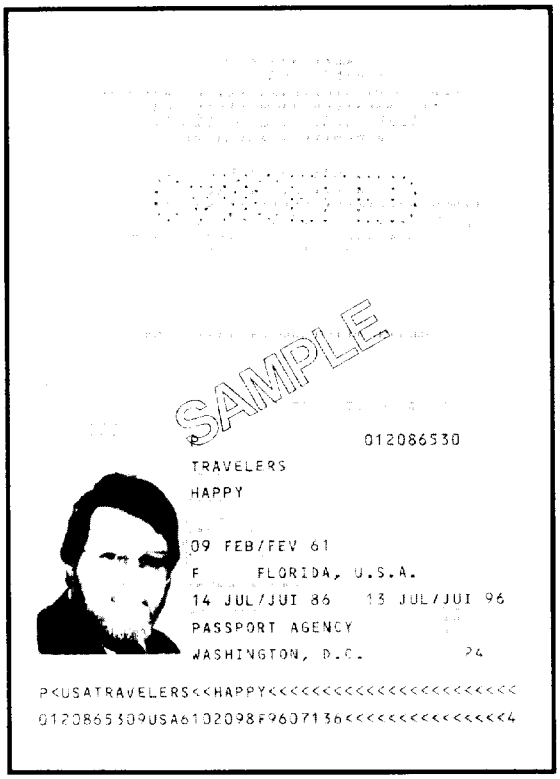
Document List A

Documents That Establish Both Identity and Employment Eligibility

The following illustrations in this handbook do not necessarily reflect the actual size of the documents.

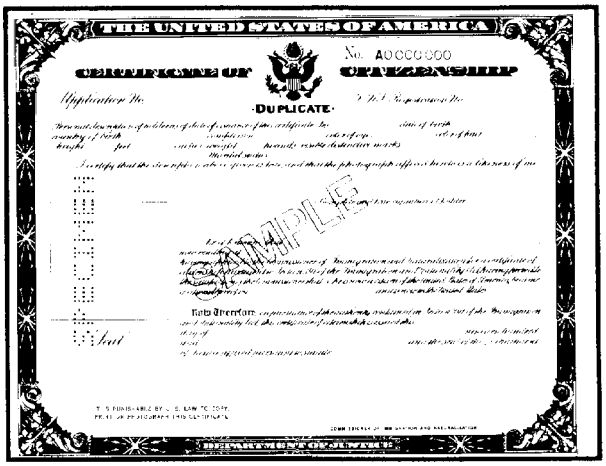
United States Passport

Issued by the Department of State to United States citizens and nationals.



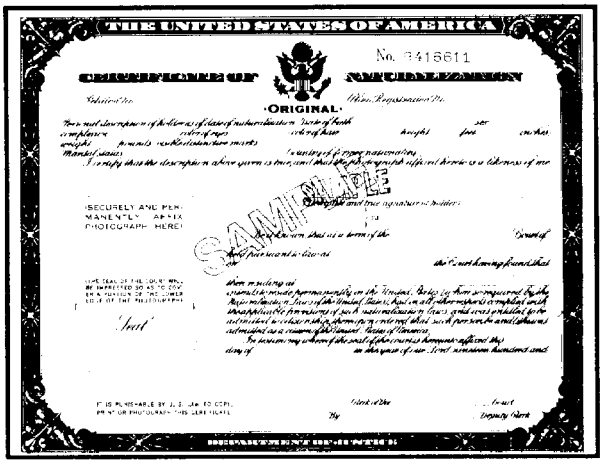
Certificate of United States Citizenship N-560 or N-561

Issued by INS to individuals who: 1) derived citizenship through parental naturalization; 2) acquired citizenship at birth abroad through a United States parent or parents; or 3) acquired citizenship through application by United States citizen adoptive parent(s); and who, pursuant to section 341 of the Act, have applied for a certificate of citizenship.



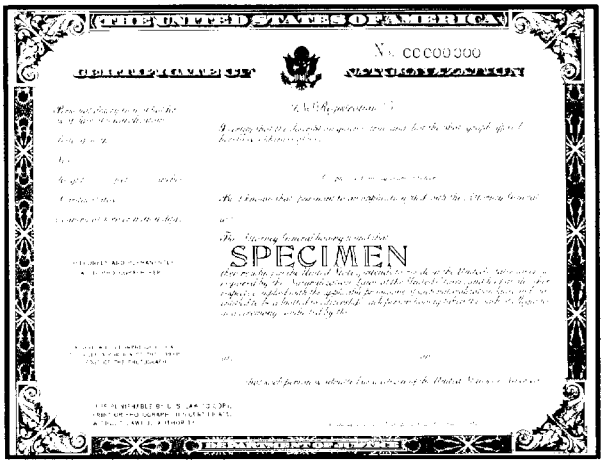
Certificate of Naturalization N-550 or N-570

Issued by INS to naturalized United States citizens.

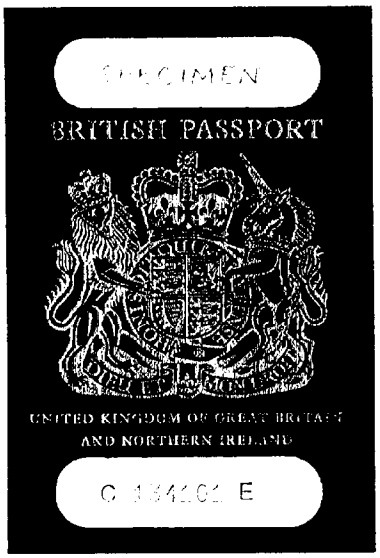


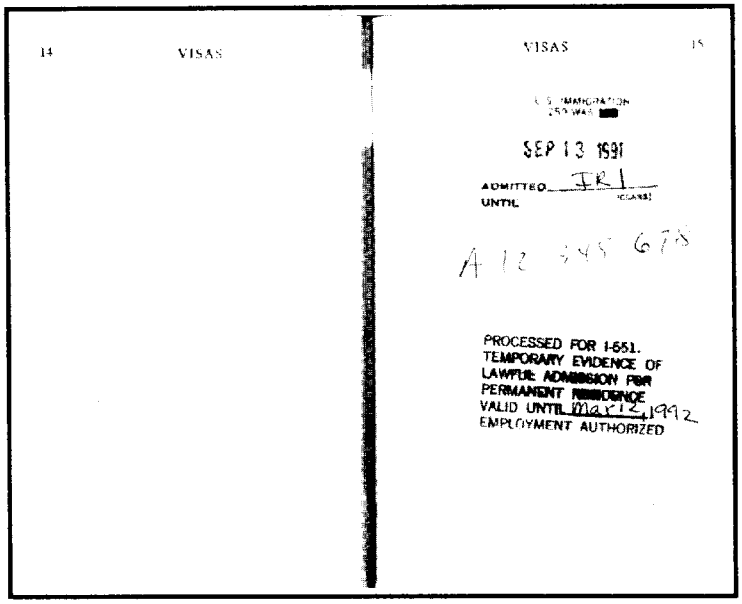
Certificate of Naturalization N-550

Issued by INS to naturalized United States citizens who file for naturalization after October 1, 1991.



