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Department of Homeland Security
131 M Street, NE
Washington, DC 20529-2600

Re: Comments Concerning I-9 Central

Dear Ms. LaGonterie:

The American Immigration Lawyers Association ("AILA") is a voluntary bar association of more than 11,000 attorneys and law professors engaged 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. Many AILA 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. Thus, our members' experiences and collective expertise provide more insight to the on-the-ground challenges employers face in complying with I-9 related matters.

DISCUSSION SUMMARY

AILA is pleased that USCIS has launched the I-9 Central website in an effort to provide a central resource widely available to employers with relevant information and guidance related to the employer's I-9 employment verification obligation. In reviewing the information posted on I-9 Central, observing the process used in 2011 to update the website, and regularly counseling employers trying to use I-9 Central as a source of guidance, several issues have come to our attention that we wish to bring to the agency's attention.

While the effort to create and maintain I-9 Central is laudable, we believe that a number of important changes are needed to ensure the accuracy and reliability of information presented on I-9 Central. It is not clear to us, based on the comments noted below, whether and how the information posted on I-9 Central is vetted by United States Citizenship

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and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), the Department of Justice's Office of Special Counsel for Immigration Related Discrimination (OSC), the Social Security Administration (SSA), and other relevant agencies prior to posting. Some information referenced in I-9 Central is inconsistent with other pronouncements by the relevant agencies. In addition, it is of vital importance that the agency identifies when each page or line of I-9 Central has been updated – not just on the "What's New" link, but in brackets after the text or via footnotes. An employer has no way of knowing if the information on any particular page has changed by just viewing the page. No history of changes is provided under the "What's New" heading. Moreover, as it currently stands, there is no way to prove to ICE, or others, that the information the employer may have relied on at one point was current at that time without making a printout from the internet showing a print-out date each and every time an employer relies on I-9 Central information. This result is an unworkable approach and defeats the purpose of accountability by the government for its posted information.

We request that USCIS consider the following:

UPDATING I-9 CENTRAL CONTENT

1. **Highlight Changes.** When a document, information, or graphic is changed, we request that the agency provide a summary of the substance of the changes to the relevant I-9 Central posting and/or related agency documents and note the page numbers/location of the updated language. For example, under the current system, when the agency notes a change in the M-274 on I-9 Central but does not provide more specific information, employers, employees, and practitioners must comb through more than sixty pages of the M-274 and contrast it to the prior version to find the updated language. This time-consuming process is not an effective way to notify stakeholders of important new changes in agency policy and interpretation. Therefore, we urge the agency to include a special update section in I-9 Central that lists, by date, a summary of the changes to the affected government documents and corresponding page numbers. As noted above, we also request the same posting of a history of any changes to I-9 Central, which an employer could use to document their reliance on I-9 Central's content.

2. **Date of Updates.** We appreciate that almost all pages and documents posted on I-9 Central bear dates on the bottom right corner. These date annotations are extremely helpful. In addition, it would be equally helpful for the agency automatically to create a log or document history when a document is changed so that prior versions of the document remain available in archived form. This document history will enable users to understand the history of changes and best enable them to explain why certain policies or practices were in place at certain times. An easily available document history would likely be a value to agency personnel as well.

3. **Other Agency Review and Approval.** We agree with USCIS that it is critical to have other agencies review and approve materials/postings before they are published on I-9 Central. If I-9 Central is intended to be a credible source of information for employers, the information provided must be consistent with guidance from other agencies which influence our federal worksite enforcement structure, including ICE,

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OSC, and SSA. To assist not only employers, employees, and compliance personnel, but also relevant agency personnel, it would be helpful if the agency added notations to the published materials confirming that provisions were reviewed by any other agencies as of a date certain. Occasionally, personnel at other agencies are not aware that their agency has approved a change in policy or interpretation. In addition, an employer that is working to establish a compliance system that satisfies a number of different agencies, which may have conflicting policies and goals, needs to know and have a way to document if certain agencies have approved specific practices to assess its overall compliance practices.

