



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

December 27, 2021

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Associate Chief for Policy and Guidance  
Verification Division  
Immigration Records and Identity Services Directorate  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

Submitted via <http://www.regulations.gov>

**Re: Remote Document Examination for Form I-9, Employment Eligibility  
Verification: Request for Public Input (Docket ID No. USCIS-2021-0022)**

Dear Mr. Lujan,

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced request for public input on Remote Document Examination for Form I-9.<sup>1</sup>

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Many of AILA's members regularly advise and represent American companies, both in developing I-9 compliance programs and in preparing for and defending against worksite enforcement claims, as well as in compliance activity related to other workplace laws, including those that prohibit employment discrimination. Our members' collective expertise and experience make us particularly well-qualified to offer views that we believe will benefit the public and the government.

## **I. Overview**

AILA welcomes the opportunity to provide input to the Department of Homeland Security (DHS) regarding document examination practices associated with Form I-9, Employment Eligibility Verification. Earlier this year, in April 2021, AILA sent a letter to DHS thanking the agency for providing Form I-9 flexibilities for remote document examination during the COVID-19 pandemic

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<sup>1</sup> 86 Fed. Reg. 59183 (Oct. 26, 2021).

and urging the agency to adopt several recommendations that would modernize the Form I-9 employment eligibility verification process, including the permanent virtual review of Form I-9 employment eligibility documentation.<sup>2</sup> AILA's April 2021 letter has been incorporated into this comment as **Exhibit A**. In this comment, we reiterate our support of DHS modernizing the Form I-9 document examination process to permit virtual review of documentation for Form I-9 purposes. We discuss employers' and employees' experiences with this process, the impacts of remote document examination conducted during the COVID-19 pandemic, and the potential costs and benefits of allowing for future remote document examination flexibilities.

As we approach the two-year mark of the United States declaring the COVID-19 pandemic a national emergency on March 13, 2020, employers' plans to bring employees back to their workplaces as a result of the pandemic have been repeatedly altered and/or delayed by emerging variants and rapidly fluctuating COVID-19 infection rates.<sup>3</sup> It is now a practical reality that many employers will likely never resume pre-pandemic normal business operations. Even those employers that intend to bring employees back to physical worksites face highly uncertain timelines.<sup>4</sup> Compounding the problem, employers have struggled over the past year to find sufficient workers for open positions and are increasingly hiring employees working remotely who reside outside of normal commuting distance from employer office locations.

The challenges of the pandemic will be viewed in history as triggering a significant culture shift toward remote work flexibility and increased use of masks indoors when individuals are ill or seeking to protect immuno-compromised household members. In light of these considerations, it is imperative that the Form I-9 verification process and associated document review options evolve to reflect these new realities and allow for prompt verification of remote hires who are not onsite and/or may not wish to remove a mask for onsite in-person verification due to health considerations. Existing technology allows employers to view employees' unobstructed faces via commonly used virtual meeting and communication platforms, such as Zoom, Microsoft Teams, FaceTime, etc. Moreover, numerous federal, state, and local governments as well as the private sector have adopted flexible policies that leverage readily available technology to be responsive to the COVID-19 pandemic.<sup>5</sup> A return to a fully "in-person" Form I-9 document examination process would be a significant step backwards in terms of compliance<sup>6</sup>, process efficiency and avoiding

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<sup>2</sup> *AILA Sends Letter to DHS Urging Modernization of the Form I-9 Employment Eligibility Verification Process*, AM. IMMIGRATION LAWYERS ASS'N (Apr. 13, 2021), <https://www.aila.org/advo-media/aila-correspondence/2021/letter-to-dhs-urging-modernization-of-the-form-i-9>.

<sup>3</sup> According to the U.S. Centers for Disease Control and Prevention, as of December 12, 2021, the current 7-day moving average of daily new cases (118,515) increased 37.3% compared with the previous 7-day moving average (86,315), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

<sup>4</sup> See Nne D'Innocenzio, *Omicron Cases Have Companies Rethinking Return to Work Plans*, TIME, Dec. 10, 2021, <https://time.com/6127429/omicron-companies-rethinking-return-to-work/>.