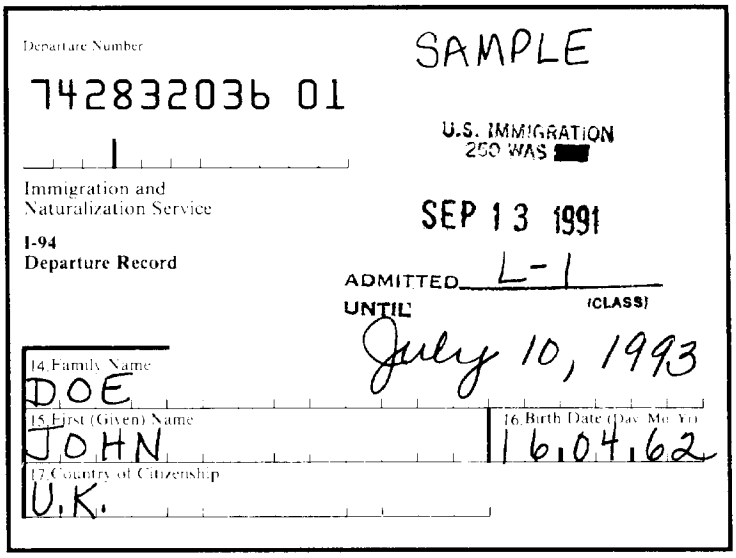
Unexpired Foreign Passport with I-551 Stamp





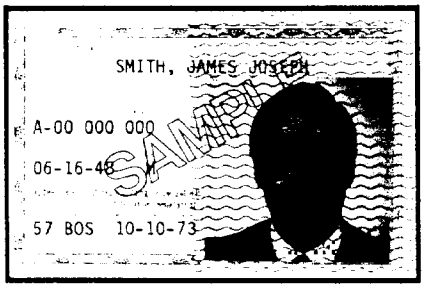
I-94 Arrival/Departure Record

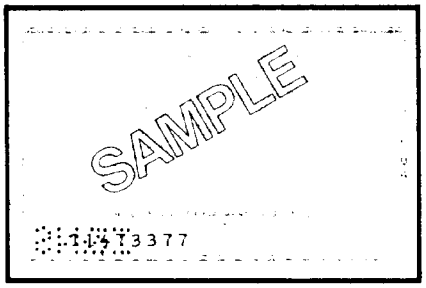
Arrival-departure record issued by INS to nonimmigrant aliens. An individual in possession of the departure portion of this document may only be employed if the document bears an "employment authorization" stamp **or** employment incident to the nonimmigrant classification is authorized with a specific employer (i.e. A-1, A-2, A-3, C-2, C-3, E-1, E-2, G-1, G-2, G-3, G-4, G-5, H-1A, H-1B, H-2A, H-2B, H-3, I, L-1, O-1, O-2, P-1, P-2, P-3, Q, NATO 1-7 and TC). The expiration date is noted on the Form I-94.



Alien Registration Receipt Card I-151

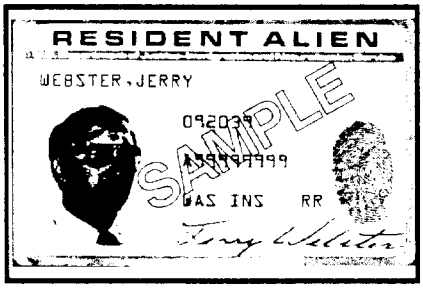
Issued by INS prior to June 1978, to lawful permanent resident aliens. There are numerous versions of this card because it was periodically revised. Although this card is no longer issued, it is valid indefinitely. This card is also commonly referred to as a "green card" although most versions were blue.

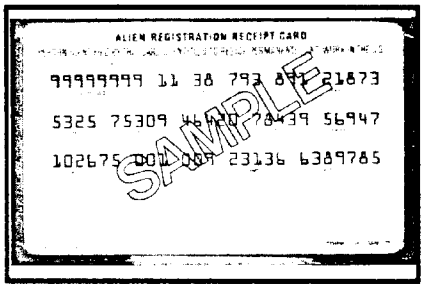




Alien Registration Receipt Card (Resident Alien Card) I-551

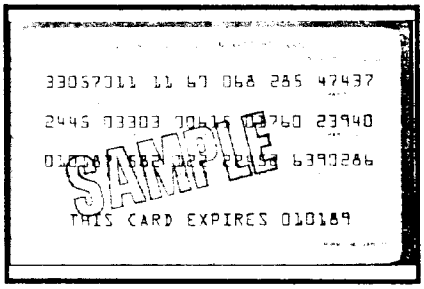
Issued by INS after March 1977, to lawful permanent resident aliens. Although this card is no longer issued, it is valid indefinitely. This card is commonly referred to as a "green card" and is the replacement for the Form I-151. This version is white with a blue logo.





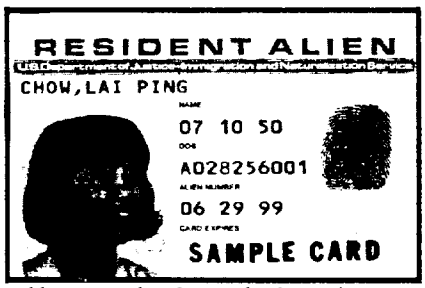
Alien Registration Receipt Card (Conditional Resident Alien Card) I-551

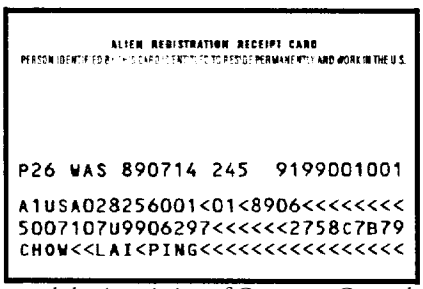
Issued by INS after January 1987, to conditional permanent resident aliens such as alien spouses of United States citizens or lawful permanent resident aliens. It is similar to the I-551 issued to permanent resident aliens. Although this card is no longer issued, it is valid for 2 years from the date of admission or adjustment. The expiration date is stated on the back of the card. This version is white with a blue logo.



Alien Registration Receipt Card (Resident Alien Card) I-551

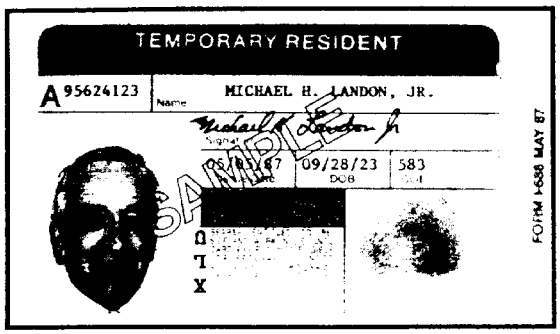
Currently issued by INS since 1989 to both conditional and lawful permanent resident aliens. Although it is similar to the previously issued I-551s, this card is valid only for a limited period of time -- 2 years from the date of admission or adjustment for conditional permanent resident aliens and 10 years from issuance for lawful permanent resident aliens. The expiration date is stated on the front of the card. This version is rose-colored with a blue logo.

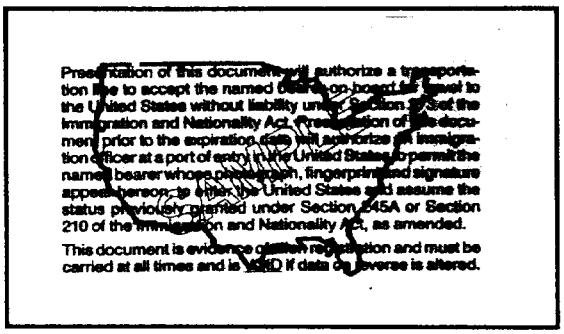




Temporary Resident Card I-688

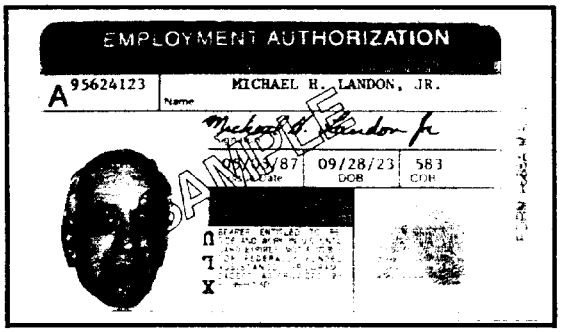
Issued by INS to aliens granted temporary resident status under the Legalization or Special Agricultural Worker program. It is valid until the expiration date stated on the face of the card or on the sticker(s) placed on the back of the card.