In summary, inclusion of a record of changes, including a summary of the changed language, date of the change, and a list of agencies that approved the change, would make I-9 a central repository of information and historical context and thereby greatly enhance the utility of I-9 Central to the public as well as to relevant agencies.

4. **E-mail Alerts.** The opportunity for stakeholders to receive e-mail alerts of I-9 Central changes/additions is an excellent idea. To promote the use of the site's e-mail alerts about updates and changes on I-9 Central, the e-mail registration should include language emphasizing that the agency regularly updates and changes the material on I-9 Central. Thus, there should be a clear notice posted on I-9 Central recommending that anyone using it should sign up for e-mail updates.

PRESENTATION OF I-9 CENTRAL CONTENT

1. **Languages.** We are pleased that the agency has provided the guidance in I-9 Central in both English and Spanish. There are many employers, however, whose native language is neither English nor Spanish. Employers who transact business or interact with their employees in languages other than English or Spanish often have the least access to critical information regarding their obligations under I-9 related laws. Accordingly, to disseminate the information in I-9 Central to the employer community more effectively, we would suggest that the agency expand the offering of I-9 Central and the other related guidance materials in the other most common languages used in the United States (U.S.).

2. **Content.** It was confirmed at the USCIS stakeholders meeting in August that the controlling document with regard to USCIS's position and guidance for completion of the Form I-9 is the M-274 *Handbook for Employers*. Accordingly, we make the following two suggestions:

- i. Include a prominent notice on I-9 Central that the web material is provided for employer guidance, but that the M-274 should be considered the primary and controlling guidance as to an employer's I-9 obligations.
- ii. Each and every section of the M-274 should be included on the corresponding area of I-9 Central. As a controlling document, the M-274 content should be referenced in I-9 Central where relevant.

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3. **Disclaimer.** We are concerned that there are certain complex situations in which the guidance given on I-9 Central is overly simplified or may not apply. Accordingly, we recommend that the agency include a disclaimer on I-9 Central stating that the contents constitute general advice but not legal counsel. For example, I-9 Central directs an employer to request new documents if it believes that an employee has presented documents which it believes are fraudulent. In this situation, the employer may be faced with a number of complicated and competing obligations under various laws and agency policies – USCIS, ICE, OSC, even perhaps a U.S. attorney – that it must carefully consider before deciding on the most suitable course of action. Also, the employer must incorporate into its approach the particular facts of the situation, including whether the employer has possible constructive knowledge of an employee's lack of work authorization, the basis for suspecting the documents are not valid, and other factors to avoid taking a course of action that is inconsistent with its obligations and adverse to its interests. Accordingly, we recommend that the agency provide a clear disclaimer on I-9 Central that the site does not provide legal advice or attempt to address every situation.

CORRECTIONS

AILA urges the agency to provide expanded guidance to its stakeholders so that employers who identify errors or omissions on their I-9s can effectively correct the errors with some level of confidence. Although I-9 Central provides some limited guidance on correcting I-9s in the section entitled, "Complete & Correct Form I-9," we believe that this point is an issue for which employers need substantially more guidance and certainty. Based on our experience representing employers, we urge the agency to consider the following issues that we find the most common and troublesome:

1. **Section One Corrections.** I-9 Central states that all Section One corrections should be made by the employee. However, certain minor omissions such as the address of the worker can be easily obtained from existing records provided by the employee in other contexts, including the W-4 and payroll data. In the interest of facilitating an employer's efforts to come into compliance on its I-9s, we believe that the employer should be allowed to correct (with corresponding initials and date) basic information deficiencies in Section One. This recommendation is particularly relevant when the employee no longer works for the employer, but the I-9 remains subject to retention.

