



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

August 8, 2022

Samantha L Deshommnes,
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Submitted via www.regulations.gov
e-Docket ID number USCIS-2006-0068.

Re: Comment to Proposed Revision of a Currently Approved Collection: Employment Eligibility Verification (Form I-9); OMB Control Number 1615 0047

Dear Ms. Deshommnes:

The American Immigration Lawyers Association (AILA) respectfully submits this response to the above-referenced 30-day notice and request for additional comments on proposed changes to Form I-9, Employment Eligibility Verification, as published in the Federal Register on July 8, 2022.¹ This response is submitted in conjunction with our comments of May 31, 2022², incorporated herein by reference. Specifically, we provide information regarding whether the proposed collection of information is necessary for the proper performance of the functions of the agency, suggestions for enhancing the quality, utility, and clarity of the information to be collected, and proposals for minimizing the burden of the information collection.

Established in 1946, AILA is a voluntary bar association of more than 16,000 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 nationality 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. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Introduction

¹ 87 FR 40857 (July 8, 2022)

² See AILA Submits Comments on Proposed Revisions to Form I-9, May 31, 2022, available at <https://www.aila.org/infonet/comments-on-proposed-revisions-to-form-i-9>.

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 | Fax: 202.783.7853 | www.aila.org

AILA would first like to applaud U.S. Citizenship and Immigration Service (USCIS) for considering and implementing many of the public comments received in its latest revision to the proposed Form I-9. The resulting one-page form is a significant improvement over the prior proposal. While we continue to urge USCIS to reconsider its plan to return to a one-page format from the current two-page version, we understand that the majority of employees will now only require completion of this single page. Moving the less common sections of the form to addenda is a welcome compromise. Critically, moving the preparer/translator section to an addendum created space on the form to improve the Section 2 document fields. And the addition of an “additional information” section for reverification increases functionality.

We also greatly appreciate the reintroduction of boxes for individual digits of the Social Security number and the return of three separate spaces for noncitizens in category 4 to record USCIS/A numbers, I-94 numbers, and passport information, although we would still recommend including separate fields for the passport number and country of issuance.

The many places where USCIS added “if any” (and removed the requirement for the user to indicate “N/A”) improve the overall form and reduce the burden on the user. The additional comments on the Lists of Acceptable Documents relating both to receipts and to expired documents that have been extended by the issuing authority are also helpful. The new proposed form offers impactful improvements over the previously published form, and AILA is grateful to USCIS for making these changes. Below we offer additional comments that we believe will further improve the functionality of the form while reducing the burden on employers and employees and increasing overall employer compliance.

Suggestions for Improvement

In addition to reducing the length of the Form I-9 and the burden of its completion, USCIS has an opportunity to make the Form I-9 more useful and helpful to employers.³ We urge USCIS not to miss this opportunity. We believe the following enhancements to the form would dramatically improve the Form I-9 user experience:

1. Adding a method for new hires to indicate that an application for a SSN has been submitted (and a method to indicate the date the SSN is later added);
2. Including a box for those in the “Category 4” noncitizen group whose work authorization does not expire to check (instead of writing “N/A”);
3. Removing the employee address requirement;
4. Removing the employer address requirement;
5. Making clear that the e-mail and phone number fields are optional (or removing them entirely);
6. Adding a Form I-9 retention calculator;

³ While we have numerous suggestions relating to improvements for E and L spouses, the definition of “physical” examination of documents, E-Verify, and additional opportunities for USCIS to modernize the Form I-9 process, we focus this comment on specific changes to the Form I-9, the Lists of Acceptable Documents, and the forms accompanying instructions.

7. Including checkbox options in the “additional information” field to provide a simpler and more useful method for employers to remember and properly apply the various notations that are needed and to track critical data (see below for additional details);
8. Separating the rehire and reverification sections of the form;
9. Providing clearer instructions on the Form I-9 relating to reverification (to avoid accidental use); and
10. Adding the date of the auto-extension to Form I-797 notices so that employers (and ICE agents) do not need to calculate the current dates.

We understand that these changes may require reverting to a two-page form or including additional addendum sections. However, while USCIS has succeeded in reducing the first two sections of Form I-9 from two pages to one page on the form, we note that the proposed form has arguably expanded Form I-9 from 3 pages to 4 pages.⁴ As previously explained, in our extensive and collective experience, the change from one-page to two pages had the very real effect of reducing the number of inadvertent errors made by both foreign nationals and employers because the respective responsibilities of employers and employees are clearly delineated on two separate pages of the current Form I-9, providing adequate space for all relevant information.