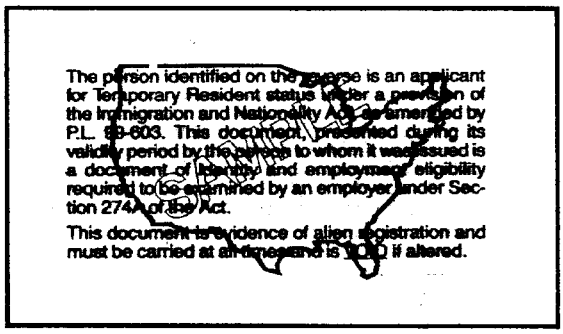




Employment Authorization Card I-688A

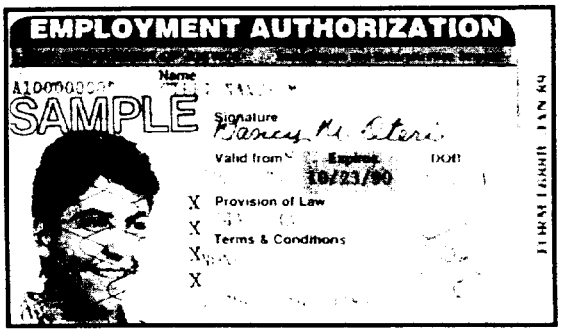
Issued by INS to applicants for temporary resident status after their interview for Legalization or Special Agricultural Worker status. It is valid until the expiration date stated on the face of the card or on the sticker(s) placed on the back of the card.

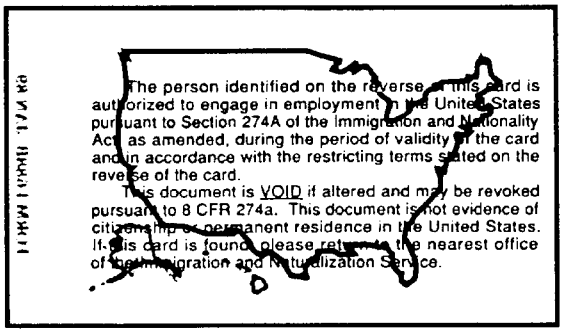




Employment Authorization Card I-688B

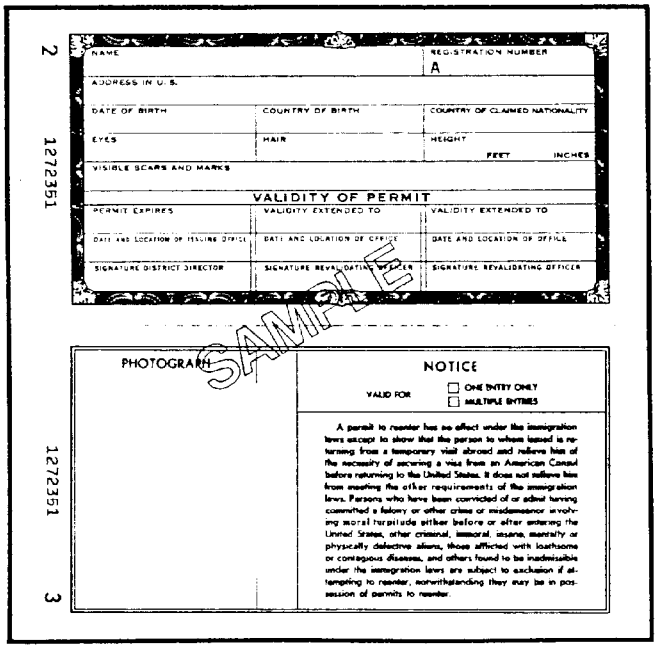
Issued by INS to aliens granted temporary employment authorization in the U.S. The expiration date is noted on the face of the card.





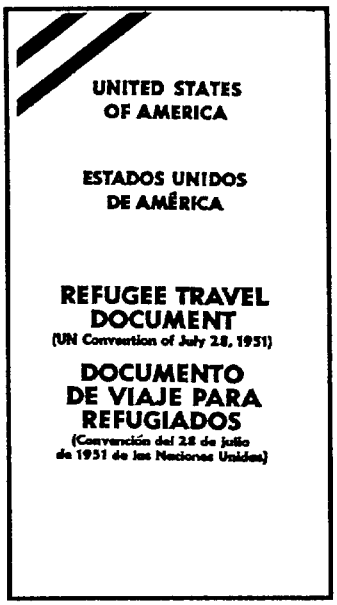
Unexpired Re-Entry Permit I-327

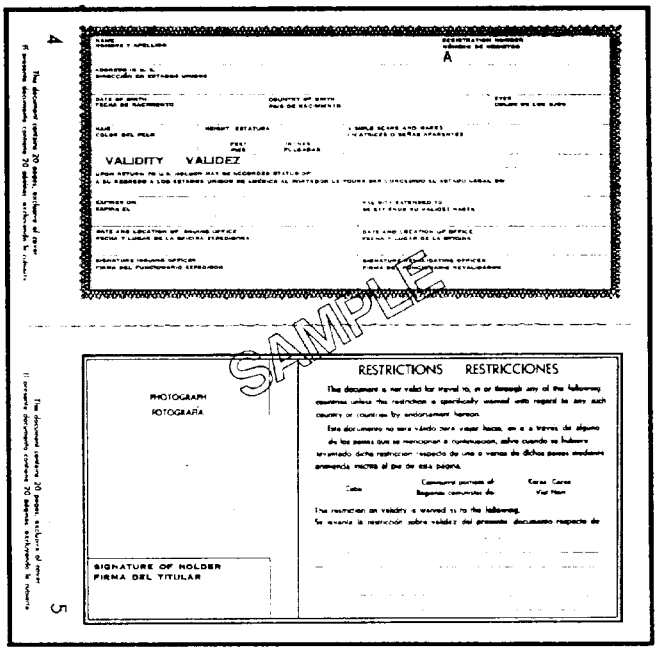
Issued by INS to lawful permanent resident aliens before they leave the United States for a 1-2 year period.



Unexpired Refugee Travel Document I-571

Issued by INS to aliens who have been granted refugee status. The expiration date is stated on page four (4).