We would also request guidance on I-9 Central as to how Section One can be corrected when an employee checks the wrong attestation box, but provides the correct data as to his or her status. In lieu of completing a new I-9, we recommend that the employee be allowed to draw an arrow to the correct box and to initial and date the change.

2. **Note Attachments to the I-9.** I-9 Central states repeatedly that certain corrections should be accompanied with an explanatory note in the I-9 file. We recommend that the agency reconsider this guidance. We believe that the great majority of corrections should be self-evident and not require additional documentation via explanatory notes. If an I-9 compliance history file is being recommended by USCIS, then we would suggest that ICE and OSC adopt a clear written policy of reducing liability

related to I-9 compliance when such an employer history file exists showing the employer's good faith efforts.

3. **Wrong Version of Form I-9.** I-9 Central states in the Self-Audit questions and answers section that when an employer has used an outdated version of the I-9, the employer should execute a new I-9 using the "correction" version and attach the new I-9 to the old one previously completed. While we acknowledge that a new I-9 with full document reverification might be appropriate if the employer reviewed documents that under the proper version of the I-9 would no longer have been acceptable at the time of hire (e.g. a naturalization certificate after April 2009), we believe that it is unreasonable and unnecessary to require the employer and employee to go through the steps of executing an entirely new I-9. At present, an employer cannot even determine the differences in versions of the I-9, because the timeline posted on I-9 Central provides no .pdf versions of the I-9 forms listed. We therefore recommend that if an employer has used an outdated or wrong version (e.g. CNMI form) I-9 form at the time of completion, that the agency provide the employer with two options: (1) to complete a new I-9 on the version of the form valid at the time of correction; or (2) to annotate the I-9 that the wrong version was used in error. We would also request that USCIS ask OSC to provide written guidance on its website that such a request for the completion of the correct version of the I-9 by an employer does not constitute a discriminatory act.

4. **Late Completion of I-9s.** The agency does not provide any guidance on I-9 Central regarding the appropriate employer action when the employer determines that an I-9 was completed outside of the required time frames. We request that the agency provide guidance to employers on the proper notation or other correction for I-9s that were not completed on a timely basis. In addition, we would request that ICE be in clear agreement that the completion of a lost I-9 or a missing I-9 as recommended by USCIS will be considered as an act of good faith compliance by an employer taken into consideration in any penalty reduction related to I-9 compliance.

5. **Correcting I-9s for Terminated Employees.** The agency does not address the common problem of when an employer finds an I-9 with missing information in Section One for a former employee. We recommend that I-9 Central include guidance stating that an employer has properly corrected technical I-9 errors for a former employee by simply noting on the I-9, "Unable to correct as employee no longer employed," and then initial and date such correction. If the I-9, however, contains a substantive error, then the employer or authorized representative of the employer may make corrections (with contemporaneous initials and date) to the I-9 as long as the person making the correction bases the correction on the best information and documentation available to the employer at the time of correction.

6. **Correcting I-9s When the Original Employer Representative Is No Longer Available.** Often, an employer that completes an audit finding errors or omissions in Section Two may not have access to the original employer signatory on the I-9, because that person is no longer employed or otherwise unavailable. We suggest that the agency include language on I-9 Central to advise employers that any authorized employee or representative of the employer may make corrections to address errors on the I-9 (with contemporaneous initials and date), as long as that person is attesting to

information or documentation that the representative has direct knowledge of or has reviewed.

7. **Third-Party Correction to the I-9.** We suggest that the agency include language on I-9 Central to advise employers that any authorized representative, including legal counsel or another authorized third party, may make corrections to the I-9 on behalf of the employer, as long as the employer has clearly delegated this duty to the individual and that person is attesting to information or documentation that he or she has direct knowledge of or has reviewed.

8. **Overdocumentation.** While the law prohibits employers from requiring employees to produce more documentation than required by the I-9 with an intent to discriminate, in practice employees often present more documentation than required and employers, in turn, accept and record those documents usually in good faith. For example, an employee's I-9 may contain a permanent resident card in Column A, a driver's license in Column B, and a Social Security card in Column C.

