

From: Nice, Amy [mailto:ANice@USChamber.com]
Sent: Tuesday, May 29, 2012 11:28 PM
To: uscisfrcomment@dhs.gov
Subject: OMB Control Number 1615-0047

Please find enclosed the comment on the proposed new I-9 Form from the Chamber of Commerce of the United States of America, with two attachments related to and made part of our comment.

Amy M. Nice

Executive Director, Immigration Policy

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RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

AMY M. NICE
EXECUTIVE DIRECTOR
IMMIGRATION POLICY

January 20, 2011

The Honorable John Morton
Director
United States Immigration and Customs Enforcement
500 12th Street, SW
Washington, DC 20536

The Honorable Alejandro Mayorkas
Director
United States Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: Technical errors versus substantive violations in Employment Eligibility
Verification

Dear Director Morton and Director Mayorkas,

The U.S. Chamber of Commerce is the world's largest business federation, representing interests of more than three million businesses and organizations of every size, sector, and region. As you are aware, one issue the Chamber is following closely is policy concerning all facets of Employment Eligibility Verification. We know you both agree that worksite enforcement is vitally important in our current immigration system, and integral to any immigration reform. As you each evaluate means to focus your resources on improving the effectiveness of Employment Eligibility Verification systems, we would like to draw your attention to the need to more efficiently address technical and procedural errors by employers in employment verification. Since we realize that both of your agencies play a role concerning the employment verification process, with CIS controlling the I-9 and instructions to employers and ICE controlling investigation of employer compliance, we are writing you jointly.

Between FY08 and FY10, worksite audits increased from about 500 to over 2,500. One issue that has been of concern to the Chamber's member companies since ICE put into action its increased worksite audit presence is the lack of transparency in implementation of the statutory mandate to differentiate between technical errors and substantive violations. Even with the new M274 Employer Handbook just released, CIS does not have complete instructions out to employers concerning identification and correction of

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CIS Director Alejandro Mayorkas
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technical errors. Within ICE, there is no unified approach on this subject, leading to inconsistency from ICE, between regions, within regions, and often simply depending on the assigned ICE officer or auditor

The failure of ICE and CIS to act in concert to address technical and procedural errors in employment verification means that agency proceedings and resources are **not** firmly directed toward bad actors. This seems to be the exact type of agency action that is “not worth the cost or is just plain dumb,” as the President recently announced as this Administration’s guidepost in governing federal agency activity.

The IIRIRA amendments to the INA, as you know, included the “Bono Amendment” at Section 411, codifying, at INA Section 274A(b)(6)(A), the concept that employers who act in good faith should not be the focus of government enforcement efforts.

First and foremost, it appears to employers that given the developments in the use of technology and the internet in the intervening years since the 1996 IIRIRA amendments were signed into law, it now seems eminently doable for CIS to program out technical and procedural errors, through software development, by providing the option of completing the I-9 verification through a government portal. We are hopeful you agree, and that CIS will take steps to largely eliminate the discussion on technical errors by making it impossible (through drop-down menus and careful software programming) for any employer to complete the I-9 Employment Eligibility Verification process online absent also providing employer zip code, employee maiden name, correct name for issuing agency for List B documents, and so forth. Similarly, the date of completion of the employee section and the employer confirmation section could be date stamped through software development. CIS’s use of technology could make implementation of Section 274A(b)(6)(A) of the INA (good faith exception mandated by the Bono Amendment in IIRIRA) very straightforward and allow ICE to more productively direct its worksite enforcement resources.

In order to ensure that agency resources are not wasted on small businesses and other employers who have acted in good faith, we suggest that the following principles be incorporated in CIS guidance to employers and ICE standards for its enforcement officers:

1. There are some technical errors which are *de minimus* and no employer should be required to spend time to correct them. ICE should not provide notice to employers mandating corrections for minor technical errors, as this means that employers can spend hundreds of hours chasing down their employees’ maiden names or addresses (in Section 1 of the Form I-9) or redocumenting identity or work authorization (in Section 2 of the Form I-9) solely because the issuing authority agency name was abbreviated, to name just a few of the common technical errors.

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2. Where an employer acts in good faith, failure to timely complete the I-9 Employment Eligibility Verification should always be a technical violation.

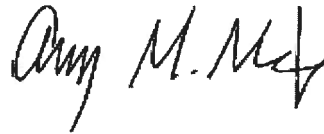
The Chamber is committed to working with federal agencies to advance common sense regulatory reform measures, just as the President has suggested, and identifying the difference between technical errors and substantive violations is an area where your agencies already have the authority to implement useful reform.