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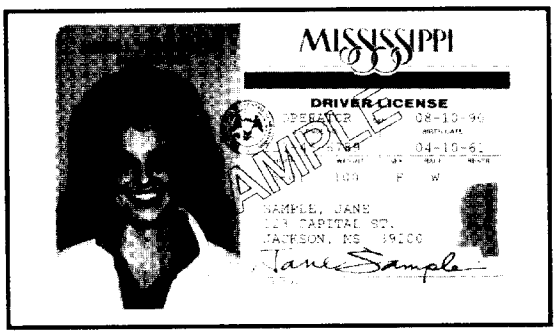
Document List B

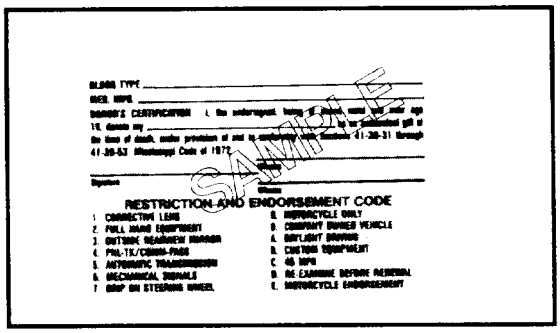
Documents That Establish Identity Only

The following illustrations in this handbook do not necessarily reflect the actual size of the documents.

Sample Driver's License

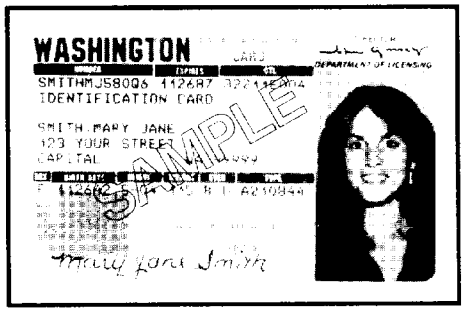
A driver's license issued by any state or outlying possession of the United States (including the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa) or by a Canadian government authority is acceptable if it contains a photograph or other identifying information such as name, date of birth, sex, height, color of eyes, and address.





Sample State Identification Card

An identification card issued by any state (including the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands) or by a local government is acceptable if it contains a photograph or other identifying information such as name, date of birth, sex, height, color of eyes, and address.



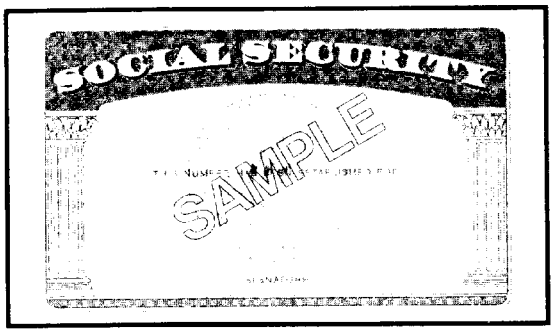
See List C for ID cards issued by INS.

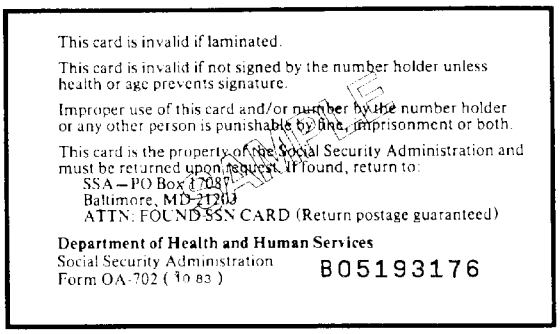
Document List C

Documents That Establish Employment Eligibility Only

The following illustrations in this handbook do not necessarily reflect the actual size of the documents.

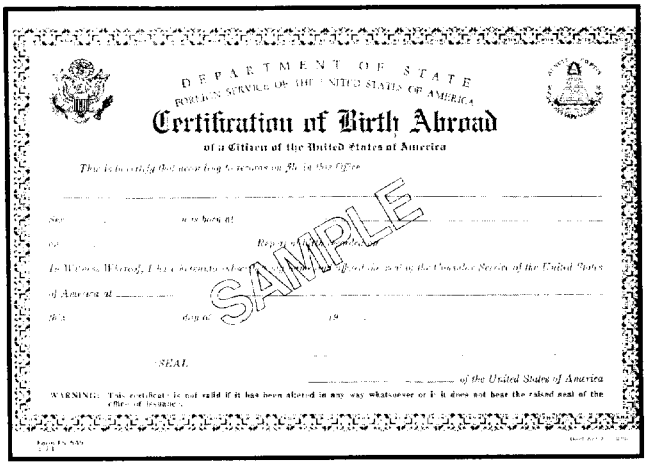
Social Security Card (other than one stating "NOT VALID FOR EMPLOYMENT," metal or plastic reproductions, or certain laminated cards.) There are many versions of this card.



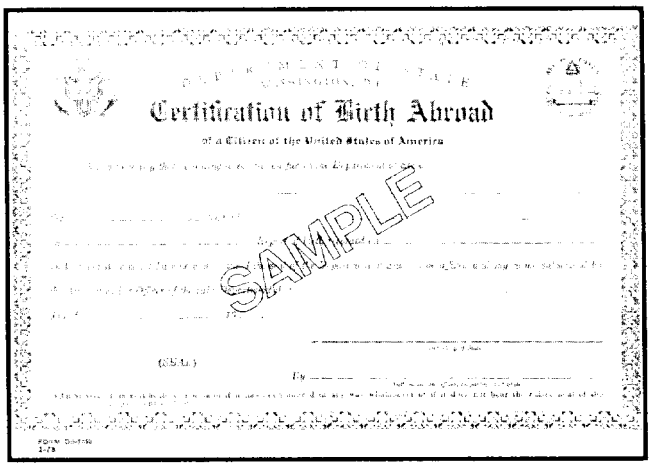


Certifications of Birth Issued by the Department of State

FS-545
Issued by U.S. embassies and consulates overseas to United States citizens born abroad.



DS-1350
Issued by the U.S. Department of State to United States citizens born abroad.



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Sample Birth Certificates

BIRTH CARD CERTIFICATION
KENTUCKY DEPARTMENT FOR HEALTH SERVICES
REGISTRAR OF VITAL STATISTICS

BIRTH NUMBER 116-80-29839-26
NAME OMAR L. GREEMAN
BIRTHDATE 6-11-1926 SEX MALE
BIRTHPLACE McCRACKEN COUNTY KENTUCKY
RECORD FILED 6-17-1926 DATE ISSUED 10-11-83
CARD NUMBER 0000

SAMPLE Omar L. Greeman
OMAR L. GREEMAN STATE REGISTRAR

THIS CERTIFICATION IS A TRUE ABSTRACT OF THE ORIGINAL BIRTH RECORD OF THE PERSON NAMED ON THE REVERSE SIDE, WHICH RECORD IS ON FILE WITH AND IN OFFICIAL CUSTODY OF THE STATE REGISTRAR OF VITAL STATISTICS AT FRANKFORT, KENTUCKY.

ISSUED UNDER AUTHORITY OF CHAPTER 213
KENTUCKY REVISED STATUTES.