We recommend that the agency advise employers that there is no need to "correct" I-9s in which the employer has accepted more than the minimum required I-9 documents. If the employer did, in fact, commit impermissible document abuse, then subsequent notations as to the excessive documentation merely document recognition of the error, but corrections do not cure a knowing action to discriminate. If the employer simply accepted additional documents that the employee presented at hire and did not request additional documents with discriminatory intent, then there is no need to make any modifications to the I-9. In fact, an employer could be placed at a higher risk for document abuse, if it chose to "correct" the situation by completing a new I-9 and thereby requiring the employee to provide yet more documentation for the I-9 file. We also ask that USCIS request OSC to publish corresponding guidance on its website.

DOCUMENT REVIEW

1. **"Reasonable person" standard.** In the I-9 Central section entitled, "Examining Documents," the agency states, "The standard used for determining whether a document is genuine is whether a reasonable person would know that the document is fraudulent." While this language is consistent with the statute, it is an abstract legal standard that does not provide employers with any meaningful guidance for developing a compliant I-9 process. It would be very helpful to employers if the agency could provide some additional guidance, including examples of conduct that meets or fails to meet the standard. In addition, it would be useful for the agency to include in the examples conduct that impermissibly exceeds the standard by violating the immigration-related anti-discrimination provisions. Also, we urge the agency to include practical guidance confirming that an employer's additional I-9 compliance measures – such as forensic document training, enrollment in E-Verify, or participation in the IMAGE program do not create a higher "reasonable person" standard for such employers. We would suggest that the reasonable person standard be clearly tied to use of the current M-274 *Handbook for Employers* posted on the USCIS website.

2. **Determining whether the document reasonably relates to the employee.**

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We recommend that the agency provide clarification on a number of important points regarding whether documents reasonably relate to the employee under the "Examining Documents" section of I-9 Central, including:

- a. In the I-9 Central chart relating to I-9 inconsistencies and discrepancies, in a number of places the agency instructs the employer to question the employee regarding the observed differences and then to make a "reasonable" determination following the employee's responses. It would be very helpful for the agency to provide guidance as to the sorts of questions that the employer is permitted to ask to make its determination. May an employer who is faced with inconsistencies in the documents ask the employee when, where, and how the employee obtained the document. Is the employer required/recommended to ask such questions? As employers often face allegations that asking such follow-up questions violates the anti-discrimination provisions, we recommend that the agency obtain confirmation from OSC that this type of inquiry does not constitute discrimination provided the same questions are asked of all employees who present documents with such inconsistencies.
- b. We urge the agency to clarify a number of points on slight discrepancies in the spelling of the name on the I-9 and the I-9 support documents. If there is a slight difference in spelling (particularly between the spelling on Form I-551 and Section One), must the employer require the employee to correct the I-9 or provide the employer with a corrected document? Must this process be completed before the employer representative completes the attestation in Section Two? How long must the employer give the employee to provide the corrected document? Does the failure to complete Section Two due to the need for a corrected document toll the 3-day rule? If the employer fails to follow this "Tip," is the government free to assert that the employer's conduct was not reasonable? (Note that FAQ # 27 in the M-274 merely states that it is helpful if a permanent resident employee uses the same name on the I-9 as on Form I-551. I-9 Central, however, in the "Complete Section 1, Employee Information and Verification" portion of I-9 Central directs the employer to require the employee to provide their "full legal name.") We would request a consistent recommendation.
- c. If a double or compound name is recorded on the Form I-9 but not on the document presented, I-9 Central recommends that the employer prepare a memo explaining the discrepancy. We respectfully request that the agency delete this burdensome guidance. Many naming conventions, including those of Hispanic workers, are well-known both to the employer as well as to the agency. Requiring the employer to attach a memo for each instance in which an employee shortens a compound name to one of the two names is, in the absence of more serious discrepancies or issues, unnecessarily burdensome.
- d. FAQ # 26 of the M-274 states that an employer may not require an employee to provide documentation supporting a name change. We recommend that the same guidance should be added to the Examining Documents chart on I-9 Central.

- e. We recommend that the agency clarify that employers using E-Verify do not need to undertake further inquiry concerning naming conventions or minor variations in spelling among the I-9 and the documents presented unless more serious discrepancies or issues exist.

3. **Who Issued This Document?** AILA would like to identify two points of recommended clarification:

- a. Consistent with the M-274, we recommend that the agency state that an employer should reject a permanent resident card from an employee who identifies him or herself as a U.S. citizen in Section One (See FAQ # 14, M-274.)
- b. Consistent with the M-274, the agency should reiterate that an employer may not require an employee to present a document issued by DHS, if the employee identifies him or herself as a non-U.S. citizen in Section One. (See FAQ # 7, M-274).

4. **Acceptable Documents.** We recommend that the agency clarify a number of issues on I-9 Central related to documentation:

- a. Clarify that only original documents are acceptable, except for a certified copy of a state issued birth certificate.
- b. Clarify that generally employers may not accept expired documents, unless USCIS has extended those documents. See FAQ # 15, M-274. For example, the agency should provide clear guidance to employers for understanding and documenting automatic extensions of TPS status announced in the *Federal Register*, which is a source of widespread confusion in the employer community. I-9 Central should also clarify how the I-9 should be updated to reflect continued work authorization.
- c. State that older versions of the alien registration card (except for the I-151) without expiration dates are acceptable List A documents. (FAQ #16, M-274).
- d. Provide clear guidance on the acceptability of laminated social security account cards to be consistent with FAQ #17, M-274, which advises that laminated social security cards are not acceptable only if the back of the card states that the card may not be laminated. Although there is a reference to this point in the Q & A section of I-9 Central, it should be referenced or linked in the Acceptable Documents for Section Two, List C.
- e. Clarify that SSA printouts containing an individual's name, date of birth, and social security account number are not acceptable List C documents.
- f. Clarify that K-1 nonimmigrant visa holders have work authorization incident to status, and that there is no requirement for the I-94 of a K-1 nonimmigrant visa

holder to be annotated with "employment authorized" to serve as an acceptable List A document. <https://secure.ssa.gov/poms.nsf/lnx/0110211420>

6. **Insufficient correlation between examples and narratives.** AILA notes that there are a number of inconsistencies among the examples and explanations provided in the Acceptable Documents screens, the Document Review screen, the Q&A screen, and Part 8 of the M-274, including:

- a. Only the current Permanent Resident Card (Form I-151) is shown (front and back) among the sample List A Documents on I-9 Central; past versions of the card are not shown. We recommend that I-9 Central provide a more comprehensive set of sample documents and additional resources to assist employers in determining whether a document is genuine. For example, I-9 Central should refer employers to page 55 of the M-274 (June 2011) for information relating to other acceptable versions of the permanent resident card and the older resident alien cards.
- b. We recommend that I-9 Central reproduce or link to the examples and narrative accompanying the description of the Foreign Passport with an I-551 stamp or a machine readable immigrant visa (MRIV) example in the M-274 (pp.55-56).
- c. I-9 Central contains only the front side of one version of Form I-766 (EAD) and no guidance as to the essential elements of the I-766 card. To avoid confusion, we recommend that I-9 Central reproduce or link to the M-274 EAD section.
- d. Information regarding the documents evidencing nonimmigrant visa (NIV) status (e.g. F-1, J-1, H-1, L-1, etc) related work authorization is completely missing from the I-9 Central Documents List A screen. We recommend that I-9 Central reproduce or link to the M-274 information about I-9 documentation for nonimmigrant visas.
- e. I-9 Central only provides a sample of one version of a social security card. We recommend that the agency clarify that there are currently more than 50 versions of the social security account card in circulation, all of which may be acceptable as proof of work authorization. We also recommend that I-9 Central state that the employer may accept an unsigned social security card in the List C section of I-9 Central versus just in the Q & A section. (FAQ # 17, M-274 and I-9 Central Q&A.)
- f. No guidance is provided as to the acceptability of a Native American Tribal Document, in contrast with the M-274 (FAQ # 11), which requires employers to check the Bureau of Indian Affairs (BIA) website (www.bia.gov) to verify that the tribe is legally recognized by the U.S. We recommend that I-9 Central provide more comprehensive guidance on this point, including that a Certificate of Indian Status is not the same as a Native American Tribal Document and is not acceptable as a List B and/or C document. Presently, the Q & A section of I-9 Central provides the following:

“Q. Where can I find an example of a Native American Tribal Document?

A. Each of the 564 federally recognized tribes may issue its own unique tribal document based on private tribal information. USCIS does not have examples of these tribal documents nor can it provide guidelines on specific tribal documents.”

7. **Photocopying documents.** We strongly urge the agency to advise employers on I-9 Central that that they may, but are not required to, photocopy and retain employee documents (unless they fall under the special rules for E-Verify employers).

ACCEPTABLE DOCUMENTS

1. **Permanent resident cards.** I-9 Central only identifies the new permanent resident card, which may leave the impression that prior versions are not valid. We recommend that the agency clarify this text on I-9 Central and add the text from p. 55 of the M-274 regarding the acceptability of older resident alien and permanent resident cards. At least link the page with the exemplar of the legal permanent resident card to the following comment in the Q & A section of I-9 Central:

“Q. May I accept a permanent resident card with no expiration date and a picture of the holder as an infant?

A. Older green cards (Forms I-551), called Resident Alien cards, were issued by the U.S. Department of Justice, Immigration and Naturalization Service, between January 1977 and August 1989. These cards are peach in color and contain the bearer’s fingerprint and photograph. They do not have expiration dates and are valid indefinitely. If an employee presents this type of card to complete Form I-9, you must accept the card, as long as it reasonably appears to be genuine and to relate to the individual presenting it. If you cannot determine whether the card relates to the individual presenting it, you may reject the document and ask for another acceptable document.”

2. **Drivers licenses.** We recommend that the agency include Canadian driver’s licenses in the list of acceptable driver’s licenses in I-9 Central under “Acceptable Documents,” subsection “List B Documents.” In the I-9 Central Q&A under “Customer Support,” the agency states that an expired driver’s license with a receipt is an acceptable List B document and implies that no further action is necessary. This recommendation appears to conflict with the M-274 Handbook, which states that an employer may not accept an expired document, unless extended by USCIS (p. 39). The M-274 Handbook requires the employee to present the actual document within 90 days (p. 6). We recommend that the agency link the List B acceptable documents section with the Q & A section of I-9 Central regarding whether or not a receipt for a temporary driver’s license functions as a self-standing government-issued identity document or whether it is a receipt that must be reverified within 90 days.

“Q. Can an employer accept an expired driver’s license with a paper document from the state department of motor vehicles (DMV) stating that the paper document serves as a temporary license?

A. Yes. A state-issued temporary driver's license is an acceptable List B document provided it contains a photograph or identifying information including name, date of birth, gender, height, eye color, and address. If the temporary driver's license has conditions, such as that the expired license must accompany the temporary driver's license for it to be valid, then those conditions must be followed."

3. **Tribal documents.** On I-9 Central, the tribal document is listed in the middle of references to other documents. AILA suggests that the agency amend the section on "Acceptable Documents" to either move the listing of a tribal document to the end of the section, with the description (but no representation) of employment authorization documents or provide a representation of a tribal document.

4. **Student employment.** While the M-274 reminds employers to ensure that the employee has recorded the Admission # in Section One, I-9 Central does not mention this point. We recommend that the agency add a sentence to I-9 Central under "Acceptable Documents," in the subsection on "Additional Documentation," reminding employers that a foreign student must include the Admission # in Section One. In addition, while the M-274 includes information on optional practical training (OPT) and M-1s with other student employment options such as curricular practical training (CPT) and J-1s, I-9 Central makes no mention of OPT or M-1s. We recommend that the agency include one sentence in I-9 Central under "Acceptable Documents," in the subsection on "Additional Documentation," with further information on student employment included in the M-274 in the "More Categories" section under "Complete and Correct Form I-9," subsection "Complete Section 2."

5. **Receipts.** The M-274 Handbook makes clear that a refugee may work when the departure portion of Form I-94 or I-94A has an unexpired refugee admission stamp (p. 6). On the other hand, I-9 Central makes no mention that the refugee admission stamp must be unexpired under "Acceptable Documents," in the subsection on "Receipts." We recommend that the agency amend this section of I-9 Central to add the word "unexpired" to the description of the refugee admission stamp. We also recommend that the agency revise I-9 Central to make it clear that a refugee may present an I-94 with no expiration date and provide a reference to FAQ #50 of the M-274.

RETAIN AND STORE

We recommend that the agency clarify a number of inconsistencies between this section of I-9 Central and the M-274:

1. **Retaining Form I-9: Copies of documents.** We recommend that I-9 Central clarify that if the employer chooses to make copies of underlying documents, it should consistently make copies of all employees' documents until such policy is officially changed by the employer. The following is contained in the I-9 Central Q & A, but there should be a link to this information in the retention section.

Q. Has there been a change in the regulations concerning keeping photocopies of the documents employees present to demonstrate employment authorization?

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A. The employment eligibility verification and employer sanctions provisions in the Immigration and Nationality Act (INA) have always provided that employers may choose to make copies of documents, stating, "notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection ..." (INA section 274A (b) (4), 8 USC §1324a (b) (4)). However, once an employer photocopies a document an employee presents, the employer must retain the photocopy with Form I-9 or store it with the employee's records. See 8 CFR 274a.2 (b) (3). The option to store copies with the employee's records is a relatively new option added to the regulations in 2010. See 75 *Fed. Reg.* 42575-01 (July 22, 2010).

2. **Storing Forms I-9 electronically.** I-9 Central provides only minimal information to employers on the important topic of electronic I-9 systems. I-9 Central states that an employer "may use a paper system, an electronic system or a combination of paper or electronic systems to store Forms I-9." We recommend that the agency clarify in I-9 Central that employers may also use electronic systems to complete the I-9.

We suggest that I-9 Central use the language as to electronic I-9s from the final rule published at 75 *Fed. Reg.* 42575 (July 22, 2010). We recommend that the agency clarify that the electronic I-9 system must contain a retrieval system that includes an indexing mechanism that permits the identification and retrieval for viewing or reproducing of relevant documents and records maintained in an electronic storage system.

With regard to audit trails, I-9 Central tells employers that an electronic I-9 system must include controls to ensure that an audit trail can detect any alteration or change to the form since its creation and can be accessed by an appropriate government agency inspecting the forms. The above-referenced July 2010 regulations clarified that the audit trail must ensure that "whenever the electronic record is created, completed, updated, modified, altered, or corrected, a secure and permanent record is created that establishes the date of access, the identity of the individual who accessed the electronic record, and the particular action taken." I-9 Central should revise the information posted to track the regulatory requirement.

Neither I-9 Central nor the M-274 makes a clear distinction between I-9s that are created in paper (original handwritten signatures) and then scanned into a .pdf versus I-9s created in an electronic database and the related audit trails required. It should be clear to employers that simply scanning I-9 forms into a .pdf format and saving them to a computer are not enough.

On the all-important question of electronic signatures and signature receipts, I-9 Central does not provide any guidance to employers on what is an acceptable electronic signature method, nor that the system they select must create and preserve a record verifying the identity of the signatory. It also does not inform employers that they must provide an employee with a receipt of such transaction, if requested. We believe that the paucity of information provided in the regulations and by the relevant agencies create an employer trap. We suggest that the agency create a system to approve I-9 electronic systems.

Complementing the above comments, AILA's recommendations related to electronic I-9s are three-fold:

- a. I-9 Central would be a good vehicle to tell employers the minimum "items" or "fields" that must be present in an electronic audit trail.
 - b. I-9 Central would also be an ideal location for USCIS to inform employers that neither USCIS nor ICE has "certified" any electronic system, and that there are no preferred electronic I-9 vendors. In addition, USCIS should confirm that just because an electronic I-9 system may be part of a designated agent system that has been certified for E-Verify purposes, such certification does not mean that the electronic I-9 system is in compliance with the regulations.
 - c. I-9 Central should reference the 2010 Final Regulation on Electronic I-9 Storage to provide more information to employers. This information could either be included in the "Retain and Store Form I-9 section" or the "Form I-9 Legislation" section.
5. **Inspections.** The section in I-9 Central that deals with inspections seems to relate to the inspection of electronic I-9s. While the first two paragraphs discuss inspections in general, the listed action items an employer must do at the time of an inspection seem to relate exclusively to electronic I-9s. We recommend that the agency clarify and expand this section by providing separate action items for inspections of paper versus electronic I-9s. We also recommend that this section contain a link to the I-9 Inspection Overview Document issued by ICE found at: http://www.ice.gov/doclib/foia/dro_policy_memos/formi9inspectionoverview.pdf.

ABOUT THE FORM, STATUTORY LISTING

In the section in which I-9 Central provides a list of Form I-9 Statutes and Regulations, we recommend that the agency provide information about the distinction created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) between substantive and technical violations on the I-9. It may be helpful to link the information regarding I-9 audits: <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>. In addition, in the section in which the agency is summarizing the premise of the Immigration Reform and Control Act of 1986 (IRCA), we recommend that I-9 Central clarify that the employer's obligation is to act in good faith by stating that: "IRCA prohibits employers from hiring and employing workers for employment in the United States *when they have actual or constructive knowledge that the employee is unauthorized to work*" (highlighted text added).

REMOTE HIRES

In light of advances in technology, we would ask the agency to consider providing employers with a realistic solution for completing I-9s for remote hires.

In the I-9 Central Q & A section, it states:

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“Q. My company uses a notary to complete Section 2 of Form I-9 when an H.R. person or internal employee is not located in the area in which the new employee will work. What is the best way to make a correction if the notary makes a mistake on an employee's form?

A. The notary acts as an agent of the employer. Therefore, either the notary or the employer may make corrections to Forms I-9 as needed. To make corrections, you or the notary may line through the incorrect information, enter the correct information, and initial and date the change.”

FAQs #38 and 39 to the M-274 note that while a notary or designated agent may complete an I-9 for an employer, the person viewing the original documents must execute the I-9. In practice, many notary publics refuse to provide this service even when they are instructed that they are not certifying the I-9 form for the employer in a notarial capacity. In addition, HR departments are justifiably concerned about designating agents they do not know to complete the I-9 form for the company. In light of the capabilities afforded by Skype and other video conferencing services, we recommend that USCIS permit an employer to use remote video conference capacity to view the new hire and documents digitally to determine whether the documents are genuine and relate to the employee for I-9 completion.

CONCLUSION

AILA appreciates the opportunity to provide our observations and recommendations regarding the I-9 Central website to the agency. We also appreciate the efforts of USCIS to help guide employers in the proper completion and maintenance of the Form I-9 by establishing I-9 Central, and hope that the agency takes under consideration our recommendations for improvements in the content, presentation, and updating of I-9 Central to enhance its potential as an effective guidance tool.

Thank you for your attention to this matter.

Sincerely,

The American Immigration Lawyers Association