



the new handbook for employers (m-274): i-9 updates employers need to know

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On January 5, 2011, USCIS issued its newest version of the "Handbook for Employers" (M-274). The Handbook is designed to instruct employers on the essential I-9 employment verification procedures. It is an essential resource for employers as the primary source of instruction available from the government covering the process of completion and retention of the Form I-9 - a deceptively complicated form. Each updated version of the Handbook has made increasing efforts to clarify earlier instructions and advise employers on the many confusing scenarios that arise when verifying the identity and employment authorization of a newly hired employee.

The newest version of the Handbook is the latest attempt by USCIS at tackling many questions about the I-9 process that were previously left unanswered. Though it falls short of being perfect, it offers many important improvements over the last version. Some of the most notable of these improvements include guidance on timing requirements for Section 2 and instructions on how to complete the I-9 for employees with Temporary Protected Status, temporary evidence of lawful permanent resident status, exchange visitors, and students. It also offers guidance on name changes, the use of agents to review employee documents, electronic storage of I-9s, and the wide range of circumstances under which a company may acquire an H-1B employee.

Below are a few of the most important changes in the newest version of the M-274 Handbook for Employers:

Updated Instructions on the Reverification of Employee Documents

The previous version of the Handbook instructed employers not to reverify List B identity documents. However, identifying how broad this statement this is, the

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new Handbook has replaced this instruction with the following, more insightful statement:

NOTE: U.S. citizens and noncitizen nationals never need reverification. Do not reverify the following documents: An expired U.S. passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card (Form I-551), or a List B document that has expired.

New Guidance on Employees With Temporary Protected Status (TPS)

The Handbook offers new guidance on employees in Temporary Protected Status (TPS). TPS is a temporary immigration benefit that allows foreign nationals from designated countries to reside and work in the United States for a specified period of time. However, as TPS is generally tied to a specific natural or political crisis, it is difficult to anticipate how long TPS will be granted for each country. Therefore, the Department of Homeland Security (DHS) will regularly extend a country's TPS designation and automatically extend the employment authorization documents (EADs) for TPS employees. As a result, USCIS has permitted the practice of presenting an expired EAD under these circumstances, provided that the EAD has been automatically extended by Homeland Security.

To guide employers in making the determination of when a TPS employee's EAD has been automatically extended, the Handbook now presents a process of identifying whether an EAD is related to TPS, whether DHS has issued an extension of TPS, and how to demonstrate the verification of the corresponding EAD extension on the Form I-9. These steps are available at pages 10-11 of the new Handbook.

"Cap Gap" H-1B Petitions: F-1 Students Changing to H-1B Status

This section of the Handbook is particularly important to employers that regularly hire graduates with Optional Practical Training (OPT) work authorization. Many of these employers will attempt to change the employee's status to H-1B before the OPT work authorization expires. The government recognizes that OPT work authorization will often expire after the H-1B filing has occurred, but before the new H-1B visa numbers become available on October 1. As a result, USCIS added a section to the regulations that allows for OPT authorization to be automatically extended while the H-1B petition is pending or after it is approved, up until October 1. This scenario is often referred to as the "cap gap" extension.

The Handbook reiterates that the OPT work authorization for these individuals will remain valid through September 30, even though the Employment Authorization Document (EAD) previously provided by the student will have expired before October 1. The Handbook then provides detailed instructions for completing the Form I-9 for the automatic "cap-gap" extension of OPT employment authorization. To do so, employers are instructed to reverify the employment authorization with the modified Form I-20 provided by the school showing that the cap-gap extension has been endorsed by the Designated School Official (DSO), along with the student's expired OPT EAD. These documents together qualify as List A documents.

H-1B Portability - Employees Changing Employers



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The previous version of the Handbook required employers to obtain a Form I-797 Receipt Notice from USCIS for an employee who was changing ("porting") H-1B status from a previous employer. The receipt notice was then to be used in List A of the I-9 in conjunction with a valid foreign passport and H-1B I-94 card. However, the new Handbook follows the regulations more closely and states that an employee in valid H-1B status who ports his or her H-1B status can begin to work with the new employer "upon filing" an H-1B petition with USCIS. Furthermore, the Handbook explains that the employer may accept the employee's valid foreign passport, along with the current Form I-94, as List A documents without the I-797 Receipt Notice initially. Instead, to identify that this is a H-1B portability case, the employer is instructed to write "AC21" on the Form I-9 and record the date that the new H-1B petition was submitted to USCIS in the margin next to Section 2.

Additionally, if the portability filing also encompasses an extension of H-1B status, as they typically do, then the employer should note the additional instructions below.

Extensions of Nonimmigrant Status

Per USCIS regulation, an employee for whom a timely petition to extend nonimmigrant status has been filed is authorized to continue employment for up to 240 days beyond the expiration of the employee's current I-94 card, or until the extension petition is adjudicated. The Handbook now explains that, where a timely extension is filed, and the extension remains pending beyond the I-94 expiration, the employer should write "24-Day Ext." on the I-9 and record the date that the employer submitted the extension petition in the margin next to Section 2. Additionally, the Handbook significantly increases the documentation that should be attached with the I-9 as evidence of the timely extension. This documentation now includes the following:

- A copy of the Form I-129 filed with USCIS requesting the extension;
- Proof of payment of the filing fees associated with the I-129; and
- Evidence that the new Form I-129 was properly mailed to USCIS.

Furthermore, once USCIS has issued the I-797 receipt notice for the extension petition, this should be added to the I-9 supporting documents.

Conclusion

Many of the processes outlined above mark important departures from previous USCIS guidance. Employers should take the time to familiarize themselves with the many additional changes in the new version of the Handbook and consult with qualified immigration counsel when unique situations arise.