<sup>5</sup> See e.g., *AILA Sends Letter to DHS Urging Modernization of the Form I-9 Employment Eligibility Verification Process*, *supra* note 2 at pages 2, 3 (documenting some of the many flexibilities that have been adopted by federal, state and local governments and the private sector in response to the COVID-19 pandemic, such as the majority of states enacting some form of remote online notarization law, immigration courts offering Webex video conferencing for hearings, etc.).

<sup>6</sup> *Id.* AILA's April 2021 letter highlights that the review of scanned employment verification documentation allows for a more thorough and comprehensive review than is typically possible during the normally rushed onboarding process.

disability discrimination. Given these important considerations, AILA urges DHS to make virtual review of Form I-9 documentation a permanent component of the employment verification process.

## **II. Experiences with Pandemic-Related Document Examination Flexibilities**

### *a. Employer and employee experiences with flexibilities for remote document examination*

For employers, the flexibilities provided by DHS relating to in-person Form I-9 compliance have fit well with the new workplace flexibilities that have emerged as a result of the COVID-19 pandemic. Many workplaces now offer employees flexible policies with respect to remote work and are hiring employees to work remotely from all over the United States and around the world. This modernization has already become an important aspect of many jobs. It is unlikely that there will ever be a total return to daily in-office work, even as some employees are returning to standard worksites, particularly in light of the emergence of new and highly transmissible variants like Omicron. Moreover, having experienced the benefits of remote hires, many companies will value the continued ability to hire remote talent to fill important, key positions which help to build the U.S economy, enabling the country to remain competitive in the global marketplace.

DHS's flexible employment verification process is arguably more secure than the alternative agent/representative process. This is because Form I-9 flexibility allows companies to maintain a centralized employment verification process in-house among well-trained and experienced employees who understand document discrimination issues and are well versed in the complexities of the Form I-9, the different types of documents that can be presented, and the different processes involved in examining documents for individuals with receipt notices or individuals in statuses such as Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA). Having a dedicated staff of well-trained individuals perform this work on a consistent and regular basis, with a high level of excellence, means employers have fewer mistakes and a more compliant process.

I-9 flexibility is also financially beneficial to small and large companies alike. Small companies may not be in a financial position to hire experienced agents or work with for-profit Form I-9 service providers to conduct the document examination process for employees who are offsite. Large companies, on the other hand, will no longer need to train and maintain staff in multiple locations throughout the United States to handle this part of the onboarding process for new employees and for reverifying other employees if employment verification flexibility becomes a permanent part of the process.

Employment verification flexibility is also valuable to employees and prospective employees. Remote work has opened new employment prospects for disadvantaged individuals. Maintaining this flexibility means that employees, especially those in rural areas, will not have to travel long distances simply to complete Forms I-9 "in person," whether with a far-flung agent or at a company location. Physically disabled employees and others for whom remote work is a necessity will no longer be disadvantaged by the prospect of having to travel to complete the Form I-9 verification process in person.

Providing flexibility in the document examination process has additional benefits. Staff who review documents electronically can examine them carefully using technologies such as Zoom. They also can review the documents more meticulously and do any necessary research regarding the validity of documents without necessarily having to balance all of this while having the employee present. Finally, given state and federal mask mandates, using remote technology such as video-enabled conference calls to review documents will allow staff to make accurate facial comparisons between employees and the documents provided, while at the same time safely mitigating the spread of COVID.

Small businesses<sup>7</sup>, particularly those in which all employees are not housed in one office or facility (e.g., oil field equipment company with employees on site at various rig sites) benefit from the flexibilities provided by DHS in the Form I-9 document examination process for the following reasons:

- The time and cost of in-person verification (e.g., employee travel to headquarters or hiring an agent, speed of presenting documents, etc.) are reduced and in turn, new employees can be available to commence work more efficiently;
- One person with a computer can verify completion of Section 1, review and copy the employee's identity and employment authorization documents, and complete Section 2 of Form I-9, and
- The Form I-9 verification process can be separate from but nevertheless more integrated into the overall virtual onboarding system.