SAMPLE

STATE OF MICHIGAN
DEPARTMENT OF PUBLIC HEALTH
CERTIFICATE OF LIVE BIRTH

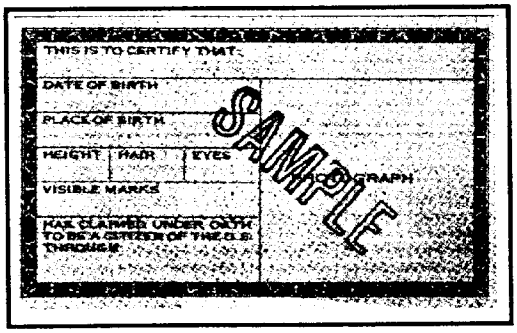
LF 000001
CF
455013B
STATE FILE NUMBER

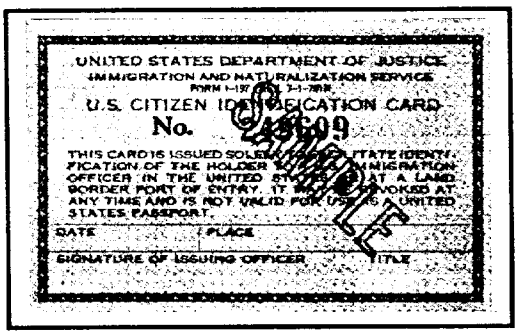
CHILD: JOHN LEE DOW
SEX: MALE | SINGLE | DATE OF BIRTH: 4 1 01 | HOUR: 12:00PM
PLACE: OUTER DRIVE HOSPITAL | LINCOLN PARK | WAYNE
CERTIFICATION: I CERTIFY THAT THE ABOVE NAMED CHILD WAS BORN ALIVE AT THE PLACE AND TIME AND ON THE DATE STATED ABOVE
SIGNATURE DR. WALTER SMITH DATE 4-2-1901
NAME AND TITLE OF ATTENDANT AT BIRTH (IF OTHER THAN CERTIFIER)
CERTIFIER NAME AND TITLE (PRINT OR TYPE): DR. WALTER SMITH
MAILING ADDRESS (ST. NO. CITY OR VILLAGE, STATE, ZIP): 100000 SOUTHFIELD RD., LINCOLN PARK, MICH. 48146
REGISTRAR'S SIGNATURE: Irma B. Britton
DATE RECEIVED BY LOCAL REGISTRAR: April 6 1901
MOTHER: MARY LOU JONES | SOCIAL SECURITY NUMBER: 111-111-3647 | AGE AT TIME OF THIS BIRTH: 22 | STATE OF BIRTH: MICH.
RESIDENCE: X WITHIN CITY LIMITS OF LINCOLN PARK | COUNTY: WAYNE | STATE: MICH.
FATHER: HENRY JOHN DOW | SOCIAL SECURITY NUMBER: 222-333-4786 | AGE AT TIME OF THIS BIRTH: 23 | STATE OF BIRTH: MICH.
I CERTIFY THAT THE PERSONAL INFORMATION PROVIDED ON THIS CERTIFICATE IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF
SIGNATURE (MOTHER OR OTHER INFORMANT): MARY DOW DATE 4-3-1901
RELATION TO CHILD: MOTHER
MDPH

SAMPLE

United States Citizen Identification Card I-197

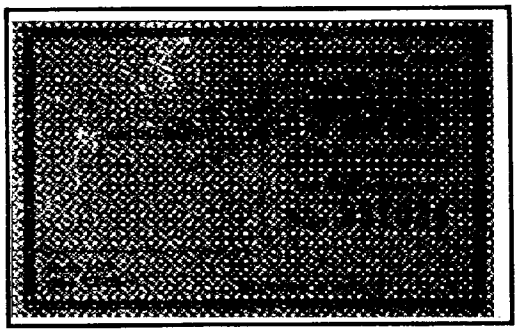
Issued by INS to United States citizens. Although INS no longer issues this card, it is valid indefinitely.

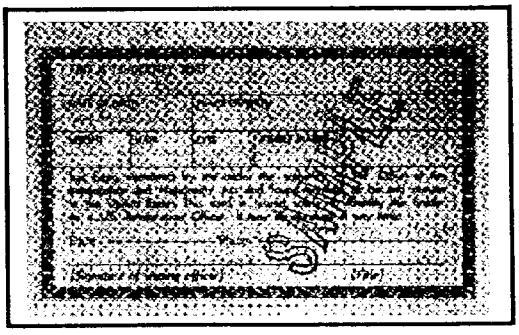




Identification Card for Use of Resident Citizen in the United States I-179

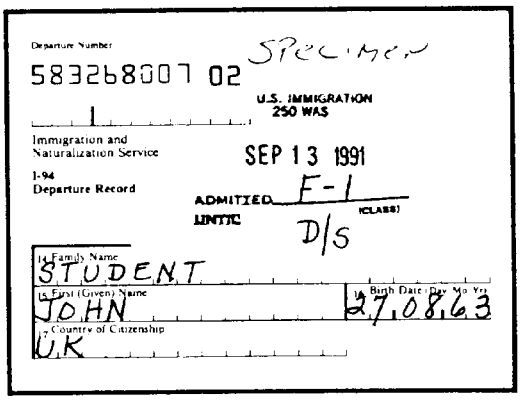
Issued by INS to United States citizens who are residents of the United States. Although INS no longer issues this card, it is valid indefinitely.



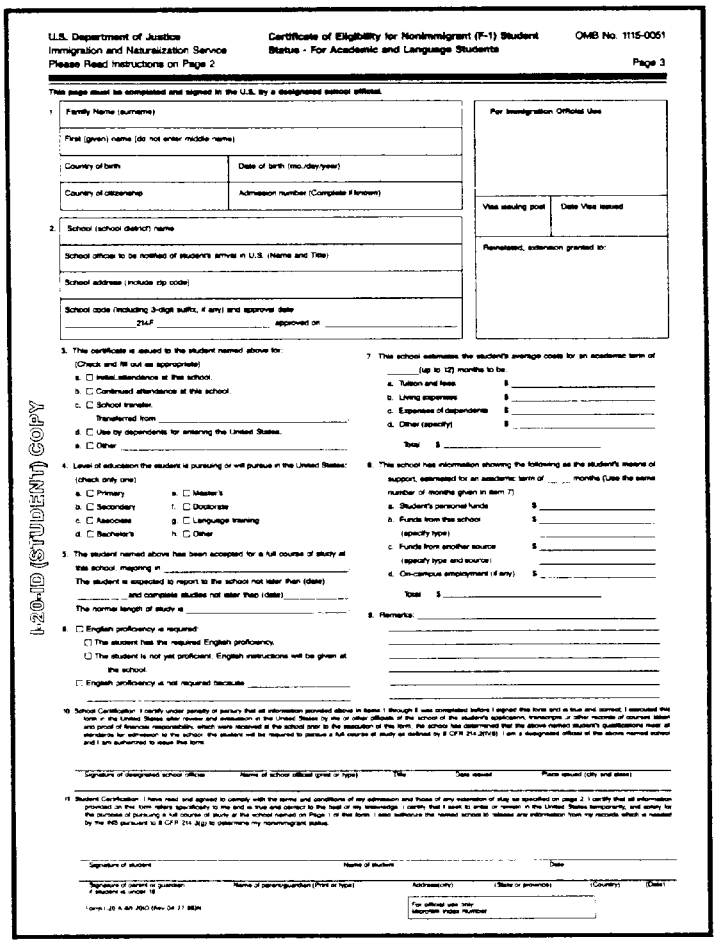


I-20 ID Card Accompanied by a Form I-94

The Form I-94 for F-1 nonimmigrant students must be accompanied by an I-20 Student ID endorsed with employment authorization by the Designated School Official for off-campus employment or curriculum practical training. INS will issue Form I-688B (Employment Authorization Document) to all students (F-1 and M-1) authorized for a post-completion practical training period.



