

BILLING CODE: 9111-97

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

CIS No. 2441-08; Docket No. USCIS-2008-0001

RIN 1615-AB69

Documents Acceptable for Employment Eligibility Verification

AGENCY: U.S. Citizenship and Immigration Services (USCIS), DHS.

ACTION: Final rule.

SUMMARY: This rule finalizes without change a 2008 interim final rule amending Department of Homeland Security (DHS) regulations governing the types of acceptable identity and employment authorization documents (EADs) and receipts that employees may present to employers for completion of Form I-9, Employment Eligibility Verification.

DATES: This final rule is effective [Insert date 30 days from date of publication in the FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The supplementary section is organized as follows:

TABLE OF CONTENTS

I. Background

A. Interim Rule

B. Final Rule

II. Public Comments on the Interim Rule

A. Summary of Comments

B. Requiring unexpired documents

C. Comprehensive review of the Form I-9 process

D. The 1998 notice of proposed rulemaking

E. Mistake in interim rule

F. Delay in effective date of interim rule

G. Comments to the Form I-9

H. Suggested revisions to the Lists of Acceptable Documents

I. Standardizing State and Federal document requirements

J. Requests for outreach and guidance

K. Comprehensive immigration reform

III. Regulatory Requirements

IV. Paperwork Reduction Act (PRA)

I. Background

All employers, agricultural recruiters and referrers for a fee¹ (hereinafter collectively referred to as “employer(s)”) are required to verify the identity and employment authorization of each individual they hire for employment in the United States, regardless of the individual’s citizenship. See Immigration and Nationality Act (INA) section 274A(a)(1)(B), 8 U.S.C. 1324a(a)(1)(B). As part of the verification process, employers

¹ Title 8 CFR 274a.2(a)(1) provides that “[f]or purposes of complying with section 274A(b) of the [INA] and this section, all references to recruiters and referrers for a fee are limited to a person or entity who is either an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, Pub.L. 97-470).”

must complete Form I-9, “Employment Eligibility Verification,” retain the form for a statutorily established period of time, and make the form available for inspection by certain government officials. See INA sec. 274A(b), 8 U.S.C. 1324a(b); 8 CFR 274a.2. On Form I-9, a newly hired employee must attest to being a U.S. citizen or national, a lawful permanent resident (LPR), or an alien authorized to work in the United States. The employee then must present to his or her employer a document or combination of documents designated by statute and regulation as acceptable for establishing identity and employment authorization. The employer must examine the document, record the document information on Form I-9, and attest that the document reasonably appears both to be genuine and to relate to the individual presenting it.

The Form I-9 has three categories of documents that employers may accept, alone or in combination, for employment authorization verification:

- (1) List A—documents that establish both identity and employment authorization (e.g., U.S. passport; Form I-551, “Permanent Resident Card;” or Form I-766, “Employment Authorization Document”);
- (2) List B—documents that establish only identity (e.g., State-issued driver’s license or identification card); and
- (3) List C—documents that establish only employment authorization (e.g., State-issued birth certificate or an unrestricted Social Security Account Number card).

See INA sec. 274A(b)(1)(B), (C) and (D), 8 U.S.C. 1324a(b)(1)(B), (C), and (D); 8 CFR 274a.2(b)(1)(v)(A), (B) and (C). An individual must present to his or her employer either one document from List A or one document each from List B and List C. The employer may not specify a document or combination of documents that the employee must present. See INA sec. 274B(a)(6), 8 U.S.C. 1324b(a)(6); 8 CFR 274a.1(l)(2).

If the employee cannot present an acceptable document from one of the three lists, he or she may present an acceptable substitute document, referred to as a “receipt.” See 8 CFR 274a.2(b)(1)(vi) (commonly referred to as “the receipt rule”). The receipt satisfies the document presentation requirement for a short period of time, at the end of which the employee must present the actual document or other documents specified in the regulations as acceptable to present. An employer may accept a receipt, however, only under specific circumstances prescribed under 8 CFR 274a.2(b)(1)(vi). For example, if a document acceptable under Lists A, B, or C is stolen or lost, the new hire may provide a receipt for the application for the replacement document, in lieu of the actual document, as long as he or she provides the replacement document within 90 days of hire. If the individual employee is an alien whose employment authorization or employment authorization documentation expires, the employer must reverify the employee’s continued employment authorization by the expiration date by reviewing any acceptable List A or List C document.² See 8 CFR 274a.2(b)(1)(vii).

A. Interim Rule

On December 17, 2008, DHS published an interim rule amending DHS regulations governing the Form I-9 process. See 73 FR 76505. The interim rule became effective on April 3, 2009.³ DHS improved the integrity of the Form I-9 process by:

- Prohibiting employers from accepting expired documents. Expired documents may not demonstrate the correct status of the bearer; are prone to

² Note that an expiration date on Form I-551 does not trigger the reverification requirement. See “Handbook for Employers, Instructions for Completing Form I-9” (M-274) (Rev. 01/05/11), <http://www.uscis.gov>, (“Handbook for Employers”), pages 9 and 39.