We would welcome the opportunity to speak to you further about Employment Eligibility Verification issues, and appreciate any consideration you can give our concerns.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits



Amy M. Nice
Executive Director
Immigration Policy

Cc: Mr. Brett Dreyer, Chief of Worksite Enforcement

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

FEB 4 2011

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Dear Mr. Johnson and Ms. Nice:

Thank you for your January 20, 2011 letter, in which you raise concerns about the need to differentiate between technical errors and substantive violations during Form I-9 worksite audits. We recognize that this has been an area of concern for employers. We are committed to improving upon areas of this process that are within the control and purview of U.S. Citizenship and Immigration Services (USCIS). As you are aware, USCIS is not itself directly involved in these audits.

Upon receipt of your letter, USCIS management met and discussed how to provide employers with better assistance, especially written guidance, on this issue. Clear guidance on how to complete the Form I-9 will be posted on a new USCIS website, I-9 Central. The anticipated launch date for I-9 Central is mid-Spring 2011. I intend to solicit your and other stakeholders' input in the development of I-9 Central.

The version of the Form I-9 that can be completed and is available on the USCIS website does not have the "smart" features that you recommend, such as drop-down boxes. I fully agree that additional features such as drop-down boxes, helper text, and radio buttons should help avoid a number of technical errors. USCIS continues to research the feasibility of creating such features as it continues through modernization efforts.

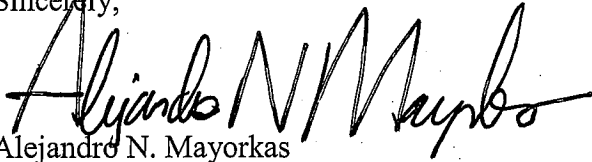
Mr. Johnson and Ms. Nice

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USCIS will continue ongoing engagement with the Chamber of Commerce and others within the stakeholder community to gather feedback on issues concerning guidance on technical and procedural errors. USCIS government partners, such as ICE, will also be invited to participate.

Thank you again for your letter. Please let me know if you have any additional questions. I can be reached at (202) 272-1000.

Sincerely,

A handwritten signature in black ink, appearing to read "Alejandro N. Mayorkas". The signature is fluid and cursive, with a long horizontal stroke at the end.

Alejandro N. Mayorkas

Director

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May 29, 2012

Sunday Aigbe
Acting Chief, Regulatory Coordination Division
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: Form I-9, Employment Eligibility Verification
77 Fed. Reg.18256 (March 27, 2012)
OMB Control Number 1615-0047
Information Collection Under Review

Dear Chief Aigbe:

We are writing in response to the Department's request for comment concerning its proposal to revise Form I-9, used by all of the nation's employers at the time of hiring a new employee. Completion of Form I-9 is required by law in order to verify the work authorization and identity of each new employee hired by the nation's employers. According to U.S. Economic Census data, there are approximately 6.05 million employers in the United States today, making somewhere in the order of 50 million new hires annually. It is time to modernize I-9 process, a government mandated process that impacts so many employers in so many transactions every year. We imagine USCIS is or will soon be poised to bring the Form I-9 into the 21st century. We ask that USCIS provide employers the option of completing a fully electronic "Smart I-9," with drop down menus that program out most technical or procedural mistakes, as well as many substantive errors.

We believe that the proposed new paper Form I-9 should not be pursued and that instead release of a new Form I-9 should occur only when the agency is ready to provide employers with a workable, electronic "Smart I-9." Should the agency proceed with issuing a new paper Form I-9, we have several clarifications necessary for the form and its instructions.

The U.S. Chamber of Commerce is the world's largest business federation. It represents 300,000 direct members and also represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, through our federation of state and local chambers. Members of the U.S. Chamber transact business throughout the United States, in every state and geographic region in the country.

As confirmed by the U.S. Economic Census: 98% of all businesses in America have 100 or fewer employees, 89% have fewer than 20 employees, and 61% have fewer than five employees. The Chamber's membership corresponds to this distribution of business size and we are very concerned that USCIS's new Form I-9 and instructions are not adequately responsive to the needs of these small businesses. Moreover, very large employers, with over 10,000 employees, have also provided us input on the agency's new proposed Form I-9. These large employers, while representing only 1% of U.S. businesses, employ over 27% of the U.S. workforce.

