

# PUBLICATION

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## Employers: When the DACA Card Shows a Different Identity

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**Employers of existing workers who are granted DACA work authorization present challenges to employers who want to keep the workers, maintain "honesty policies," and comply with I-9 and E-Verify requirements. USCIS has announced guidance on the I-9 and E-Verify fronts.**

Employers face a quandary when a worker presents new information and documentation about work authorization that calls into question the worker's previously presented information or documents. This came up often as a result of the 1986 amnesty program and since then when the government has implemented new eligibility programs for groups of people such as temporary protected status for nationals of certain countries. The government currently is inviting applications for "Deferred Action for Child Arrivals" (DACA) is an amnesty-like program that suddenly gives opportunity to people who may have been functioning without authorization to become authorized. If the DACA beneficiary seeks new employment, the situation is simple: The employer must complete Form I-9, as with all new hires, and use E-Verify if the company/facility is registered to do so.

But if the DACA beneficiary is an existing employee, the quandary arises, particularly if the new information presented in the Form I-766 Employment Authorization Document (the most important product of the DACA application process and an I-9 List A document) is inconsistent with previously provided information and reflective of a past misrepresentation. Many DACA beneficiaries are excellent workers whose continued employment is desirable in general. If, however, the employer has a policy requiring termination of workers who have lied to the employer (such as on resumes about education or other qualifications), then there is a risk of undermining the policy by allowing the worker to continue. A DACA beneficiary is not one of the protected classes under the prohibition for "unlawful immigration-related employment practices" relating to citizenship status (citizens, permanent residents, asylees, and refugees), so the legal risk of termination seems small, though national origin discrimination or other protected classes must be kept in mind.

If the employer decides to keep the existing worker who presents a DACA card, the question arises how to deal with I-9 and E-Verify. USCIS has published a guide for employers in this situation, titled "Consideration of Deferred Action for Childhood Arrivals: Guidance for Employers." Under the guidance, if identity information has changed in Section 1 of the previously completed Form I-9 (name, birth date, SSN), the employer should complete a new Form I-9 and, if the employer uses E-Verify, complete an E-Verify query. This seems contrary to the E-Verify policy/rule to limit E-Verify queries to new hires (or in certain situations involving federal government contractors), but ostensibly this is a recognition that while the employee as a human being is not new to the employer, the employee with those data points is new to the verification process and systems and needs to be checked. If the identity information has not changed-- apparently even if the new DACA status somehow calls into question the previously presented work authorization documents' validity-- the employer has the option to complete only section 3 of the existing I-9, complete section 3 of a new I-9, or complete a new I-9 altogether, and an E-Verify query is NOT to be completed.

The USCIS guidance does not purport to guide an employer about whether to continue to employ the DACA beneficiary who previously misrepresented identity or presented a forged document, but rather only how to complete the verification processes if the employer decides to continue employment.

## How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We help federal contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations.

We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens.

We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.