Departure Number SPECIMEN
583268007 02
U.S. IMMIGRATION
250 WAS
Immigration and Naturalization Service
I-94 Departure Record
SEP 13 1991
ADMITTED F-1 (CLASS)
UNTIL D/S
1. Family Name STUDENT
2. First (Given) Name JOHN
3. Birth Date (Day Mo Yr) 27.08.63
4. Country of Citizenship U.K

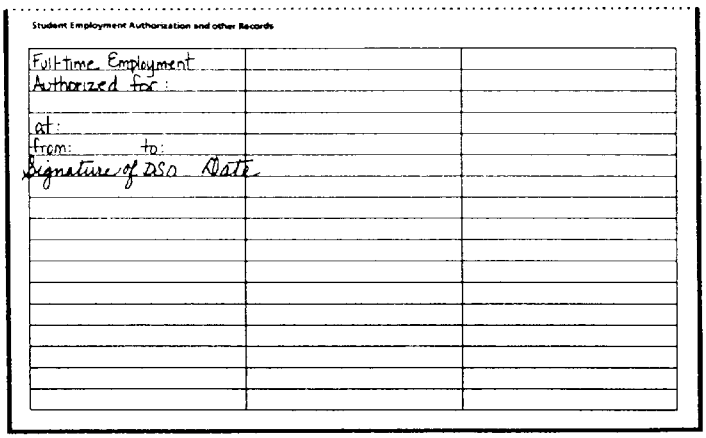


U.S. Department of Justice
Immigration and Naturalization Service
Please Read Instructions on Page 2
Certificate of Eligibility for Nonimmigrant (F-1) Student
Status - For Academic and Language Students
OMB No. 1115-0051
Page 3

I-20 ID (STUDENT) COPY

Form I-20 Student ID (Reverse)

Endorsement by Designated School Official for Employment Authorization.



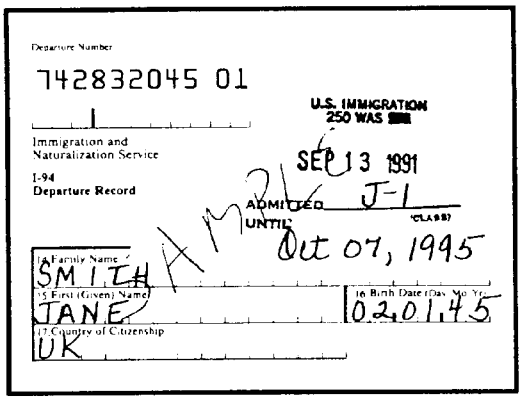
Student Employment Authorization and other Records

Full-time Employment Authorized for:		
at:		
from: to:		
Signature of DSO Date		

32

IAP-66 Accompanied by a Form I-94

Nonimmigrant exchange visitors (J-1) must have an I-94 accompanied by an unexpired IAP-66, specifying the sponsor and issued by the United States Information Agency (USIA). (J-1 students working outside the program indicated on the IAP-66 also need a letter from their responsible school officer.)



Departure Number

742832045 01

U.S. IMMIGRATION
250 WAS [redacted]

Immigration and Naturalization Service

SEP 13 1991

I-94
Departure Record

ADMITTED J-1
(CLASS)

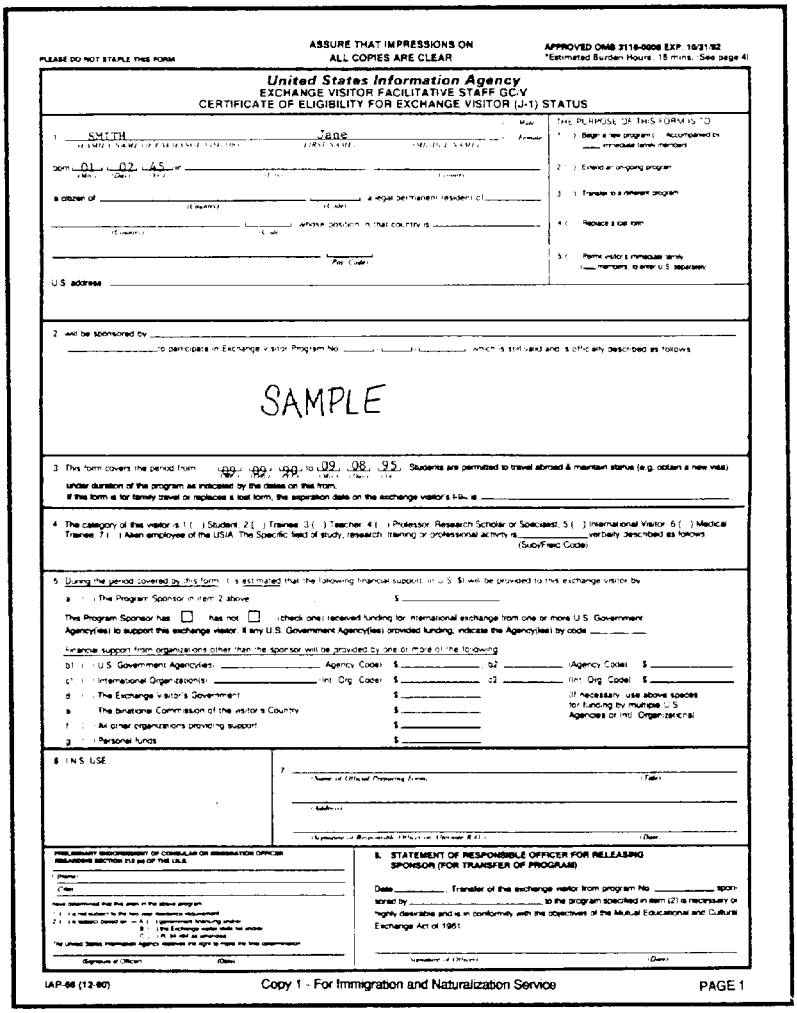
UNTIL Oct 07, 1995

16 Family Name
SMITH

17 First (Given) Name
JANE

18 Birth Date (Day Mo. Yr.)
02.01.45

19 Country of Citizenship
UK



PLEASE DO NOT STAPLE THIS FORM

ASSURE THAT IMPRESSIONS ON ALL COPIES ARE CLEAR

APPROVED OMB 3116-0006 EXP. 10/31/92
*Estimated Burden Hours: 15 mins. See page 4)

United States Information Agency
EXCHANGE VISITOR FACILITATIVE STAFF GC/V
CERTIFICATE OF ELIGIBILITY FOR EXCHANGE VISITOR (J-1) STATUS

1 SMITH Jane

born 01 02 45 in

a citizen of a legal permanent resident of

whose position in that country is

U.S. address

THE PURPOSE OF THIS FORM IS TO
1. ( ) Begin a new program ( ) Accompanied by ___ immediate family member(s)
2. ( ) Extend an ongoing program
3. ( ) Transfer to a different program
4. ( ) Replace a lost form
5. ( ) Permit visitor's immediate family ___ member(s) to enter U.S. separately

2 and be sponsored by

to participate in Exchange Visitor Program No. which is fully paid and is officially described as follows:

SAMPLE

3 This form covers the period from 00 00 00 to 09 08 95. Students are permitted to travel abroad & maintain status (e.g. obtain a new visa) under duration of the program as indicated by the dates on this form.
If this form is for family travel or replaces a lost form, the expiration date on the exchange visitor's IAP-66 is

4 The category of this visitor is 1 ( ) Student, 2 ( ) Trainee, 3 ( ) Teacher, 4 ( ) Professor, Research Scholar or Specialist, 5 ( ) International Visitor, 6 ( ) Medical Trainee, 7 ( ) Alien employee of the USIA. The Specific field of study, research, training or professional activity is ___ verbally described as follows (Subj/Field Code)

5 During the period covered by this form, it is estimated that the following financial support in U.S. $ will be provided to this exchange visitor by:

a ( ) The Program Sponsor in item 2 above $

The Program Sponsor has ☐ has not ☐ (check one) received funding for international exchange from one or more U.S. Government Agency(ies) to support this exchange visitor. If any U.S. Government Agency(ies) provided funding, indicate the Agency(ies) by code

Financial support from organizations other than the sponsor will be provided by one or more of the following:

b1 ( ) U.S. Government Agency(ies) Agency Code $ b2 (Agency Code) $
c1 ( ) International Organization(s) Int. Org. Code $ c2 (Int. Org. Code) $
d ( ) The Exchange visitor's Government $
e ( ) The binational Commission of the visitor's Country $
f ( ) All other organizations providing support $
g ( ) Personal funds $

If necessary, use above spaces for funding by multiple U.S. Agencies or Int. Organizations

6 I.N.S. USE

7 (Name of Official Preparing Form) (Title)
(Address)
(Signature of Responsible Officer or Alternate) (Date)

PRELIMINARY ENDORSEMENT OF CONSULAR OR IMMIGRATION OFFICER REGARDING SECTION 212 (e) OF THE I.N.A.