³ On February 3, 2009, DHS delayed the effective date of the December 17, 2008, interim rule to April 3, 2009 to provide DHS with an opportunity for further consideration of the interim rule. The February 3, 2009 document also extended the public comment period until March 4, 2009. See 74 FR 5899.

tampering and fraudulent use; and may create confusion among employers.

This change is intended to ensure that the documents accepted by employers as evidence of an employee's identity and employment authorization are valid and reliable;

- Removing Form I-688, "Temporary Resident Card," and Forms I-688A and I-688B, "Employment Authorization Cards," from the Lists of Acceptable Documents because USCIS no longer issues these documents and any such documents in possession of an employee would now have expired;
- Adding to the List of Acceptable Documents on List A of Form I-9: (1) the new U.S. passport card and (2) the temporary Form I-551, "Permanent Resident Card," with a printed notation on a machine-readable immigrant visa;
- Adding documentation for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) to List A to more accurately reflect their status under the Compacts of Free Association.

In addition to the amendments made by the 2008 interim rule, USCIS issued an amended Form I-9 which clarified changes, such as providing a separate box for noncitizen nationals to clearly delineate U.S. citizens from noncitizen nationals, and making minor format changes that make the form easier to use.

On January 16, 2009, DHS published a correction to the interim rule to remove extraneous language from two paragraphs of the regulation that describe a type of receipt

that can be presented by lawful permanent residents to their employers in lieu of the Form I-551, “Permanent Resident Card,” for completion of Form I-9. See 74 FR 2838.

On February 3, 2009, DHS extended the comment period for the interim rule to March 4, 2009. See 74 FR 5899.⁴ During the entire comment period, DHS received 75 comments. These comments came from a broad spectrum of individuals and organizations, including refugee and immigrant services advocacy organizations and public policy and advocacy groups. Many commenters addressed multiple issues and provided variations on the same substantive issues.

In preparing this final rule, DHS considered the comments that were received during the comment period and were within the scope of this rulemaking as well as the other materials contained in the docket. The final rule does not address comments seeking changes in United States statutes, changes in regulations or petitions unrelated to or not addressed by the interim rule, changes in procedures of other components within DHS or other agencies, or the resolution of any other issues not within the scope of the rulemaking or the authority of DHS.

All comments may be reviewed at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS–2008-0001.

B. Final Rule

The final rule adopts, without change, all of the regulatory amendments set forth in the interim rule. The rationale for the interim rule and the reasoning provided in the preamble to the interim rule remain valid with respect to these regulatory amendments, and DHS adopts such reasoning in support of the promulgation of this final rule.

II. Public Comments on the Interim Rule

A. Summary of Comments

Many commenters supported the improvements to the Form I-9 process made in the interim rule, such as: prohibiting employers from accepting expired documents; removing certain documents no longer issued by USCIS; adding two new documents to List A; adding documentation for certain citizens of the FSM and RMI to List A; and making clarifying changes to Form I-9, such as providing a separate box for noncitizen nationals. Most commenters discussed the prohibition on employers from accepting expired documents and supported the change because they believe that this change would prevent unauthorized aliens from obtaining employment in the United States by using expired documents which are more susceptible to fraud and counterfeiting than unexpired documents.

Although most commenters supported one or more changes to the Form I-9 process, several commenters opposed the prohibition on the use of expired documents because they believe that many employment-authorized individuals such as asylees, refugees, and conditional residents should not be required to present an unexpired document as evidence of employment authorization. The commenters were concerned that such employees will be unable to work if processing or issuance of a new document is delayed. Several commenters also opposed the prohibition on the use of expired documents because they believe that these changes will create additional burdens and costs for employers and employees. Some of the commenters who opposed the prohibition on the use of expired documents requested a delay in implementation of the interim rule. In response to public comments requesting an extension of the effective

⁴ See supra footnote 3.

date, DHS delayed the effective date of the interim rule from February 2, 2009, to April 3, 2009. See 74 FR 5899.

Many commenters pointed out the need for comprehensive immigration reform including a thorough review of the Form I-9 process. Some commenters suggested improvements to the Form I-9 process such as: biometrics; providing the public a truly electronic Form I-9; and detailed changes to the form. Other commenters discussed document reduction or suggested changes to the acceptability of specific document types such as: school IDs; U.S. Passports; State-issued drivers' licenses including enhanced drivers' licenses; voter registration cards; Native American tribal documents; and the Certificates of Citizenship and Naturalization.

Comments that were received are addressed below and are organized by subject area. Comments related to the economic burdens of this rule are addressed in the Executive Order 12866 and Regulatory Flexibility Act sections of part III of the Supplementary Information.

B. Requiring unexpired documents

DHS received 23 comments addressing the interim rule's requirement that all documents presented for Form I-9 be unexpired. Fifteen commenters supported the requirement and eight commenters opposed it. Most of the commenters who supported the requirement wrote that allowing employers to accept expired documents would lead to the inadvertent acceptance of fraudulent documents and, therefore, the employment of unauthorized aliens. Some commenters who supported the requirement wrote that this change eliminates confusion in the Form I-9 process and that requiring unexpired documents provides benefits to law enforcement.