It is also important to note that many small businesses would be more likely to enroll in E-Verify if the process were tied to the ability to utilize a remote verification system.

*b. Challenges for employers and employees in completing E-Verify during the pandemic*

There were many challenges to completing the E-Verify process during the pandemic, primarily related to the closure of Social Security Administration (SSA) and U.S. Citizenship & Immigration Services (USCIS) offices. This section of our comment highlights some of the more significant obstacles reported by employers and employees in attempting in good faith to complete an E-Verify query during the pandemic.

**Obtaining a Social Security Number.** E-Verify queries cannot be submitted until a social security number has been issued. For those individuals who recently obtained work authorization and needed to apply for an initial social security card (as opposed to a replacement card), SSA required them to make an in-person appointment at the local office. This was impossible while the offices were closed. Even when they reopened, appointments have been provided in an extremely limited numbers and employees have struggled to schedule in-person appointments. It often requires repeated phone calls to the local office which is either not answered or requires leaving a message.

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<sup>7</sup> A small business is defined by the Census Bureau as a private company with 100 to 1500 employees while the Small Business Administration (SBA), depending on the industry, considers it as 250 to 1500 employees. Increasingly, businesses from 1 to 100 employees are entering the marketplace.

The phone call is rarely returned, so it is a huge and on-going investment of time by the employee to resolve this process and leads to a delay in the submission of the E-Verify query, often for many months. The employer is burdened by having to keep track of the queries that have not yet been submitted and must continually check back with employees on the progress of resolution. Significantly, these delays undermine the fundamental purpose of E-Verify.

**Resolving Tentative Nonconfirmations.** For E-Verify queries that received SSA Tentative Nonconfirmations (TNCs), the employee was not able to resolve them during the required window of time while the offices were closed and had the same difficulties outlined above in resolving the TNCs once the SSA offices were open in a limited capacity. E-Verify notified employers that queries would remain open for longer than 10 business days to accommodate office closures, but keeping queries open for months on end is a significant burden to employers as well as inconsistent with the primary objective of the program. They must continually keep track of an ever-growing number of open queries, now that pandemic is approaching two years. This is an unanticipated and excessive burden on employers that were already significantly over-burdened by an overly technical employment verification process that penalizes minor errors and places responsibility for this governmental function (i.e., employment verification) upon the shoulders of public and private sector employers.

**Obtaining Evidence of Lawful Permanent Residence.** USCIS office closures have also burdened employers trying to hire employees who need temporary evidence of permanent residence in their passports because a green card has expired and the green card renewal application remains pending at USCIS. Forms I-9 and the E-Verify process cannot be completed without this critical proof of employment authorization.

### **III. Considerations for Future Remote Document Examination Procedures**

- a. *Requirement to enroll in E-Verify, or keep copies of supporting documentation or receive DHS training as a condition of relying on virtual verification*

**Training as a Precondition to Virtual Verification.** AILA appreciates DHS' interest in maintaining the security of the Form I-9 verification process, including E-Verify, and supports DHS' interest in ensuring the highest levels of compliance. Developing additional incentives for training in the Form I-9 and E-Verify process is a reasonable goal. AILA suggests that an employer wishing to avail itself of virtual document examination procedure could be required **either to** participate in DHS' online training or rely on training by private counsel who is expert in this area to provide Form I-9 and E-Verify training on the proper completion of both Form I-9 and the E-Verify process, including ensuring that documents appear to be genuine on their face and relate to the individual employee.