(Name)
(Date)
Now determined that this alien in the above program
1 ( ) is not subject to the two-year residence requirement
2 ( ) is subject based on: A ( ) government financing and/or
B ( ) the Exchange visitor skills list and/or
C ( ) all, as specified
The United States Information Agency reserves the right to make this final determination

(Signature of Officer) (Date)

8. STATEMENT OF RESPONSIBLE OFFICER FOR RELEASING SPONSOR (FOR TRANSFER OF PROGRAM)

Date ___. Transfer of the exchange visitor from program No. ___ sponsored by ___ to the program specified in item (2) is necessary or highly desirable and is in conformity with the objectives of the Mutual Educational and Cultural Exchange Act of 1961.

(Signature of Officer) (Date)

IAP-66 (12-90) Copy 1 - For Immigration and Naturalization Service PAGE 1

REMEMBER:

- Hiring employees without complying with the employment eligibility verification requirements is a violation of the employer sanctions laws.
- This law requires employees hired after NOVEMBER 6, 1986 to present documentation that establishes identity and employment eligibility, and employers to record this information on Forms I-9.
- Employers may not discriminate against employees on the basis of national origin or citizenship status.

How to Obtain More Information: If you have questions after reviewing this handbook, you may obtain information from one of the following local INS offices. Direct your letter to the attention of the *Employer and Labor Relations Officer*.

ALABAMA
77 Forsyth St. S.W., Rm. G-85
Atlanta, GA 30303

ALASKA
620 East 10th Ave., Suite 102
Anchorage, AK 99501

ARIZONA
2035 N. Central Ave.
Phoenix, AZ 85004

ARKANSAS
701 Loyola Ave., Rm. T-8005
New Orleans, LA 70113

CALIFORNIA
300 N. Los Angeles St.
Los Angeles, CA 90012

880 Front St.
San Diego, CA 92188

630 Sansome St.
San Francisco, CA 94111-2280

COLORADO
4730 Paris St., Albrook Center
Denver, CO 80239-2804

CONNECTICUT
JFK Federal Building
Government Center
Boston, MA 02203

DELAWARE
1600 Callowhill St.
Philadelphia, PA 19130

DISTRICT OF COLUMBIA
4420 N. Fairfax Dr.
Arlington, VA 22203

FLORIDA
7880 Biscayne Blvd.
Miami, FL 33138

GEORGIA
77 Forsyth St. S.W., Rm. G-85
Atlanta, GA 30303

GUAM
595 Ala Moana Blvd.
Honolulu, HI 96813

HAWAII
595 Ala Moana Blvd.
Honolulu, HI 96813

IDAHO
900 N. Montana Ave.
Helena, MT 59601

ILLINOIS
10 W. Jackson Blvd., Rm. 533
Chicago, IL 60604

INDIANA
10 W. Jackson Blvd., Rm. 533
Chicago, IL 60604

IOWA
3736 S. 132nd St.
Omaha, NE 68144

KANSAS
9747 N. Conant Ave.
Kansas City, MO 64153

KENTUCKY
701 Loyola Ave., Rm. T-8005
New Orleans, LA 70113

LOUISIANA
701 Loyola Ave., Rm. T-8005
New Orleans, LA 70113

MAINE
739 Warren Ave.
Portland, ME 04103

MARYLAND
530 Caton Center Dr., Bldg. D, Suite M
Baltimore, MD 21227

MASSACHUSETTS
JFK Federal Building
Government Center
Boston, MA 02203

MICHIGAN
Federal Building, 333 Mt. Elliott St.
Detroit, MI 48207

MINNESOTA
2901 Metro Dr., Suite 100
Bloomington, MN 55425

MISSISSIPPI
701 Loyola Ave., Rm. T-8005
New Orleans, LA 70113

MISSOURI
9747 N. Conant Ave.
Kansas City, MO 64153

MONTANA
900 N. Montana Ave.
Helena, MT 59601

NEBRASKA
3736 S. 132nd St.
Omaha, NE 68114

NEVADA
2035 N. Central Ave.
Phoenix, AZ 85004

NEW HAMPSHIRE
JFK Federal Building
Government Center
Boston, MA 02203

NEW JERSEY
Federal Building, 970 Broad St.
Newark, NJ 07102

NEW MEXICO
343 U.S. Courthouse, P.O. Box 9398
El Paso, TX 79984

NEW YORK
68 Court St.
Buffalo, NY 14202

26 Federal Plaza
New York, NY 10278

NORTH CAROLINA
77 Forsyth St. S.W., Rm. G-85
Atlanta, GA 30303

NORTH DAKOTA
2901 Metro Dr., Suite 100
Bloomington, MN 55425

OHIO
1240 E. 9th St., Room 1917
Cleveland, OH 44199

OKLAHOMA
4149 Highline Blvd., #300
Oklahoma City, OK 73108

OREGON
511 N.W. Broadway
Portland, OR 97209

PENNSYLVANIA
1600 Callowhill St.
Philadelphia, PA 19130

PUERTO RICO
P.O. Box 365068
San Juan, PR 00936

RHODE ISLAND
JFK Federal Building
Government Center
Boston, MA 02203

SOUTH CAROLINA
Room 110 Federal Building
334 Meeting St.
Charleston, SC 29403

SOUTH DAKOTA
2901 Metro Dr., Suite 100
Bloomington, MN 55425

TENNESSEE
701 Loyola Ave., Rm. T-8005
New Orleans, LA 70113

TEXAS
8101 N. Stemmons Freeway
Dallas, TX 75247

P.O. Box 9398
El Paso, TX 79984

805 No. T St.
Harlingen, TX 78550

509 N. Belt
Houston, TX 77060

727 E. Durango, Suite A301
San Antonio, TX 78206

UTAH
4730 Paris St., Albrook Center
Denver, CO 80239-2804

VERMONT
739 Warren Ave.
Portland, ME 04103

VIRGINIA
4420 N. Fairfax Dr.
Arlington, VA 22203

VIRGIN ISLANDS
PO Box 610, Charlotte Amilie
St. Thomas, VI 00801

Po Box 1270, Kingshill, Christiansted
St. Croix, VI 00850

WASHINGTON
815 Airport Way South
Seattle, WA 98134

WEST VIRGINIA
1600 Callowhill St.
Philadelphia, PA 19130

WISCONSIN
10 W. Jackson Blvd., Rm. 533
Chicago, IL 60604

WYOMING
4730 Paris St., Albrook Center
Denver, CO 80239-2804

Office of Special Counsel for Immigration Related Unfair Employment Practices: **1-800-255-7688** (in Washington, DC, 653-8121); TDD 1-800-237-2515 (in Washington, DC, 296-0168).

