From: Helen Konrad [mailto:hkonrad@lawmh.com]
Sent: Thursday, May 10, 2012 5:55 PM
To: uscisfrcomment@dhs.gov
Cc: Ed Lenz; Stephen Dwyer
Subject: OMB Control Number 1615-0047
Importance: High

Dear Sir/Madam:

Attached please find comments submitted on behalf of the American Staffing Association in response to the proposed revisions to Form I-9, Employment Eligibility Verification, published in the *Federal Register* on March 27, 2012 (OMB Control No. 1615-0047).

Please do not hesitate to contact me if you have any questions.

Sincerely,

Helen Konrad

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Washington, DC 20529

Re: Agency Information Collection: Form I-9 Employment Eligibility Verification (OMB No. 1615-0047)

The following comments are submitted on behalf of the American Staffing Association ("ASA") in response to the Notice published in the *Federal Register* on March 27, 2012, regarding proposed revisions to Form I-9, Employment Eligibility Verification.

ASA is the voice of the U.S. staffing industry. Along with its affiliated chapters, ASA promotes the interests of the industry through legal and legislative advocacy, public relations, education, and the establishment of high standards of ethical conduct. ASA has been promoting flexible employment opportunities since its founding in 1966. ASA members provide a wide range of employment-related services and solutions, including temporary and contract staffing, recruiting and permanent placement, outsourcing, training, and human resource consulting.

ASA is uniquely situated to evaluate the impact of the Proposed Rule on the Staffing Industry, which has grown significantly over the last few decades because it offers flexible employment opportunities. Every business day, staffing companies employ almost 3 million people. Over the course of a year, U.S. staffing firms employ almost 13 million temporary and contract employees. In 2011 alone, staffing firms completed approximately 10 million Form I-9s. As a result, any substantive change to the employment eligibility verification process has the potential to have a significant impact on the staffing industry.

One of the aims of the Proposed Draft Revisions is to improve the clarity of the Form and to make it more user-friendly. However, as outlined below, several proposed language changes introduce ambiguity and contradict this goal. Thus, ASA submits comments highlighting these ambiguities, proposing revisions, and seeking confirmation that staffing firms may continue to complete the Form I-9 at the time a candidate consents to be included in the staffing firm's roster of temporary employees, irrespective of the time the individual actually begins work.

BACKGROUND

Section 274A of the Immigration and Nationality Act prohibits the knowing employment of unauthorized aliens and the hiring of individuals without first verifying their employment authorization and identity. *See* INA § 274A, *codified as amended at* 8 U.S.C. § 1324A.

Since the enactment of this statutory provision, the Immigration and Naturalization Service ("INS") recognized that an employer may complete Form I-9 at any point between the first acceptance of an offer of employment and the time employment actually commences. Indeed, in the initial regulations promulgated under this statute, INS stated:

> The Service in its proposed rules defined "hire" as the "actual commencement of employment of an employee . . ." This aroused public concern as to the appropriate time for completion of the verification process. . . . **INS realizes that employers with decentralized operations may actually hire an individual well in advance of the time that the employee commences work. . . . [T]he Service wishes to stress that verification may be completed either at the time of an individual's acceptance of an offer of employment or at the time employment actually commences.**

Control of Employment of Aliens, 52 Fed. Reg. 16,216, 16,218 (May 1, 1987) (emphasis added) (first alteration in original).

U.S. Citizenship and Immigration Services ("USCIS") continues to recognize these operational realities. For example, the current version of USCIS' *Handbook for Employers* states:

> Q. If someone accepts a job with my company but will not start work for a month, can I complete Form I-9 when the employee accepts the job?
>
> A. Yes. The law requires that you complete Form I-9 only when the person actually begins working for pay. However, **you may complete the form earlier, as long as the person has been offered and has accepted the job**. You may not use the Form I-9 process to screen job applicants.