Both large and small businesses gave us feedback on the agency's proposed new form, which can be summarized as follows:

General Comments

- ❖ First, the business community applauds the agency's efforts to provide employers, and employees, better and more guidance about the I-9 process and I-9 Form.
- ❖ In light of the anticipated elimination of the paper Form I-94 Card, businesses are concerned that the new Form I-9 does not anticipate the issuance of electronic I-94 admission numbers. The proposed new Form instructs employees to only provide the foreign passport number and country of issuance if a Form I-94 is issued. When a Form I-94 is no longer issued it is not clear how a nonimmigrant authorized to work will complete the proposed new Form I-9 or have her work authorization verified. On an Inter Governmental Affairs stakeholder call on April 18th with CBP and USCIS providing information to the public, CBP stated it was moving forward soon with elimination of the paper Form I-94 Card. It would seem pretty important to have the new Form I-9 reflect text that will still be applicable when there is only an electronic I-94 admission and no Form I-94 Card since it appears that is happening soon. Furthermore, it would seem that if the agency wants to collect foreign passport information for individuals who have not received a change of status or extension of stay from USCIS that such data should be requested for any such individual, not just those who did receive a Form I-94 Card when traveling to the U.S.
- ❖ Employers were concerned about the plans announced on the recent Inter Governmental Affairs stakeholder call regarding the transition to an electronic I-94 admission number because of its direct impact on the completion of Form I-9. In particular, should CBP proceed with its suggested approach of issuing electronic admission numbers while also continuing to issue paper Form I-94 Cards with pre-printed, incorrect arrival-departure numbers, employers had questions. Business representatives queried how they would verify that the number provided by a new hire was correct or related to the new hire, and what the consequences would be if an incorrect number (the number on the Form I-94 Card) was provided.

- ❖ There needs to be a phase-in period for any new Form I-9, allowing 180 days advance notice for transition of company procedures from a one page document to a two page document. Many companies have set procedures for onboarding new employees which will be changed rather extensively by the very first substantive change to the Form I-9 in 25 years. It may be desirable to provide 180 days advance notice, plus a transition period where either the old form or the new form is acceptable. In addition, for companies that use electronic I-9 Forms, now only available through private vendors and not through USCIS, a transition time is needed to allow for these private entities to align their product to the new form specifications.
- ❖ Many employers had questions about what to do when hiring off site, and explained the growing applicability of a mobile workforce where a company employee was not available to complete the Form I-9 certification in person on the first day of work for pay. Should USCIS be able to provide instructions for how employers should handle remote hires, this would be well-received.
- ❖ Many employers who use electronic I-9s from private vendors have raised questions about the employer certification when the data on the Form I-9 is prepopulated. Again, should USCIS be able to provide instructions for the employer certification when the data is prepopulated from data provided by the employee in the hiring and onboarding process, this would be well-received.

Comments on Specific Boxes on the Form or Instructions

- ❖ There was uniform opposition about USCIS seeking employee e-mail addresses and telephone numbers in Section 1, even though such information collection is marked as optional. Employers will be put in the position of having to explain to employees why such information is collected and sanctioning the collection of personal data of this type.
- ❖ On page one of the form, under the box for “an alien authorized to work,” aliens are instructed to “list your Alien Registration Number/USCIS-Number or Form I-94 Admission Number” but employers were unfamiliar with what a “USCIS-Number” was, or where to find it, and did not find the Form Instructions illuminating on this point.
- ❖ The Forms Instructions do not provide clear direction regarding List B documents with photos in order to be consistent with E-Verify. Since employers using Form I-9 include all of those that use E-Verify, the instructions should be clear and accurate for both.

- ❖ Likewise, the Forms Instructions state it is optional copy green cards and passports, but for E-Verify users such photocopying is not optional, so we would ask that the instructions be clarified.
- ❖ There was extensive discussion regarding the new text on “Family name” and whether that was going to be clear to most employees, as well as the box for “Maiden name” suggesting that this latter name must be provided or identified as “N/A” which many employers found objectionable.
- ❖ There were a number of questions from businesses about the box on the top of the second page for the employee’s name. Is the employee supposed to complete this? Is it part of the information the preparer or translator is providing, and thus part of the certification?
- ❖ Employers request clarification in the Forms Instructions as to what to do if the anticipated “first day of work for pay” identified in Section 2 changes. For those employers who consistently have their employees complete the Form I-9 after offer and acceptance but prior to the first day of work for pay, it is not unusual that the first day of work changes for a variety of legitimate reasons. Employers want to ensure that it is clear that no update or edits to the Form I-9 itself are required in those situations.

The Chamber appreciates the opportunity to share our concerns with U.S. Citizenship and Immigration Services. Thank you for your consideration of these comments.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits



Amy M. Nice
Executive Director
Immigration Policy

Attachments:

- The Chamber’s January 2011 request that USCIS provide employers an electronic I-9 to avoid most technical and procedural errors,
- USCIS’s February 2011 letter discussing possible development of a “Smart I-9”