Session 206: IMMIGRATION LAW FOR THE IN-HOUSE PRACTITIONER (part II)

Amy T. Lee

ACC's 2004 Annual Meeting: The New Face of In-house Counsel October 25-27, Sheraton Chicago

The in-house bar association.℠

Introduction and Overview

- Who Can Work?
- Non-Immigrant Visa Types
- Employment-Based Immigration or How Can I Get a Green Card for My Employee?
- Miscellaneous Thoughts and Pitfalls for the Unwary
- Recommended Websites

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I Need a Job! Who Can Work in the US?

- United States Citizens
- Lawful Permanent Residents
- Aliens with Authorization – Asylees, TPS, AOS, Students with OPT or CPT, Certain Classes of Non-Immigrant Visa Holders

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Non-Immigrant Visa Types

- There are roughly 24 different classes of non-immigrant visas in use in the U.S. ranging from class A for Ambassadors and Diplomats all the way to class V for beneficiaries of familial immigrant petitions filed or pending for at least three years.

B-1/B2 Visitor Visas 8 CFR § 41.31

- Commonly abused visa category due to the B-1 reference as a "business visitor" visa.

B-1 Visa Holders May NOT…

- Be employed in the U.S.
- Be paid as an independent consultant while in the U.S.
- "Work" in the U.S.

A B-1 Visa Holder MAY…

- Attend conventions, meetings, seminars and conferences
- Participate in litigation (as a party, as a witness)
- Negotiate contracts
- Engage in commercial transactions

B-1 Obligations

- The B-1 applicant must demonstrate adequate financial means for the trip
- must depart at the conclusion of the visit
- must *not* intend to change to another visa category at a later date
- must present documentary evidence of the purpose of the trip
- must present proof of continuing intent to return to home country

A Word about VWP

- A citizen of a VWP country may enter the U.S. without a visa, but ONLY if the person would be in the B-1 or B-2 category. Citizens from these countries must STILL obtain work-authorized visas if they intend to engage in employment or go to school; and they CANNOT change status in the U.S.

VWP Participants – 27 Countries

- Andorra (MRP), Australia, Austria, Belgium (MRP), Brunei (MRP), Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Lichenstein (MRP), Luxembourg (MRP), Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia (MRP), Spain, Sweden, Switzerland, United Kingdom

F Visas for Students 8 CFR § 214.2(f)

- Able to work if granted an EAD for OPT or CPT – generally 1 year maximum
- The educational institution must be approved by the CIS
- The educational institution must issue Form I-20 to the student
- The student must have sufficient monetary support for himself/herself

H Visas for Temporary Workers 8 CFR 214.2(h)

- H-1B Specialty Occupations
- H-2A Temporary Agricultural Labor or Services
- H-2B "Other Temporary Service or Labor"
- H-3 Trainees
- H-4 Dependents of the Above

H-1B Specialty Occupations

- Two Parts – Labor Condition Application and Petition for Non-Immigrant Visa
- Return Fare Requirement
- Don't Forget to Withdraw the Petition if the Employment is Terminated Early by Either Party!! Otherwise, continuing liability to pay wages as stated on LCA!

H-1B (cont'd)

- Subject to Annual Quota of 65,000
- Limit of 6 Years UNLESS Meet AC-21
- No Benching
- Employer Must Pay Wage within 30 Days of Entry into U.S. or 60 Days of Approval if Already in U.S.
- AC-21 Portability Rules
- Dual Intent OK

H-3 Trainees

- Enter the U.S. for the purpose of receiving training or instruction
- Admission is for the length of the program, not to exceed two years
- No extensions, change of status or readmission is possible absent a six month absence
- No dual intent

H-3 Program Criteria

- Training is not available in the alien's home country
- Alien will not be placed in a position where a citizen or permanent resident is regularly employed
- There will be no productive employment *unless* it is incidental and necessary to the training and aids in pursuit of career *outside* the U.S.
- Training will benefit the alien in pursuit of a career outside the U.S.

J Visas for Exchange Visitors 8 CFR § 514 et seq.

- Trainees, students, professors and research scholars, foreign physicians, etc. to enter the U.S. in order to participate in an exchange visitor program that was been specifically designated by the DOS and the participation is for the purpose of teaching, studying, observing, conducting research, consulting or receiving training.

L Visas for Intra-Company Transfers 8 CFR § 214.2(l); 22 CFR § 41.54

- L-1A Managers/Executives
- L-1B Specialized Knowledge
- Blanket Petitions vs. Individual Petitions
- L-2 Dependents of L-1A or L-1B; May Obtain EAD
- L-1 Petitions Under NAFTA
- Dual Intent OK

L-1 Criteria

- Continuously employed abroad for at least six months in the past three years
- Enter the U.S. temporarily in order to continue work for the same employer or its affiliate, parent or subsidiary
- Work in the United States will continue to be managerial/executive in nature or of specialized knowledge

Eligibility for Blanket L Petitions

- Office in the U.S. for at least one year,
- Three or more domestic *or* foreign branches/subsidiaries/affiliates,
- Combined annual U.S. sales of at least $25 million, a U.S. workforce of at least 1,000 *and*
- Received approval of at least ten L petitions in the prior twelve-month period.

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TN Visas Canadian and Mexican Citizens

- Must be within a designated class of professionals, see 8 CFR § 214.6(c) for list
- Must meet criteria defined for each class
- Does *not* allow dual intent
- Cannot be self-employed in the U.S.

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Obtaining LPR Status

- **Stage One: Labor Certification** (specific classes are exempt)

→ Traditional AEC

→ Reduction in Recruitment AEC

→ Labor Certification Substitution

Obtaining LPR Status (cont'd)

- **Stage Two: Immigrant Visa Petition**
- First preference, or EB-1 for those exempt from AEC requirement
- Second preference, or EB-2 for members of professions holding advanced degrees or persons with exceptional ability in the sciences, arts or business
- Third preference, or EB-3 for skilled workers, professionals and "other" workers

Obtaining LPR Status (cont'd)

- Stage Three – AOS and Consular Processing
- AOS now merged with Stage Two Immigrant Petition for single step
- PERM – A Pipedream?

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Look Out! Pitfalls…

- *Visas vs. I-94s*
- *Working Dependents*
- *Employment-Based Visas are Employer-Specific*
- *Beware Employment Discrimination*
- *Don't Forget to File Withdrawals for H-1*

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More Potholes…

- *Lack of Sufficient Recruiting Evidence for an RIR Case*
- *Too Many Conditions/Requirements on the AEC Request*
- *Assumption that an L-1A Executive/Manager Can Always Bypass AEC*

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Miscellaneous Thoughts

- *Trends – L-1 changes*
- *Machine-readable passports, US-VISIT and VWP*
- *Recapturing time*
- *Interview requirements at US Consulates*
- *International Immigration*
- *Social Security Administration Delays in SSN issuance*

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More Ponderings

- *LCAs for H-1B Holders who Travel – 20 CFR § 655.734 and 655.735*
- *Contractors and Contingent Workforce*
- *Special Registration*

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Check Out These Websites

- uscis.gov/graphics/index.htm
- www.flcdatacenter.com/owl.asp
- www.state.gov
- → usembassy.state.gov
- → www.state.gov/travel

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More Sites

- www.aila.org and www.findlaw.com
- egov.immigration.gov/cris/jsps/index.jsp
- www.lca.doleta.gov/eta_start.cfm
- www.dol.gov
- workforcesecurity.doleta.gov/foreign/perm.asp

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