We believe the focus on paper reduction alone is misplaced when: (1) many employers need more comprehensive and clear instructions on Form I-9 completion with adequate space for input, and (2) many, if not most, employers are relying on electronic Forms I-9 and electronic storage of Forms I-9. The trend away from paper forms and toward electronic completion and retention has existed for many years and it is reasonably foreseeable that more employers will continue to gravitate toward electronic Forms I-9. Broader utilization of electronic forms will reduce paper use and storage burden, as well as provide greater flexibility to provide useful completion guidance. We believe the government’s focus would better be placed on the promotion and facilitation of electronic versions of Form I-9 rather than encouraging or accommodating use of the paper form. Additionally, as explained in more detail below, we believe the compression of the form from two pages to one page does not improve quality, utility, clarity, or reduce the effective burden of the Form I-9. The compressed form will send employers back in time to an era full of inadvertent but costly errors, and occasionally may lead to the unintentional hiring of unauthorized workers.

Comments Specific to Section 1

While there have been welcome changes to the Form I-9 and the instructions from the original NPRM of March 30, 2022, there remain elements of the currently proposed form that increase the likelihood of mistakes by the employer and employee that cannot be justified on the basis of efficiency.

⁴ Should the agency move forward with the condensed Sections 1 and 2, USCIS might consider a single page of addendums to include the Preparer/Translator section, a Rehire section, and a separate Reverification section, which would allow for the new Form I-9 to comprise 3 pages rather than 4.

We continue to suggest improvements to the proposed Form I-9, should it remain with both Section 1 and Section 2 on the same page as follows:

1. Adding Vertical Letters – “Employee” to left of Section 1
2. Adding the following helpful guidance inside the Section 1 grey ribbon at the top of Form:
 - a. “EMPLOYERS MAY NOT COMPLETE SECTION 1 unless using Supplement A to Form I-9 as a Preparer or Translator.”
 - b. “Responses provided in SECTION 1 by EMPLOYEES can subject them to serious immigration consequences, such as removal or ineligibility for immigration benefits, if not correct.”
3. In the Social Security number box, clarify by adding “if required, See instructions” or “optional unless employer uses E-Verify” to prevent unnecessary sharing of protected personally identifiable information.
4. As previously noted, provide space in the Social Security number box to indicate the date the Social Security Number was applied for and date it was added.
5. Removing the Employee Address fields. They are not necessary to determine the employee’s eligibility to work in the U.S. DHS can ask the employer for the employee’s updated address if DHS needs the address to conduct an enforcement action. Also, listing the address can lead employers to reject identity documents that reflect a different address, creating unnecessary opportunities for inadvertent unfair document practices.
6. Removing the fields for “Employee’s E-mail Address” and “Employee’s Telephone Number” as this information is not required by law and will otherwise create confusion (or, if they are not removed, making clear that these fields are optional).
7. Changing the language for Section 1, Box #4 to a “**noncitizen authorized to work,**” deleting the reference to “other than Items # 2 and 3 above” as it is confusing and likely to lead to inadvertent errors, and adding two boxes for the employee to select (A) without expiration or (B) temporarily (with a clear line for the expiration date) to clarify whether the employee is authorized to work indefinitely or with limitation.
8. Adding the letter “r” to the word “county” in Section 1, Box #4 “Foreign Passport Number and **County** of Issuance.”
9. Reintroducing two separate fields for the passport country of issuance and passport number.
10. Adding language to the attestation to ensure that employees understand the full scope of the legal consequences of completing the form and how this information may be used against them, especially in immigration proceedings: “NOTE: Information provided on this form may be used against you in future immigration proceedings.”
11. Adding “by my signature below” to the attestation for additional clarity: “I attest, **by my signature below**, under penalty of perjury...”
12. Increasing the font size in Preparer/Translator Reference under the Section 1 signature line for ease of reference and use a link (with blue font) to reference

Supplement A as has been done at the bottom of the page directly under Section 2 to reference Supplement B.

13. In the instructions for completion of Section 1, we suggest that USCIS improve clarity and usefulness by making the following changes:

- a. Adding the following to the instructions regarding Social Security Numbers: “A person’s Social Security Number is considered protected Personally Identifiable Information and should be safeguarded from unnecessary access by third parties.”
- b. Adding under “Step 2. Attest to your citizenship or immigration status”: “Responses provided in SECTION 1 by EMPLOYEES can subject them to serious immigration consequences, such as removal or ineligibility for immigration benefits, if not correct.”
- c. Adding clarifying language to the “Do not back-date this field” instruction to read “Do not provide a date earlier than the actual signature date in this field.”