**Implementing Technologies to Facilitate Employment Verification.** A requirement to keep physical copies of supporting documents appears to be increasingly anachronistic in today's digital world. In fact, the current Form I-9 process is still largely based on a "low-tech" methodology developed over 35 years ago. The Office of Inspector General (OIG) Report, issued on August 23,

2021 (OIG-21-56)<sup>8</sup>, highlighted DHS' commitment to eliminating an employer's burden to manually review photo documents and ensure that they are the same as the documents stored in the USCIS system. Specifically, DHS has committed to transition to a biometric comparison that happens online. AILA encourages DHS to adopt as rapidly as possible technologies and methodologies, such as the one highlighted above, that reduce burdens on employers while enhancing the speed, accuracy and efficiency of the employment verification process

**Ensuring that E-Verify Can Scale Up to Meet Increased Volume.** Similarly, a requirement to enroll in E-Verify may be possible but not until DHS is able to support a huge influx of users. The OIG Report notes that the current capacity is 10,430 concurrent users with a projected goal of 29,515 concurrent users.<sup>9</sup> With 1,000,000 employers currently enrolled (before mandating enrollment), there is already a significant concern about the ability of E-Verify to function properly at that increased capacity. Before proposing any increase in mandatory usage, DHS must test and confirm the capacity of E-Verify to scale up sufficiently to meet the demands of all existing and potential users.

#### IV. Other Considerations

- a. *DHS should eliminate the “secondary review” requirement for employees who were onboarded using remote verification*

As detailed in DHS' announcement regarding flexibility in requirements related to Form I-9 compliance, once the National Emergency ends or normal operations resume, all employees, who were onboarded using remote verification, must report to their employer within three business days for in-person physical verification of their identity and employment eligibility documentation.<sup>10</sup> AILA believes this “secondary review” requirement is an unnecessary and wasteful use of employer resources. In adopting Form I-9 flexibilities in response to the COVID-19 pandemic, DHS expressly authorized having employers review Section 2 documents remotely and set forth procedures for employers on how they could do so. If employers have, in good faith, followed these requirements, it is unreasonable and excessive for DHS to mandate that employers duplicate this expensive and time-consuming process through a subsequent in-person physical verification of identity and employment eligibility documentation. A critically important factor to consider, in addition to the inherent burden of the secondary review requirement, is that many employers have hired hundreds, and in some cases thousands, of employees in the more than twenty months that this policy has been in effect. To require that these employers conduct the additional step of an in-person physical verification of their employees' identity and employment eligibility documentation **within three business days** after the National Emergency has ended, is both unreasonable and unrealistic. For many employers, particularly those who have hired large numbers of employees during the pandemic, completing the additional, redundant step of an in-

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<sup>8</sup> USCIS NEEDS TO IMPROVE ITS ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS (OIG-21-56), OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HOMELAND SECURITY (Aug. 23, 2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-08/OIG-21-56-Aug21.pdf>.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> *DHS announces flexibility in requirements related to Form I-9 compliance*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SECURITY (Mar. 20, 2020), <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>.

person verification process *within three days* is likely to be accomplished without the typical care and competency devoted to this process, thus encouraging speed over accuracy and inefficiency over efficiency.

In addition, it is unlikely that this secondary review will confirm anything other than the proper completion of remote Form I-9 verification in almost all cases. Conducting a separate and subsequent Form I-9 review will be exceedingly costly for employers because in many cases they will need to hire and train large numbers of temporary employees to complete the process. These employers, some of which spend millions of dollars annually to ensure compliance with an employment verification requirement more appropriately administered by the federal government, will view any secondary review mandate as adding insult to an already substantial injury.

Relatedly, this secondary review will entail an in-person double-check of identity and employment eligibility documents. We believe this policy is unnecessary because the original digital review is as often good or better than an in-person review as it increases employer efficiency and compliance without sacrificing accuracy. Today, we digitally review documents on a daily basis, whether it is a driver's license, student ID, COVID-19 vaccination card, passport, etc. It is, therefore, questionable as to why identity and employment eligibility documents need to be double-checked through an in-person review process. In light of the fact that secondary review adds significant logistical and financial burden without a commensurate impact on compliance, AILA urges DHS to eliminate the secondary review requirement from its Form I-9 flexibility policy.

- b. *DHS should adopt a more agile and user-friendly strategy for updating changes to the current lists of acceptable documents on the Form I-9*

Both DHS and the Department of Justice Immigrant and Employee Rights (IER) section have reinforced that the key to maximizing compliance with the Immigration Reform and Control Act (IRCA) requirements is to educate and train employers on the proper completion of Form I-9. It seems obvious, however, that completion of the two-page form is not easy, given that it is accompanied by a 50+ page Handbook for Employers to assist in completing the Form I-9. DHS and IER have repeatedly confirmed that employers do not need to become document experts; instead, the guidepost to employees and employers has always been page 3 of the Form I-9, the List of Acceptable Documents (LOAD). The employee must present either one document from List A or one document from List B and one document from List C. The employer then completes Section 2 based on the documents presented by the employee. The difficulty in complying with this seemingly simple guidance is that an increasing number of documents have been deemed acceptable by DHS without any corresponding amendment of the LOAD, making it challenging for employees to understand what they can present and for employer to determine if a presented document is indeed acceptable. This is further exacerbated by the fact the Form I-9 does not refer to an employer's need to check elsewhere for additional acceptable documents.

There are over 30 documents that are not specifically listed on the LOAD but are acceptable documentation to confirm identity and authorization to work in the United States. Some of these documents are listed in the M-274, Handbook for Employers, some are part of the USCIS guidance on their website, others are obscurely outlined in USCIS memoranda, and yet others, while

considered acceptable, are not published anywhere.<sup>11</sup> As the past two years have shown, the list can (and must) have some flexibility due to circumstances outside the control of the employer or employee such as the pandemic, litigation, or changes in USCIS policy.

Employers, both small and large alike, are burdened with tracking this diverse array of guidance and need to spend an excessive amount of time and effort determining what can and cannot be accepted. Decades of Form I-9 compliance audits demonstrate that employers are overwhelmingly acting in good faith in attempting to document that their newly hired employees are authorized to work in the United States. It is therefore incumbent on DHS to simplify the process of determining which employment verification documents are acceptable for Form I-9 purposes.

AILA is concerned that the existing LOAD reflects less than one-third of the actual acceptable documents and is a significant contributing factor when employers reject an otherwise acceptable document. There is further concern regarding the complexity of what is included in the published list. AILA believes the deficiencies of the existing LOAD could be remedied in several ways, outside of updating the Form I-9 itself.

Specifically, the listing of documents on I-9 Central must include a separate list of all acceptable receipts, temporary documents, including temporary I-551 documents, auto-extensions, COVID-19 and other expired document exceptions. Any list would need to be periodically updated. DHS could also caution employers that the Supplemental LOAD List is fluid and subject to periodic updates.

Based on our members' experience, we believe many employers may not be currently aware of USCIS guidance and M-274 updates that allow for accepting documents such as:

- Temporary Driver's Licenses that contain a photo OR identification such as name, date of birth, gender, height, eye color, address;
- List B documents set to expire on/after March 1, 2020 that are not otherwise extended by the issuing authority (and treating them like Receipt);
- List B documents that have expired on/after March 1, 2020 that have been extended by the issuing authority due to COVID;
- Document combinations for certain J-1s and F-1s that include the presentation of an I-94 and other specific documents.

The list of acceptable documents is long, complex and contains an exhausting array of options. We encourage USCIS to compile and maintain it in such a way to ensure work authorized employees are not inadvertently rejected and employers are not unjustly overburdened.

In addition, the list should also add new document options, illustrating some of the more uncommon examples of existing documents. USCIS could also link explanations to the current list with a detailed description of sample scenarios in which that document might be appropriate. For example, with List A, Foreign passport with Form I-94 or Form I-94A with Arrival-Departure

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<sup>11</sup> We are aware of situations in which IER attorneys have provided guidance, shared with their office but not publicized regarding certain acceptable documents.



Record, and containing an endorsement to work, could include examples, explaining that for H-1B portability cases, the documents are an unexpired foreign passport, a Form I-94 from the prior employer, and evidence of filing Form I-129 with current employer. With List B, the ID card issued by federal, state or local government agencies or entities could specify that acceptable ID cards include NEXUS, SENTRI, FAST/EXPRESS, and Global Entry cards. For List C, the thorny employment authorization documents issued by the Department of Homeland Security considered (C)(7) employment authorization documents ([already found on I-9 Central](#)) but not on the Form I-9 itself, could be delineated wherever possible. These documents include Form I-94 Arrival/Departure Record issued to asylees or work-authorized nonimmigrants (for example, H-1B nonimmigrants) or the newly added Form I-94 containing a notation indicating that the bearer is an E or L dependent spouse, Form I-571, Refugee Travel Document, an unexpired Form I-327, Reentry Permit, Form N-560, Certificate of U.S. Citizenship or Form N-561, Replacement Certificate of Citizenship (or Form N-550, Certificate of Naturalization or Form N-570, Replacement Certificate of Naturalization), a Form I-797 issued to a conditional resident (noting an I-751 or I-829 filing) in combination with an expired Form I-551.

Creating an easily updated and easily accessible supplement to the LOAD until such time as the Form I-9 is amended, (and even after that), will ensure that employers are provided the tools they need to quickly and efficiently onboard and reverify (when required) employees. In addition to aggregating the listing of new documents not found anywhere on the LOAD, USCIS could also provide an expanded array of live and online resources to assist employers with reviewing the more complicated document scenarios.

## **V. Conclusion**

AILA appreciates the opportunity to provide input to the agency regarding remote document examination for Form I-9. AILA looks forward to a continuing dialogue with USCIS on this and related matters.

Please address any concerns or questions to AILA Director of Government Relations Sharvari Dalal-Dheini at [SDalal-Dheini@aila.org](mailto:SDalal-Dheini@aila.org).

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

# EXHIBIT A



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

April 13, 2021

Alejandro Mayorkas  
Secretary  
Department of Homeland Security  
1880 2<sup>nd</sup> Street SW  
Washington, DC 20024

**Re: Modernizing the Form I-9 Employment Eligibility Verification Process**

Dear Secretary Mayorkas:

On behalf of the American Immigration Lawyers Association (AILA), we write to express our gratitude to the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) for granting continued flexibility regarding the in person review requirement for the Form I-9 employment eligibility verification process during the global COVID-19 pandemic<sup>1</sup> and to suggest an important opportunity to modernize the process. While there are a multitude of areas that require modernization of our immigration system, the focus of this letter is to respectfully urge DHS and ICE to reconsider its interpretation of the regulatory requirement, found at 8 C.F.R. § 274a.2, that an employer “[p]hysically examine the documentation presented by the individual establishing identity and employment authorization” when completing Form I-9, Employer Eligibility Verification. Currently, the physical inspection requirement is interpreted by USCIS and ICE to mean that the employer must review the documentation *in person*. We believe this strict interpretation of regulations, formulated almost three and one-half decades ago, can and should be updated as part of a longer-term operational effort to maximize efficiencies and improve employee and employer experience (including improving the health and safety of those involved in the Form I-9 process). AILA believes that certain virtual review (which includes a video conference where the employee’s identity and the proffered documentation are reviewed simultaneously but does not include a faxed or emailed set of documents alone) of documentation for Form I-9 purposes constitutes physical examination within the meaning of the existing regulations. Further, the temporary relaxation of the in-person verification requirement should, due to changes in technology and business realities, become – perhaps with some adjustments – a permanent change to agency interpretation.

**Regulatory Language**

A shift in agency interpretation does not require legislation. The existing regulation (8 CFR § 274a.2(b)(1)(ii)(A)) requires that an employer “[p]hysically examine the documentation presented by the individual establishing identity and employment authorization.” One definition of

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<sup>1</sup> *DHS Extends Form I-9 Requirement Flexibility (Effective Mar. 31, 2021)*, U.S. CITIZENSHIP & IMMIGRATION SERV. (Mar. 31, 2021), <https://www.uscis.gov/i-9-central/form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-mar-31-2021>.

“physical” is “perceptible to the senses,” which would include sight. In medicine, a “physical inspection” is “the process of examining the body by means of *sight*, touch, percussion, *or* auscultation to diagnose disease or verify fitness.”<sup>2</sup>

Even if “physically” originally assumed “in person,” that assumption is no longer the most logical. When the relevant regulations were drafted, the authors could not have conceived of the current quality of video offerings and technology that provide clear, secure, and thorough methods of verifying identity and capturing document images. E-Verify was also unavailable. The combination of new video technologies make virtual review a much more secure and accurate procedure.

In order to be responsive to the COVID-19 global pandemic as well as technological advancements, federal and local governments and the private sector have begun to reevaluate in-person requirements. Examples include the following:

- The majority of states have enacted some form of remote online notarization law allowing notarial acts (which are meant to confirm the identity of the signatory) to be completed using audio-visual communication rather than in-person confirmation of identity.<sup>3</sup>
- Thirty-eight of the 69 immigration courts are offering Webex video conferencing for hearings.<sup>4</sup>
- Members of AILA have experienced criminal proceedings being handled via video; and there are even moves in some states toward virtual grand jury hearings.<sup>5</sup>
- The Miami Asylum Office has announced that on March 24, 2021, a pilot program allowing video appearances of attorneys and representatives will begin.
- The Internal Revenue Service interprets “in-person” for interview recordings to include telephone interviews.<sup>6</sup>
- Virtual medical exams have become common. In fact, Medicare regulations state that “face-to-face” includes telemedicine.<sup>7</sup>
- In some states, marriages do not require an in-person officiant.<sup>8</sup>

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<sup>2</sup> Both definitions found in the Collins Online Dictionary.

<sup>3</sup> *Coronavirus: Federal and state governments work quickly to enable remote online notarization to meet global crisis*, DLA Piper (Feb. 11, 2021), <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/>.

<sup>4</sup> *Operational Status Map*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir-operational-status/operational-status-map>.

<sup>5</sup> See C. Villani, *Lori Loughlin, Husband Plead Guilty in 'Varsity Blues,'* LAW360 (May 22, 2020), <https://www.law360.com/california/articles/1276185>.

<sup>6</sup> *Simien v. Internal Revenue Service*, 2007-1 USTC 50,352.

<sup>7</sup> 42 CFR § 424.22(a)(1)(v)(A)(4)(B).

<sup>8</sup> Procedures for Virtual Marriage Ceremonies Conducted by Non-City Clerk’s Office Marriage Officiants, OFFICE OF THE CITY CLERK, THE CITY OF NEW YORK, <https://www.cityclerk.nyc.gov/assets/cityclerk/downloads/pdf/Ceremonies%20Procedures%20for%20non%20city%20clerk%20conducted%20ceremonies%20FINAL%2005%2007%202020.pdf>.

- Real estate closings are being handled virtually.<sup>9</sup>
- New York conducts statewide virtual workers' compensation hearings using a computer or mobile device.<sup>10</sup>
- U.S. citizens may apply for replacement social security cards online.<sup>11</sup>

There are clear ways to allow for secure and thorough document review without an in-person requirement.

Further, virtual review actually allows for a more thorough review and scrutinization of documentation than does in-person review. With clear color copies of the front and back of a document, the reviewer can enlarge the document to more closely examine perceived issues. The copies can be shared with the employer's attorney if the employer has questions about their authenticity. And many employer representatives may be more comfortable taking additional time to review a questionable document virtually than when sitting with the employee in person.

Finally, even if there is a return to "normal operations," we expect that employees may continue to wear masks. Virtual review allows the employer to more safely compare the photograph on the identity and employment authorization documentation with the employee's own face. Virtual review eliminates concerns about asking an employee to remove a mask and concerns about touching documentation and the possible transmission of a virus through touch. As we move into a post COVID-19 world it is critical that employees and employers are protected during the onboarding process.

### **A Change in Interpretation Would Benefit Employers, Employees, and the Federal Government**

This change in interpretation would benefit employers, employees, USCIS, ICE, and the Immigrant and Employee Rights (IER) section of the Department of Justice for a number of reasons. Employers, as a matter of business reality, often hire new employees without any sort of in person meeting. Many employees work for an employer without ever setting foot in the employer's offices. The Form I-9 process, as currently defined, requires that remote hires meet with an employer representative or agent to complete the Form I-9 in person. Such in person reviews by agents are more difficult than they were prior to COVID-19.