U.S. Citizenship & Immigr. Servs., *Handbook for Employers: Instructions for Completing Form I-9 (Employment Eligibility Verification Form)* 37 (June 1, 2011 rev.) (emphasis added).

Specifically pertaining to staffing agencies, on its website, USCIS confirms:

> In most cases, if a business uses a temporary or staffing agency to obtain workers, those workers are employees of that agency and provide service to the business as independent contractors. . . . **An agency may complete Form I-9 before one of its workers accepts a particular assignment, even if:**

- **The worker has not yet been offered or accepted an actual assignment.**
- **There is the possibility that no actual work may arise from the arrangement.**

U.S. Citizenship & Immigr. Servs., Who Needs to Use Form I-9, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=97bd1a48b9a2e210VgnVCM100000082ca60aRCRD&vgnextchannel=97bd1a48b9a2e210VgnVCM100000082ca60aRCRD (last revised Apr. 12, 2012) (emphasis added).

This recognition of the unique operational aspects of the staffing business is critical for the staffing industry. As a general matter, once a qualified worker is identified and screened, the staffing industry includes that worker in its assignment "pool." Depending on the demand for that worker's skill set, there is usually a delay between the time a worker accepts an offer and entry into the staffing company's assignment pool and the time that worker is placed at a client site.

The employer certification in the current version of Section 2 of Form I-9 accommodates the distinction between the date of employment and the first day of work:

> 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 authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Form I-9 at 4 (emphasis added). Recognizing the process employed by staffing companies and the potential dichotomy between date of employment and first day of work for pay, USCIS—as recently as April 26, 2012—has instructed:

> In the case of a staffing agency, acceptance of an offer and entry into the assignment pool can be considered equivalent to an offer and acceptance of employment, after which Form I-9 may be completed. **The agency does not need to delay the verification until the worker actually has accepted a particular assignment. The date the staffing agency should put in Section 2 "Certification" of Form I-9 is the date of acceptance of an offer and entry into the assignment pool.**

U.S. Citizenship & Immigr. Servs., How to Complete Form I-9, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=91908318c9c64310VgnVCM100000082ca60aRCRD&vgnextchannel=5c1f8318c9c64310VgnVCM100000082ca60aRCRD (last revised Apr. 26, 2012) (emphasis added).

PROPOSED CHANGES

Section 1 of the Draft Revised Form I-9

The proposed revisions to Section 1 of the Draft Revised Form I-9 are entirely consistent with this established policy. Specifically, Section 1 states that "[e]mployees must complete and sign Section 1 of Form I-9 **no later than the first day of work for pay, but not before accepting a job offer.**" Draft Revised Form I-9 at 7 (emphasis added). Thus, implementing the Draft Revised Form would permit employees of staffing companies to continue to complete Section 1 upon accepting an offer and entry into the assignment pool.

Section 2 of the Draft Revised Form I-9

The Certification in Section 2 of the Draft Revised Form I-9, however, deviates from the well-established—and USCIS-endorsed—process for Form I-9 compliance relied upon by staffing companies nationwide. Specifically, the Draft Revised Form changes the date contained in the Section 2 Certification from the date "the employee began employment" to the date of "the employee's first day of work for pay:"

> I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.
>
> The employee's **first day of work for pay (*mm/dd/yyyy*):** _____ (State employment agencies may omit this date.)

Draft Revised Form I-9 at 8 (emphasis added).

The date "the employee began employment" for direct hire employers is the same date as the first date of work for pay. Therefore, the USCIS proposal to create a distinction in these terms does not change the administrative burden on direct hire employers at all. However, that is decidedly not the case for the staffing industry. "Date of employment" for the staffing industry is, according to longstanding USCIS policy, the date the job offer has been accepted, regardless of the first day of work for pay. Therefore, the proposed revision creates an entirely new administrative burden for all staffing company employers to separately track "date of

employment" from "first day of work for pay," which has *never* been required of this employer pool.[1]

This revision is a drastic and substantive departure from prior INS/USCIS policy. ASA notes that this abrupt departure from prior policy could not have been the intention of USCIS. As previously noted, guidance on USCIS' website—revised after the Draft Revised Form I-9 was published for comment—continues to instruct the staffing industry to list the date of acceptance of an offer and entry into the assignment pool in the Section 2 Certification, suggesting that USCIS did not intend to alter its policy on this issue.