Comments Specific to Section 2

We again thank USCIS for reviewing and implementing comments made by AILA and other stakeholders in Section 2. While we again reaffirm our suggestion to place Sections 1 and 2 on separate pages, our recommendations below are focused on the current proposed Form I-9.

1. We suggest that the field for “First Day of Employment” box should be more prominently displayed. In its current position, many employers will fail to complete this field.
2. We also suggest that the instructions for the “First Day of Employment” field should reside in the Section 2 instructions (in addition to, or instead of, where they currently reside, in the definition of “Employees”). We ask that USCIS consider relocating the instructions and clarifying that, if the First Date of Employment is changed, the employer may, but is not required to, update the date. It is too burdensome for larger employers, including those in the hospitality, retail, agriculture, manufacturing, and other industries, where start dates frequently change, to make this update. Further, the Section 2 instructions should clarify that the first day of employment corresponds with the intended date for the employee to begin performing labor or services in the U.S. in return for wages or other remuneration.
3. Due to the fact that the employee and employer no longer each have a separate page, we suggest that USCIS add, in vertical letters, “Employer” to left of Section 2.
4. In the horizontal line in Section 2 containing “List A,” “List B” and “List C”, in order to avoid confusion and to ensure employers are aware of the document requirements under 8 CFR § 274a.2, we suggest moving the word “OR” in the grey bar between Lists A and B to the same horizontal level as the word “and” between Lists B and C.

5. Currently there are “combination documents” that must be reviewed to satisfy lists other than List A. For example, USCIS states that an expired Permanent Resident Card with a Form I-797 Notice of Action for Form I-751 Petition to Remove Conditions serves as a List C document. An F-1 student working under Curricular Practical Training may present Forms I-94 and I-20 as a List C document. However, the employer is not given instructions on what to record on the Form I-9, and List C only has space to record information from one document, not two. We suggest adding List C fields and providing clearer instructions to employers on what to record on the Form I-9 and where to record it. Alternatively, the “additional information” area might be used to make this process much simpler for employers. Please review the attached proposed Forms I-9 (provided previously with our earlier comment), which have a “receipts” list and the option for an employer to check a box to indicate that the LPR card was presented with a Form I-751 receipt.

6. Due to the continuously evolving guidance and the enormous amount of information USCIS requires be placed in the Additional information field, we suggest creating a place in Supplement B for “Notes and Additional Information.” This would provide a space for employers to record any data that does not fit in the existing, relatively small space in Section 2. In this case, we also suggest adding a check box to indicate whether Supplemental B is being utilized to provide additional information.

7. AILA also renews our request to include check boxes for the employer in the Additional Information section. Specifically, these boxes should allow the employer to add specific information relating to:

- a. Automatic Extensions;
- b. Optional Tracking Details (such as EAD category code and TPS country);
- c. Optional E-Verify Details; and
- d. Receipts. By including fields for this specific information, employers will be able to better understand when a receipt is required/acceptable and under what List of Acceptable Documents the information should be placed.

Please refer to AILA’s suggested “additional information” sections on both proposed versions of Form I-9 included with our May 31, 2022 comment (copies enclosed).

8. We also seek clarification surrounding the instructions related to the Additional Information Box. The updated Instructions located at the bottom of Page 5 note the employer or an authorized representative should record “any additional information required to complete Section 2, or any updates that are necessary once Section 2 is complete. Initial and date each additional notation.” Should employers consider this to mean that only updates made after the execution of Section 2 require the individual making the update to initial and date? Further if the person who initially signed Section 2 is not the person making the additional notation, should they include their full name and title?

9. Underscore or otherwise highlight “Title of Representative” in the signature block. It is too easy to miss. Alternatively, separate the last name, first name, and title fields to ensure that this is not overlooked.
10. Further, it would be helpful if the instructions clarified what “Title of Employer or Authorized Representative” means. This should be clarified to better inform the person completing the verification that, if they are an employee of the business or organization employing the new hire, their job title should be written, but that if person completing the verification is a third-party authorized representative, then that person should only write that he/she is an “Authorized Representative,” as that person does not necessarily have a title with the employer. This provides clarity for both the employer and the government agencies reviewing the Forms I-9 for compliance.
11. Finally, we question whether a business address is needed in Section 2 of the Form I-9. If it remains, USCIS might consider providing instructions to clarify that the employer can choose to list the headquarters address, the address where verification of employment authorization is conducted, or the address where the employee will work.