In the past, employers have relied on notaries or third party services when possible for this process, even though notaries/vendors are generally not trained in the specific rules related to the Form I-9 and risk paperwork violations, inadvertently committing an act that may constitute discrimination,

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<sup>9</sup> Sydney Franklin, *Real Estate Transactions Go Virtual*, THE NEW YORK TIMES (Nov. 11, 2020) <https://www.nytimes.com/2020/11/11/realestate/10virtual-deals.html>.

<sup>10</sup> *Virtual Hearings*, WORKERS COMPENSATION BOARD, NEW YORK STATE, <http://www.wcb.ny.gov/virtual-hearings/>.

<sup>11</sup> *Social Security Number and Card*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/ssnumber/#issnrc>.

or otherwise rejecting acceptable documentation. In at least one state<sup>12</sup>, notaries are prohibited from completing the Form I-9, leaving employers scrambling to identify agents for the I-9 process.

Many employers require their employees to identify someone to act as the employer's agent for I-9 completion. This leaves the Form I-9 in the hands of someone who is even less likely to understand the complex Form I-9 rules, more likely to break those rules or otherwise commit paperwork errors, or to mistakenly attest to the fact that the new hire is authorized to work in the U.S. even if the new hire is not.

Allowing employers to have their trained professionals conduct virtual review of new hire documentation reduces the number of paperwork errors, reduces the risk of discrimination, and reduces the chances that the employer will accept fraudulent or unacceptable documentation. Because, as set out above, virtual review is in many cases *more thorough* than in person review, and because document review is more likely to be conducted by professionals trained in the I-9 process, allowing virtual review would in many cases increase compliance with USCIS, ICE, and IER objectives relating to paperwork requirements, confirmation of employment authorization, and nondiscrimination.

In the specific COVID-19 context, a revised interpretation of physical review would also help employers tailor their virtual review processes to reduce or eliminate the need for follow-up document inspections after a return to normal operations. A clear statement of the specific requirements for acceptable virtual review would also help ICE and IER in their enforcement efforts now and in the future when reviewing I-9s completed during 2020 and beyond.

### **Suggested Process for Virtual Review**

AILA respectfully suggests that DHS and ICE publish guidance allowing for virtual review of identity and employment authorization documents in the following circumstances:

1. The review is conducted via a web-based audio/visual meeting (i.e., not by fax or e-mail);
2. Copies of the front and back of the documents presented are made and retained with the Form I-9; and
3. The employer uses E-Verify to confirm the identity and employment authorization of the new hire.

### **Conclusion**

Many facets of our daily life that would previously have involved “in person” encounters have shifted dramatically over the past year, and in many cases may permanently change to virtual environments going forward. In light of these changes and the opportunities presented by virtual

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<sup>12</sup> See CA Business and Professions Code sections 22440-22449.

review, employers are seeking the option to review I-9 documents virtually as a permanent alternate to in person document review, something that would benefit not only employers but also the federal government. President Biden has made clear that one of his priorities is to modernize the immigration system.<sup>13</sup> We believe that modernizing the process for completing Form I-9, the most commonly completed immigration form in our country, is a perfect place to start.

We thank you for your consideration of this matter. If you require any additional information or clarification, please contact Sharvari (Shev) Dalal-Dheini at (202) 507-7621 or by email at [sdalal-dheini@aila.org](mailto:sdalal-dheini@aila.org) or Diane Rish at (202) 507-7642 or by email at [drish@aila.org](mailto:drish@aila.org).

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

cc: Tracy Renaud, Senior Official Performing the Duties of the Director, U.S. Citizenship and Immigration Services  
Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement  
Alberto Ruisanchez, Deputy Special Counsel, Immigrant and Employee Rights Section, U.S. Department of Justice

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<sup>13</sup> *Biden to sign order to modernize the U.S. immigration system on Tuesday*, REUTERS (Jan. 29, 2021), <https://www.reuters.com/article/us-usa-biden-immigration/biden-to-sign-order-to-modernize-the-u-s-immigration-system-on-tuesday-idUSKBN29Y23G>.