As a result, ASA strongly recommends that USCIS retain the language in the Section 2 Certification that is currently in effect. Incorporating the other proposed changes to the Section 2 Certification, the revised language would read as follows:

> I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.
>
> **The employee began employment on** (*mm/dd/yyyy*): _____ (State employment agencies may omit this date.)
>
> (proposed revisions in bold).

In addition, the proposed revised language at the beginning of Section 2, which specifies that "[e]mployers must complete and sign Section 2 within 3 business days of the employee's first day of work for pay," Draft Revised Form I-9 at 8, should also be revised to make it consistent with Section 1. Specifically, it should say "[e]mployers must complete and sign Section 2 within 3 business days of the employee's first day of **employment, but no later than three days from first day of work for pay.**"

This change to the proposed revised Section 2 Certification and introductory language also requires corresponding changes to the Draft Revised Instructions for Section 2. Specifically, #3 on Page 3 of the Draft Revised Instructions requests that the employer "[e]nter the employee's first day of work for pay." Instead, this instruction should read "[e]nter the **date the employee's employment began, which must be after a job offer has been accepted, but**

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[1] Indeed, as previously outlined, staffing companies employ approximately 13 million temporary and contract employees—and complete approximately 10 million Form I-9s—over the course of a year. More importantly, annual temporary employee turnover was approximately 360% in 2011—an average tenure of 2.6 months. This demonstrates the highly transient nature of temporary employment and dramatically illustrates the disproportionately high volume of Form I-9s that staffing firms have to process each year compared to "direct hire" employers. Thus, because staffing companies complete an inordinate number of Form I-9s compared to direct hire employers, any additional administrative burden would have significant ramifications for the industry.

no later than the first day of work for pay." This revision would be consistent with the Draft language used in Section 1.

In addition, the Draft Revised Instructions for Section 2 elaborates on the earliest date for completion of the I-9, stating that "[e]mployers may not ask an individual to complete Section 1 before he or she has accepted a job offer," but then goes on to confirm that, regardless, "[e]mployers must complete Section 2 . . . within 3 business days of the employee's first day of work for pay." *Id.* at 2-3. This section should also be amended to state that "[e]mployers must complete Section 2 . . . within 3 business days of the **date of employment or first day of work for pay**."

Finally, ASA strongly recommends that the specific instructions USCIS has provided for staffing companies currently outlined on the USCIS website be formally incorporated into this part of the Form I-9 Instructions. Specifically, the instructions should state that for staffing companies, the date of acceptance of an offer and entry into the assignment pool is the date that should be listed in the Section 2 Certification, eliminating any confusion regarding the Section 2 Certification.

CONCLUSION

The current language of the Draft Revised Form I-9—essentially requiring employers to wait until the employee's first day of work for pay before completing Section 2—represents a significant departure from long-established policy that would impose a significant burden on staffing employers nationwide. USCIS should revise this language on both the Draft Revised Form I-9 and the Draft Revised Instructions to conform to prior policy and practice.

ASA supports USCIS' effort to provide employers with additional clarification and guidance for navigating the Form I-9 employment eligibility verification process. ASA requests that the agency incorporate the changes outlined above in order to accommodate the agency's established policy regarding how this process applies in the context of staffing or contract labor. All of these revisions would make the Draft Revised Form I-9 and its instructions internally consistent, in addition to conforming to decades of practice and policy.

Sincerely,

Helen L. Konrad

Helen L. Konrad

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cc: Edward A. Lenz, Senior Vice President, Legal & Public Affairs, American Staffing Association
Stephen Dwyer, General Counsel, American Staffing Association