Comments Specific to the Lists of Acceptable Documents (LOAD)

AILA appreciates that UCSIS has, in its proposed new Form I-9, improved the Lists of Acceptable Documents (LOAD). Specifically, we applaud the addition of statements clarifying the acceptability of receipts, reiterating that documents must be unexpired, and also indicating that documents extended by the issuing authority are considered unexpired. We agree that it is important to highlight these points and we commend USCIS for doing so.

We believe, however, that the LOAD page in particular highlights the difficulties employers face in determining acceptable documents due to the complexity and ever-changing nature of our immigration laws. For compliance, the goal should be simplicity as well as fairness. Employers are faced with a practical labyrinth of references to determine what documents are acceptable for completion of the Form I-9. The M-274 in Section 12 directs employers and employees to I-9 Central. I-9 Central includes a Latest Headlines page and a list of acceptable documents link, which is incomplete. Federal Register notices are frequently issued that change or add to the LOAD. And E-Verify employers must be aware that some documents must include photos in order to be acceptable. This convoluted array of instructions can lead well intentioned and compliance-focused employers to incorrectly terminate work-authorized employees from their jobs.

At a recent liaison meeting between the American Immigration Lawyers Association (AILA) and U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE) – Homeland Security Investigations (HSI), DHS Civil Rights and Civil Liberties (CRCL) and the Department of Justice’s Immigrant and Employee Rights Section (IER) on April 7, 2022, AILA committee members noted that there are now more than 26 additional document combinations that can be presented to complete the Form I-9, which are not listed on the Form I-9 itself. A copy of the revised LOAD prepared by AILA for that meeting is attached hereto.

We recognize that USCIS provides a Form I-9 Contact Center, but we believe that the M-274 should be modified to direct employers to a page on I-9 Central that is maintained in real time to reflect all acceptable document combinations with examples of what they look like and how to complete the relevant Form I-9 section. In that same list, references to Federal Register notices with respect to automatic extensions of Temporary Protected Status based work authorization should be provided. The LOAD page is a critical component of Form I-9 compliance, but employers are currently left to research too many locations to make sure that they are accepting all appropriate documents. This page should also annotate the modifications required by E-Verify employers as opposed to directing employers to yet another page on the USCIS website. We believe this simple approach will improve both the likelihood that employers will locate relevant information and ensure compliance with the employment verification process.

In addition, HSI should confirm the responsibility of reasonable employers in relation to the determination of the current LOAD. It seems that employers must – at minimum - consider the Form I-9, the Form I-9 instructions, the M-274, I-9 Central, and the E-Verify section of the USCIS website to feel reasonably certain that they are conducting their Form I-9 legal compliance in an acceptable manner. Reducing the Form I-9 to one page in no way reduces the complex maze of documents deemed acceptable to provide work authorization and we believe it is imperative that USCIS give equal priority to providing employers with a simplified resource for ensuring compliance with the Form I-9 documentation requirements.

List C, Item 7

List C, Item 7 presents significant compliance challenges to employers trying to satisfy their employment verification requirements because there is no link to a single location on I-9 Central, and USCIS is unable to update the M-274 to keep pace with immigration law and policy changes. The proposed changes to the upper portion of List C now refer employers and employees to Sections 6 and 12 of the M-274. Section 6 of the M-274 refers to “Evidence of Status for Certain Categories,” while Section 12 provides an incomplete list of “Acceptable Documents.” (Please note that the proposed new instructions to the LOAD omit the reference to Section 6 and only refer to Section 12.)

The M-274 notes in Section 12.0 that, “However, this section does not provide all of the variations of a particular document, and new versions of a document may become available after we publish this handbook... For examples of acceptable employment authorization documents issued by the Department of Homeland Security (List C #7), please visit uscis.gov/i-9central.” I-9 Central’s LOAD link includes the following information regarding List C, Item 7 employment authorization documents:

Employment authorization document issued by the Department of Homeland Security (DHS)

Some employment authorization documents issued by DHS include but are not limited to [Form I-94 Arrival/Departure Record](#) issued to asylees or work-authorized nonimmigrants (for example, H-1B nonimmigrants) because of their immigration status, [Form I-571, Refugee Travel Document \(PDF\)](#), an unexpired Form I-327, Reentry Permit, Form N-560, [Certificate of U.S. Citizenship or Form N-561, Replacement Certificate of Citizenship \(PDF, 40.3 KB\)](#), or Form N-550, [Certificate of Naturalization or Form N-570, Replacement Certificate of Naturalization \(PDF, 176.3 KB\)](#). A Form I-797 issued to a conditional resident may be an acceptable List C document in combination with his or her expired Form I-551. Form I-9 [contact center](#) can assist with questions on DHS-issued documents.