1. Continued acceptance of expired documents

Eight commenters opposed the requirement that documents must be unexpired for Form I-9 and stated that employers should be able to continue to accept expired documents as permitted before the interim rule went into effect. Five of these commenters proposed the continued acceptance of expired documents for varying periods between 30 days and five years after expiration of the document. Two of these commenters wrote that the cost of obtaining replacement documents was too high. One commenter wrote that refugees and asylees should be excused from this requirement because these individuals are authorized for employment incident to their status.

DHS is retaining the requirement that documents be unexpired and is not adopting the commenters' suggestions to continue accepting expired documents. Concerns about document fraud were among the most important reasons for this rulemaking. Unexpired documents are more likely to contain up-to-date security features that make them less vulnerable to counterfeiting and fraud. Because expired documents may lack security features or may have outdated security features, these documents can more easily be counterfeited.

DHS disagrees with the commenters who wrote that expired documents should be allowed within specified parameters (e.g., 30 days after expiration). Establishing a requirement that all documents be unexpired sets a clear standard that is easy for U.S. employers to apply. Such a requirement honors the time limits of validity placed on documents by their issuing authorities. In addition, precluding employers from accepting expired documents alleviates confusion when determining whether documents are valid for Form I-9 and helps to ensure that the documents relate to the person presenting them. Moreover, disallowing the acceptance of expired documents reduces document fraud and may prevent unauthorized aliens, criminals and even terrorists from evading detection.

2. Refugees and asylees

One commenter requested that DHS allow employers to accept Employment Authorization Documents (EADs) presented by refugees and asylees that have been expired no longer than 90 days. The commenter wrote that neither group requires an EAD because both are authorized to work incident to their lawful immigration status.

DHS has not adopted the commenter's request in this final rule. DHS is aware of the many difficulties that refugees and asylees face in adapting to a new life in the United States and has carefully considered those difficulties as they relate to employment authorization. However, permitting the use of expired documents for Form I-9, even for the limited period of 90 days as suggested by the commenter, introduces vulnerabilities into the verification process that undermine the purpose of the process as a whole. The EAD is not the only acceptable document that refugees and asylees may present for Form I-9 purposes. They may satisfy Form I-9 requirements by presenting a combination of a List B and a List C document, such as a State-issued driver's license and an unrestricted Social Security Account Number card. Many refugees and asylees instead choose to present an EAD because of the simplicity of having a List A document that meets identity and employment authorization requirements. DHS acknowledges the desire for simplicity on the part of both groups; however, permitting the use of expired EADs for only refugees and asylees and for only a 90-day period after a particular document's expiration conflicts with DHS' desire to provide a consistent rule prohibiting the use of expired documents.

3. Alleged delays in the issuance of documents by USCIS

Five commenters wrote that expired documents should be acceptable because USCIS is unable to timely process applications for new documents demonstrating employment authorization.

DHS is not adopting the commenters' recommendations. DHS processes applications for renewal of immigration-related documents in a timely manner for applicants who apply to renew their immigration documents with sufficient planning in advance of expiration dates. In the event of a processing delay or unforeseen emergency, or for applications filed too close to the documents' expiration dates, applicants may request expedited processing. The regulations at 8 CFR 274a.13(d) impose a 90-day processing time for DHS to adjudicate applications for Form I-765, "Application for Employment Authorization Document," and to issue an EAD. DHS records indicate that the current average cycle time for Form I-765 processing was 1.9 months as of November 2008.⁵ Aliens whose applications for employment authorization have been pending for more than 90 days may call USCIS to request expedited processing of their applications. Lawful permanent residents (LPRs) seeking to replace a Form I-551, "Permanent Resident Card," that has expired or has been lost, stolen, or mutilated can present other non-USCIS documents to meet Form I-9 requirements, such as a State-issued driver's license and an unrestricted Social Security Account Number card, until a new card can be issued. In the alternative, LPRs may request a temporary Form I-551 stamp in their passports or on Form I-94, "Arrival-Departure Record," that is evidence of LPR status while their renewal or replacement application is pending. Consequently, DHS does not adopt the commenters' recommendations.

⁵ See Memorandum by Michael Aytes, Former Acting Director, USCIS, Response to Recommendation 35. Recommendations on USCIS Processing Delays for Employment Authorization Documents, (Jan. 2, 2009) (available at www.dhs.gov (Citizenship and Immigration Services Ombudsman page)).

Two of the five commenters also wrote that if USCIS precludes the use of expired documents, then USCIS should adopt a rule that permits employers to accept, in lieu of an acceptable Form I-9 document, a receipt for the application of replacement of an expired document, for a 240-day period. These two commenters also stated that the current 90-day period provides insufficient time to present proper documentation due to USCIS's processing delays.

DHS is not adopting the suggestion by the commenter to expand the period of time that a receipt for the application for a replacement document may be used in lieu of a document listed as acceptable for Form I-9. The commenter is referring to the "receipt rule" which allows employers to accept a document specified in the regulations as a "receipt" in lieu of a List A, B, or C document for a temporary period. Under the receipt rule, an employer may accept a receipt for the application for a replacement document for a 90-day period for Form I-9 if the List A, B, or C document that is being replaced has been lost, stolen, or damaged. See 8 CFR 274a.2(b)(1)(vi)(A). Because the receipt rule only applies if the List A, B, or C document has been lost, stolen, or damaged, and not when the document has expired, it is not relevant to DHS's preclusion of the use of expired documents.

Another commenter wrote that refugees should be permitted a grace period of 90 days from the requirement that they present an unexpired document because refugees are employment-authorized incident to their status and may not receive an initial EAD from USCIS in a timely manner. The commenter also wrote that refugees may not be aware that expired documents are no longer acceptable.

DHS has not adopted the commenter's suggestions in this final rule. USCIS expedites applications for those refugees who choose to apply for an EAD. DHS records

show that, in most instances, USCIS issues EADs to refugees within two weeks of their admission to the United States. In addition, current regulations already contain a “90-day grace period” for refugees. Until refugees receive their EADs, they may present Form I-94, “Arrival-Departure Record,” with an unexpired refugee admission stamp as temporary proof of employment authorization. See 8 CFR 274a.2(b)(1)(vi)(C)(1). Refugees have 90 days from receipt of the admission stamp to present either an EAD or a combination of a List B and List C document. See 8 CFR 274a.2(b)(1)(vi)(C)(2).

4. Definition of an unexpired document

One commenter requested that DHS provide a definition of the term “unexpired.” In general, DHS considers a document to be unexpired when the expiration date on the face of the document, if any, has not passed. DHS is not, however, including a formal definition of “unexpired” in this final rule. DHS has determined that, given the wide variety of documents acceptable for Form I-9 purposes, and the fact that the term has been present in the regulations for many years, it would not be appropriate or necessary to provide an all-encompassing definition of the term in this rulemaking. DHS will provide guidance to the public in response to specific questions concerning particular documents as appropriate.

C. Comprehensive review of the Form I-9 process

Six commenters expressed concerns about the entire Form I-9 employment verification process. Three of the six commenters requested that DHS conduct a comprehensive review of the entire Form I-9 process that carefully considers the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

DHS has not adopted these comments as they are outside the scope of the interim rule. The interim rule did not make changes to the verification process as a whole.

Instead, the rule made limited changes to the types of documents that are acceptable for employment verification, such as eliminating outdated List A documents and precluding the presentation of expired documents. See, e.g., 73 FR 76506-07. DHS regularly reviews and analyzes its programs for improvement and greater effectiveness and may consider changes to the employment verification process in a future rulemaking.

One of the commenters wrote that DHS has not removed enough documents from the Lists of Acceptable Documents on Form I-9 to fulfill its mandate under the authorizing statute. DHS assumes that the commenter is referring to the document reduction provision of IIRIRA. IIRIRA amended section 274A(b)(1) of the INA, 8 U.S.C. 1324a(b)(1), by removing several documents from List A (e.g., certificate of naturalization) and List C (e.g., birth certificate). However, IIRIRA retained the authority of the Attorney General (now the Secretary of Homeland Security) to designate additional documents within certain boundaries, including the requirement that the designated documents contain security features that make them resistant to tampering, counterfeiting, and fraudulent use. The former Immigration and Naturalization Service (INS) implemented the document reduction mandate of IIRIRA in its interim rulemaking at 62 FR 51001 (Sept. 30, 1997). DHS believes that the 1997 interim rulemaking met its statutory mandate to ensure that the documents remaining on List A and C contain certain minimum security features. Through this final rule, DHS is making additional changes to further secure the Form I-9 process.

One commenter suggested that Form I-9 is not an effective tool to discourage unauthorized employment because an employer can easily discard a Form I-9 after three years under certain circumstances. The same commenter also noted that an employee's

departure from the United States is not confirmed after his or her employment authorization has expired.

DHS has not addressed Form I-9's effectiveness as a means of providing employment verification or reporting the departure of aliens previously authorized to work in this rulemaking. The Form I-9 retention requirement is statutory, and, therefore, is not within DHS's authority to change. The statute requires that employers retain completed Forms I-9 for all employees for three years after the date an employee is hired, or one year after the date employment is terminated, whichever is later. See INA sec. 274(b)(3), 8 U.S.C. 1324a(b)(3); 8 CFR 274a.2(b)(2)(i)(B). For more information on retention requirements, please refer to the Handbook.⁶

With respect to the commenter's suggestion that an employee's departure from the United States be noted on Form I-9, current rules only require reverification of employment authorization once the employment authorization noted on Form I-9 expires. See 8 CFR 274a.2(b)(1)(vii). The interim rule did not modify the reverification provision. Note that an individual whose employment authorization has expired may not necessarily be required to depart the United States if he or she remains lawfully present in the United States (e.g., asylees) or has received a renewal of employment authorization.

Another commenter requested that the 2008 interim rule be withdrawn because of DHS's failure to perform a comprehensive review of the Form I-9 process, noting that time and resources could be better spent on a comprehensive review.

DHS is not withdrawing the 2008 interim rule for purposes of conducting a comprehensive review. The changes made in the interim rule will lead to significant

⁶ Part Three, "Photocopying and Retaining Form I-9" "Handbook for Employers, Instructions for Completing Form I-9" (M-274) (Rev. 01/05/11), www.uscis.gov, pages 23-26.

administrative benefits by reducing employer confusion and increasing compliance. Moreover, to withdraw the rule and revert to the preceding Form I-9 also would result in considerable confusion among employers. DHS continually reviews and analyzes the employment eligibility verification process and considers changes to the process as appropriate. DHS may propose additional changes in the Form I-9 verification process in the future as needed.

D. The 1998 notice of proposed rulemaking

Two commenters discussed the 1998 notice of proposed rulemaking found at 63 FR 5287. One commenter wrote that prior to the 2008 interim rule, the former INS last requested public comments in 1998 and has not published responses to those comments. The commenter added that DHS has not promulgated a rule in the **Federal Register** on one issue mentioned in the preamble to the 1998 proposed rule: the good faith defense against technical Form I-9 paper violations. The commenter also wrote that the failure to promulgate rules has denied employers a compliance standard and led to confusion.

DHS agrees with the commenter that the INS did not publish responses to the public comments received with respect to the 1998 proposed rule, and neither has DHS published responses to the comments. As stated in the Supplementary Information to the interim rule, however, the interim rule superseded the 1998 proposed rule, and the comments received as part of that rulemaking informed the development of the interim rule. DHS does not intend to publish responses to the public comments, given the time that has passed since the 1998 proposed rule. INS published a proposed rule in 1998 regarding the good faith defense against technical Form I-9 paper violations. See 63 FR 16909 (Apr. 7, 1998). DHS disagrees that employers have been operating without a

compliance standard. The Handbook for Employers provides guidance for employers on Form I-9 compliance.⁷

E. Mistake in interim rule

One commenter alerted DHS that the interim rule erroneously added the language “with an unexpired passport” to the regulation found at 8 CFR 274a.2(b)(1)(vi)(B)(1). The commenter pointed out that the regulation in question describes a receipt for Form I-551, “Permanent Resident Card,” (the arrival portion of Form I-94 with an unexpired temporary Form I-551 stamp and photograph of the individual) and that the interim rule had placed language in the wrong section.

DHS published a correction to 8 CFR 274a.2(b)(1)(vi)(B)(1) in the **Federal Register** on January 16, 2009 at 74 FR 2838 and deleted the erroneous language.

F. Delay in effective date of interim rule

Ten commenters requested a delay in implementation of the interim rule. DHS did delay the initial effective date, extending the date from February 2, 2009, to April 3, 2009. DHS determined that there was no basis for any further delay in the effective date for this rule.

G. Comments to the Form I-9

⁷ Part Four, “Unlawful Discrimination and Penalties for Prohibited Practices,” “Handbook for Employers, Instructions for Completing Form I-9” (M-274) (Rev. 01/05/11), <http://www.uscis.gov>, page 30. See also Part Four, “Unlawful Discrimination and Penalties for Prohibited Practices,” Handbook for Employers, Instructions for Completing Form I-9” (M-274) (Rev. 07/31/09) (no longer available online), p. 22. Part Four, “Unlawful Discrimination and Penalties for Prohibited Practices,” Handbook for Employers, Instructions for Completing Form I-9” (M-274) (Rev. 04/03/09), (no longer available online), p. 19; Part Four, “Unlawful Discrimination and Penalties for Prohibited Practices,” “Handbook for Employers, Instructions for Completing Form I-9” (M-274) (Rev. 11/1/2007), (no longer available online), p. 17; and Part 5, “Penalties for Prohibited Practices,” “Handbook for Employers, Instructions for Completing Form I-9” (M-274) (11/1991) (no longer available online), p. 10.

DHS received several comments regarding Form I-9 in response to the information collection published with the interim rule. These comments are addressed below.

1. Expiration date of Form I-9

Eight commenters discussed the expiration date indicated on Form I-9. Six commenters were concerned that the revised Form I-9 (Rev. 02/02/09) might expire on June 30, 2009, as indicated on the form. Four commenters suggested that because the current Form I-9 bears an expiration date of June 30, 2009, employers should be allowed to continue using the preceding Form I-9 until that time, with its allowance for accepting expired documents. Three commenters noted that the gap between the implementation date of the new form and the expiration of the old form is confusing. One commenter argued that DHS should allow the use of either Form I-9 until June 30, 2009.

Employers may use either Form I-9 with the new revision date of 08/07/09 or Form I-9 with the 02/02/09 revision date. On April 28, 2009, DHS published a 30-day notice in the **Federal Register** at 74 FR 19233, extending the expiration date of Form I-9 (Rev. 02/02/09) beyond June 30, 2009. The expiration date is now August 31, 2012. Therefore, the commenters' concerns about whether to use Form I-9 (Rev. 02/02/09) are moot. DHS recognizes that the expiration date on Form I-9 may be confusing to some employers. The Office of Management and Budget (OMB) expiration date found on the front page of Form I-9 refers only to the control number assigned for the information collection requirements of the form, which must be updated and renewed periodically.

2. Adding miscellaneous instructions and reorganizing Form I-9

Seven commenters recommended specific changes to Form I-9. Two commenters recommended that all acceptable documents and receipts be included on Lists A, B, and

C. Another commenter requested that Part 8 of the Handbook be updated to include the current Lists of Acceptable Documents. One commenter requested that DHS provide guidance about List A, Item 5, the foreign passport with Form I-94 indicating:

- nonimmigrant status,
- work is authorized incident to status, and that
- work is restricted for a specific employer.

While DHS appreciates the commenters' recommendations, DHS is not making further changes to Form I-9 beyond those made based on the interim rule. DHS may consider these recommendations when undertaking future revisions to Form I-9 and the Handbook.⁸ Note that the Handbook contains a listing of all documents, including receipts, that are acceptable for Form I-9. DHS has also included a section in the Handbook that provides images of common documents acceptable as permanent or temporary proof of employment authorization.⁹ The Handbook provides guidance on nonimmigrant aliens with temporary employment authorization who present List A, Item 5 documents.¹⁰ DHS released a revised Handbook on January 5, 2011.

One commenter requested that instructions to Form I-9 be written in plain language. DHS promotes and supports the use of plain language and regrets that the commenter found the instructions difficult to understand. DHS will continue carefully to examine future changes to Form I-9 for plain language.

Another commenter recommended that the boxes to attest to U.S. citizenship and noncitizen national status should be separated on Form I-9. In the Form I-9

⁸ Id.

⁹ Part Eight, "Acceptable Documents for Verifying Employment Authorization and Identity," in the "Handbook for Employers, Instructions for Completing Form I-9" (M-274) (Rev. 01/05/11), <http://www.uscis.gov>, pages 51-63.

accompanying the interim rule, DHS added a separate check box for U.S. citizens and noncitizen nationals in the immigration/citizenship status attestation of Section 1 of Form I-9. DHS is retaining this change in Form I-9.

3. Public access to new Forms I-9 prior to issuance

Two commenters requested that any future version of Form I-9 be made available at www.uscis.gov further in advance to allow the public time to prepare for changes.

DHS recognizes the need for employers and human resource professionals to have sufficient time to prepare for any changes to Form I-9. For this rulemaking, DHS made Form I-9 available to the public for informational purposes on December 17, 2008. DHS will make every effort to make any future version of Form I-9 available on USCIS's Web site at the earliest possible time.

4. Discretion in use of incorrect Form I-9 due to employer confusion following implementation of the interim rule

One commenter requested that DHS exercise favorable discretion for employers who unintentionally used the wrong Form I-9 after the interim rule went into effect.

Beginning April 3, 2009, employers were required to use the Form I-9 (Rev. 02/02/09) containing the revisions based on the interim rule. A subsequent Form I-9 was made available on August 7, 2009 (Rev. 8/7/09). Employers may use either form. DHS may exercise favorable discretion if an employer unintentionally used the wrong Form I-9 due to confusion regarding which form to use between February 2009 and April 2009. Employers who used the wrong form during this time period are still expected to comply with all other Form I-9 regulations applicable to the preceding form.

¹⁰ Part Two, "Completing Form I-9," "Handbook for Employers, Instructions for Completing Form I-9" (M-274) (Rev. 01/05/11), <http://www.uscis.gov>, pages 3-19.

5. Creating an electronic employment eligibility verification process

Three commenters requested that DHS make an electronic Form I-9 available that could be used with human resources software. Another commenter requested specific technical improvements to create a solely electronic employment authorization verification process. Four commenters noted that the Form I-9 provided on the USCIS Web site was password-protected or had security settings that prohibited them from completing and saving the form electronically. These commenters also requested that DHS provide an electronic Form I-9 that can be completed, signed electronically and saved on their computer systems.

DHS appreciates the commenters' recommendations regarding requested enhancements in electronic completion and storage of the electronic Form I-9. These comments are technical in nature and outside the scope of the changes that DHS is making to Form I-9 through this rulemaking. Changes to Form I-9 are limited to amending the Lists of Acceptable Documents and making minor clarifications to the data elements on the form.

The revised Form I-9 that DHS posted on the USCIS Web site as of January 16, 2009, can be completed online but cannot be signed and stored electronically. As such, DHS must password-protect the form to prevent the public from making any changes to it. DHS recognizes the public's desire for an electronic Form I-9. DHS is continually evaluating possible improvements to the Form I-9 process so that it is more user-friendly.

H. Suggested revisions to the Lists of Acceptable Documents

DHS received several suggested changes to the lists of documents acceptable for Form I-9. Suggested changes to List A documents include one commenter's proposal for DHS to rename the Native American tribal document and add it to List A because it is

already acceptable as both a List B and List C document. Two commenters requested that Form I-797, “Notice of Action,” be made an acceptable document for permanent residents who possess an expired Form I-551 and whose conditions on status have been removed. One commenter requested that Form I-797 serve as an acceptable receipt for a List A document until the initial Form I-551 is received in the mail. Four commenters requested that Certificates of Naturalization or Citizenship be added to List A of Form I-9. One commenter wrote that it is discriminatory to allow U.S. citizens to use certified copies of birth certificates but not allow Certificates of Naturalization or Citizenship for those born outside of the United States. Two commenters requested that enhanced State-issued drivers’ licenses be added to the list of documents that establish both identity and employment authorization (List A).

Suggested changes to acceptable documents on List B of Form I-9 included one commenter’s suggestion that Native American tribal documents meet the same minimum requirements as State-issued driver’s licenses if they are included on List B. Two commenters wrote that school ID cards should meet the same minimum requirements as State-issued driver’s licenses.

With respect to changes to acceptable documents on List C of Form I-9, one commenter proposed that voter registration cards, currently under List B, be made acceptable documents on List C because such documents evidence that the bearer is 18 or older and a U.S. citizen. Concerning all documents acceptable for Form I-9, two commenters suggested the addition of biometrics to Form I-9 documents. One of the two commenters suggested that the addition of biometrics would prevent identity fraud.

DHS appreciates these commenters’ concerns and suggestions. However, these comments do not address the changes made in the interim rule to the Lists of Acceptable

Documents for Form I-9 and, therefore, are outside the scope of this rulemaking. In considering any future changes to the Lists of Acceptable Documents, DHS may consider commenters' suggestions.

I. Standardizing State and Federal document requirements

One commenter suggested that all State and Federal agencies should accept the documents on Lists A, B, and C of Form I-9 as proof of entitlement to a benefit.

This suggestion is outside the scope of the interim rule, which is limited to documents used for the Form I-9 employment eligibility verification process. Moreover, DHS does not have the authority to mandate that State and Federal agencies accept Form I-9 documents as proof of entitlement to benefits.

J. Requests for outreach and guidance

DHS received several requests for additional outreach to the public and additional guidance on the Form I-9 process. Two commenters requested that DHS perform greater outreach to inform the public about their responsibilities concerning Form I-9. One of the two commenters indicated that special efforts should be made to reach refugees and asylees.

One commenter asked whether Forms I-9 that were completed a few days before the effective date of the revised Form I-9 still have to meet the requirements of the final rule.

Two commenters wrote that there is insufficient guidance for the many categories of aliens with temporary employment authorization. One commenter wrote that many of these aliens are at risk of losing or being denied employment because they are unable to meet the requirements of the interim rule. The first commenter wrote that since the notice of proposed rulemaking at 63 FR 5287 was published in 1998, Congress and

USCIS have created a number of new categories of employment authorization, for which it provided only sporadic or no guidance. The first commenter also wrote that the 1997 interim rule that precedes this interim rule (see 62 FR 51001) provides no guidance for these categories. Both commenters, however, requested DHS guidance for the special categories of temporary employment authorization with varying validity periods, such as those with automatic extensions.

With respect to acceptable documents for Form I-9, one commenter requested that DHS provide examples of school ID cards acceptable as List B documents. One commenter asked whether an employer can accept documents other than those the employee originally presented under the receipt rule and would like this clarification to be included in the Handbook.

With respect to completion of Form I-9, one commenter wanted to know whether a notary public can act on behalf of an employer.

Several commenters requested that DHS provide additional guidance for employers about reverification of an employee's continued employment authorization. Six commenters requested clarification on reverifying documents that have expired after the time of hire and after Form I-9 is completed. Four commenters asked if U.S. passports or State-issued drivers' licenses had to be reverified. One commenter requested that refugees and asylees not be required to be reverified once their EADs expire because both are authorized to work incident to status. One commenter wanted to know how to complete Form I-9 for employees who are rehired by the same employer and whose documents that were used to complete the original Form I-9 have expired. The commenter also questioned whether Section 3 of Form I-9 has sufficient room to reverify two documents. Two commenters asked if they were required to reverify expired

passports from FSM or RMI that were not expired at the time Form I-9 was initially completed.

DHS appreciates the commenters' requests for outreach and further guidance on the Form I-9 process. In addition to multiple written resources, including the Handbook, USCIS continually provides individualized outreach to employers. USCIS regularly provides Web-based seminars on Form I-9 and E-Verify and conducts live presentations in several states. Employers may request these seminars and live presentations at the DHS Web site. USCIS also collaborates with U.S. Immigration and Customs Enforcement (ICE) to provide additional outreach to employers regarding employment authorization requirements. Employers with specific questions related to the Form I-9 process are encouraged to call the USCIS Verification Division at 1-888-464-4218.

K. Comprehensive Immigration Reform

Nineteen commenters requested that DHS conduct a comprehensive reform of current immigration policies. Thirteen of the 19 commenters expressed opposition to the displacement of U.S citizens and/or employment-authorized persons in the workforce by undocumented workers. Two of the 19 commenters supported the legalization of undocumented workers. Three of the 19 commenters opposed continued legal immigration to the United States. Six of the 19 commenters specifically supported the use of E-Verify, and five commenters specifically opposed it.

These comments are outside the scope of the interim rule which was limited to making discrete changes to the Lists of Acceptable Documents for Form I-9.

III. Regulatory Requirements

The interim rule published by DHS on December 17, 2008, contains a complete regulatory analysis for the changes implemented under that rule. See 73 FR 76505,

76507-10.

A. Executive Order 12866

This rule is a significant regulatory action under Executive Order 12866, section 3(f)(1), Regulatory Planning and Review. Accordingly, the Office of Management and Budget (OMB) has reviewed this rule.

DHS received three comments on the interim rule's estimated cost of renewing an expired document to comply with the rule. One commenter suggested that the costs may be too high for many individuals or may force an employee to get a new type of document. The commenter also wrote that the basis for the decision to remove expired documents is not supported by any study or statistic.

DHS appreciates the concerns of the commenters regarding the added costs that some individuals may bear to obtain unexpired documents to meet the new Form I-9 requirement. However, DHS has determined that any such costs are outweighed by the benefits of retaining the requirement that all documents be unexpired. Continuing to permit use of expired documents for Form I-9 would undermine the reliability of the verification process. Expired documents are subject to fraud. DHS experience indicates that:

- older, invalid, expired documents are too easily converted to uses other than the purpose intended by their issuing authorities,
- requiring documents to be unexpired establishes a clear standard for U.S. employers,
- since an expired document is no longer useful for its original purpose as intended by the issuer, DHS should not impute validity to an expired document for purposes of Form I-9,

- as stated in the interim rule, once the transition to the new Form I-9 is complete, DHS anticipates that the costs incurred by employers will decrease because the updated Lists of Acceptable Documents, simplified design of the Form I-9, and more comprehensive instructions provided with the form, will make the verification process for employers easier than it is now.

DHS is not adopting the commenters' suggestions in this final rule.

Another commenter objected to the use of leisure time to calculate the cost of the time spent obtaining unexpired documents, noting that the time spent retrieving documents could be spent working. DHS agrees that it is possible that some of the opportunity costs associated with obtaining replacements for expired documents could be based on the value of time spent working and not solely the value of leisure time as the interim rule estimated. In the example that the commenter refers to, the interim rule stated that if 1.2 percent of the estimated 58 million annual new hires in the United States must obtain a new document, 696,000 people are affected. See 73 FR 76510. The example said that costs for an identification card was \$14.40, and that each affected person would spend about 4 hours of personal time to obtain a new card at a cost per hour of \$14.06. Id. If the interim rule had used the Bureau of Labor Statistics employer compensation costs for all civilian occupations of \$28.11 per hour worked, instead of the value of leisure, the example would have estimated that a person could expend up to \$14.40 in cash and \$112.44 in opportunity costs, or total costs of \$126.84, to obtain a State-issued identification card. Thus, using, as suggested by the commenter, the value of time spent working instead of the value of leisure, along with the 1.2 percent figure

from the American University study cited in the interim rule,¹¹ the rule would have shown that the aggregate employee expense for obtaining an acceptable document could be as high as \$88,280,640, instead of the \$49,137,600 that was cited in the interim rule's example. It is likely that the time spent obtaining unexpired documents would be a mix of foregone leisure time and foregone work time and the actual cost would be within the range of the \$49,137,000 cited in the interim rule and the \$88,280,640 calculated above. DHS continues to believe these costs are outweighed by the benefits of retaining the requirement that all documents be unexpired.

B. Regulatory Flexibility Act

As discussed in the interim rule, DHS determined that this regulatory action is exempt from notice and comment rulemaking pursuant to 5 U.S.C. 553(b)(B). Therefore, the interim rule was exempt from the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Accordingly, USCIS has not prepared a regulatory flexibility analysis of this action.

IV. Paperwork Reduction Act (PRA)

In the December 17, 2008, interim rule DHS requested and received OMB approval to use the revised Form I-9 when the interim rule became effective until June 30, 2009. The interim rule also allowed the public to submit comments on the revised Form I-9 for 60 days. The comments to the revised Form I-9 have been addressed in the supplementary portion of this final rule, and DHS determined it would not make additional changes to Form I-9 at this time. On April 28, 2009, DHS published a 30-day notice in the **Federal Register** at 74 FR 19233 to extend the use of the revised Form I-9

¹¹ Robert Pastor, et al., Voter IDs Are Not the Problem: A Survey of Three States (Center for Democracy and Election Management, American University, Washington, D.C., Jan. 9, 2008). <http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf>.

past the June 30, 2009, expiration date. OMB approved the extension request on August 7, 2009. Form I-9 does not expire until August 31, 2012.

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 8 CFR part 274a, which was published in the **Federal Register** at 73 FR 76505 on December 17, 2008, including the corrections to the interim rule which were published in the **Federal Register** on January 16, 2009, at 74 FR 2838 and March 11, 2009, at 74 FR 10455 are adopted as a final rule without change.

Janet Napolitano,
Secretary.

[FR Doc. 2011-9152 Filed 04/14/2011 at 8:45 am; Publication Date: 04/15/2011]