As noted above, I-9 Central does not contain a single location listing all current LOAD documents. We encourage the establishment of one central link, to be updated in real time. This will make employer compliance more likely, will allow employees to more easily determine what they need to present to employers, and will prevent inadvertent discrimination issues.

Additional Proposed Changes

- Please consider adding the word “immigration,” before the word, “status,” at List A, Item 5 to clarify the intent of the provision.
- The last line on the page contains an “*” reference to the employment authorization extensions page on I-9 Central. We are not sure to what portion of the LOAD page the asterisk refers, and USCIS should clarify to which section of the LOAD it relates. It is unclear but perhaps List A, Item 4 should be the line designated for this reference.
- The clarification in List C that a Form I-766 is a List A, Item 4 document may be better placed in the same “*” reference rather than in Item 7 of List C due to its relevance to List A.
- For consistency, we further suggest that the bottom portion of the LOAD relating to Acceptable Receipts should refer to the M-274 as well as to I-9 Central, particularly as to receipt validity dates, as I-9 Central is used to provide ongoing guidance with respect to updates. It would be helpful if the current “Latest Headlines” portion of the home page of I-9 Central would also include a LOAD filter category in the “Related News” page.

Comments Specific to Supplements A and B

Following the initial comment period, we appreciate USCIS’ revisions that allow for easier completion of Form I-9 by both the employee and employer. Specifically, the proposed revised version of the Form I-9 includes some beneficial changes, such as the following:

1. Moving the Preparer and/or Translator Certification from page 1 to Supplement A, allowing for more space for other items in Sections 1 and 2 on page 1 of the Form.
2. The inclusion of an “Additional Information” section in Supplement B (formerly Section 3) will permit employers to include key information relevant to the reverification process, including references to EAD auto-extensions, TPS extensions, and receipts.
3. The instructions for Supplement B now clarify that “[e]mployers need only complete and retain the supplement page when employment authorization reverification is required.”

Nevertheless, to ensure that Form I-9 is even easier to use by employers and employees, and thus ensuring a more fully compliant verification process, AILA makes the following recommendations to Supplements A and B.

Supplement A, Preparer and/or Translator Certification for Section 1

1. As previously noted, on the bottom of Section 1, include a reference to Supplement A for Preparer and/or Translator assistance, similar to reference to Supplement B at the bottom of the page.
2. Given the extra space on the page, we recommend increasing the font size to enhance readability or including three separate addenda on one page (Preparer/Translator, Rehire, and Reverification). In the second option, we recognize that an employer would add a new addendum page to the Form I-9 for subsequent rehire or reverification events, but the Form I-9 would return to a three page (rather than the current four page) total length.
3. In the instructions section on the top of page, add “above” (i.e. “in the spaces provided **above**”) at end of second sentence to clarify preparer and/or translator enters employee’s name in boxes on top of the page.
4. The instructions to Supplement A should clearly state that if a preparer/translator is not utilized, the employer is NOT required to retain a blank Supplement A with the Form I-9.

Supplement B, Reverification and Rehire (formerly Section 3)

1. To be consistent with the List of Acceptable Documents, as well as List C’s references to the M-274 and I-9 Central, the instructions for Supplement B should also refer to both sources and not just to the M-274.
2. We reiterate our previous suggestion that USCIS reorganize the “Reverification, Update, Rehire, or Name Change” into separate sections to aid employers and avoid misunderstanding or misuse of Supplement B. Please refer to our preciously provided proposed “one page” Form I-9.
3. Clarify the reverification instructions to differentiate between an update (after presentation of a receipt) and a reverification (which only applies to “Category 4” nonimmigrants. Please refer to our previously provided proposed Forms I-9 for proposed instructions.

4. In the instructions, at page 5, Reverifications, first paragraph, last sentence, we suggest replacing “additional” with “subsequent” for enhanced clarity. The new sentence should read as: “Employers should complete any **subsequent** reverifications by the expiration date of the List A or List C documentation entered during the employee’s most recent reverification.” Please refer to AILA’s suggested reverification instructions on the sample “two-page” version of Form I-9 included with our May 31, 2022 comment (copy enclosed).

5. We also suggest including a retention calculator, similar to the chart published on I-9 Central, as a separate supplement. Please refer to AILA’s suggested retention calculator on the proposed “two-page” version of Form I-9 included with our May 31, 2022 comment (copy enclosed).

Conclusion

AILA appreciates the opportunity to provide feedback to the agency regarding its proposed revisions to 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.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION