

PUBLICATION

Immigration Update: FAM Gets a Makeover; I-9/E-Verify tips for Documenting H-1B Validity Dates for Short-Term Workers; Conducting Internal I-9 Audits

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Where is the Foreign Affairs Manual?

As of November 19, 2015, the Foreign Affairs Manual (FAM) Chapter 9 “9 FAM” has been revised, rewritten, renumbered and relocated to 9 FAM-e on the Department of State website. This 9 FAM-e is now the authoritative source for visa guidance. The FAM and its associated Handbooks are the single, comprehensive and authoritative source for the Department of State's organizational structures and contain the policies and procedures that govern the operations of the State Department, the Foreign Service and, as applicable, other federal agencies. While the new 9 FAM-e overhauls language and organization, it does not alter substance. The new 9 FAM-e presents information in a more improved way and adopts an organizational structure that is both more logical and better suited to modern search technologies.

For those with frequent travelers, the 9 FAM-e section (formerly 9 FAM) is the complete resource on all visa classifications, both nonimmigrant and immigrant, and is a valuable tool in understanding the eligibility requirements for any particular visa classification.

For example, a frequently consulted section, [9 FAMe 402.2-5\(B\)](#) (formerly 9 FAM 41.31 N8), lists the acceptable types of activities for B-1 business visitors.

The scope of 9 FAM-e includes details on grounds of ineligibility, waivers and other critical issues facing foreign nationals seeking to enter the United States. Users of the new FAM-e will notice that is much easier to navigate and search than its predecessor and should become an invaluable resource. The new site contains a special section with crosswalks to the former 9 FAM, so users can match new sections with former locations in the legacy FAM and vice versa.

I-9 Guidance on H-1B Petition/I-94 Mismatch and Short Term Workers

In a recent meeting between the Verification and Document Liaison Committee within American Immigration Lawyers Association (AILA) and USCIS's Verification Division and ICE Homeland Security Investigations, further guidance was provided on documenting the mismatch of dates for H-1B nonimmigrant workers between the status expiration date noted on the I-94 Arrival/Departure Record and the underlying USCIS petition expiration date. Pursuant to H-1B regulations, the H-1B beneficiary may be admitted for a period that includes the validity of the underlying H-1B petition, plus a period of up to 10 days before the period begins and 10 days after the validity period ends, but work authorization is limited to the period of the approved H-1B petition. This can often result in confusion for employers who are completing Sections 1 and 2 of Form I-9 and do not know how to address the conflicting dates.

Employers and H-1B employees are instructed to handle this mismatch according to the following guidance:

When completing Form I-9 in this situation, the employee should enter the H-1B petition expiration date in Section 1. In Section 2, the employer should enter the expiration date from the Form I-94 the employee presents.

If the expiration date for employment authorization provided by an employee in Section 1 does not match the expiration date of the List A or List C document the employee presents for Section 2, employers should re-verify the employee's work authorization no later than the earlier of the two dates. *Q & A November 10, 2015 AILA Verification and Documentation Liaison Committee Meeting, Q14.*

Also discussed was the treatment of short-term work assignments and cases where employees have completed the work and left their assignment by the time a Social Security Number (SSN) can be processed and issued. If the employee is no longer employed by the U.S. employer by the time an SSN is issued, the employer should not update Form I-9 or create E-Verify cases for these short-term workers just to add the SSN, but instead “employers should note on the employee's Form I-9 why the E-Verify case was not created.” This does not alter the normal process for simply delaying an E-Verify query until the SSN is issued in cases where an employee is waiting to receive an SSN and is still employed with the U.S. employer when the SSN becomes available. *Q & A November 10, 2015 AILA Verification and Documentation Liaison Committee Meeting, Q5.*

More on I-9: Government Offers Guidance for Employers Conducting Internal I-9 Audits

The U.S. Immigration and Customs Enforcement (ICE) Office of Special Counsel for Immigration-Related Unfair Employment Practices recently issued guidance to help employers conduct internal I-9 audits in compliance with the employer sanctions and anti-discrimination provisions of the Immigration and Nationality Act (INA).

The ICE guidance addresses key issues for employers to consider in structuring and implementing an internal I-9 audit:

- Appropriate purpose and scope of the I-9 audit.
- Avoiding I-9 audits that are discriminatory or retaliatory.
- Employer communications to employees before and during an I-9 audit.
- Procedures for correcting errors or omissions on a Form I-9.
- Processes for determining whether Section 2 documents meet the Form I-9 requirements.

The new ICE guidelines tell employers what they should do in the following internal I-9 audit situations:

- Discovery that no Form I-9 was completed or that the Form I-9 is otherwise deficient.
- Photocopies of Form I-9 documents do not appear to be genuine.
- Employer failed to create individual E-Verify case for employee.
- Employer terminated employee upon receipt of a tentative non-confirmation (TNC)
- Employee admits that he or she is not work-authorized or had worked with a false identity or fraudulent documents.
- Employee fails to present acceptable documents within a reasonable amount of time.
- An employee offers a "tip" that another employee is not work-authorized.

Finally, the ICE guidance clarifies the government's position relating to certain questions in connection with internal I-9 audit practices:

- Whether the "90-day period" set forth by the U.S. Department of Homeland Security Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45611 (Aug. 15, 2007) (which was rescinded) applies to an employer's internal I-9 audit procedures.
- Whether employers should follow the ICE 10-day period set by ICE policy relating to a Notice of Suspect Documents letter.

- Whether employers should use the Social Security Number Verification Service (SSNVS) during an I-9 internal audit.

In short, employers should review the new ICE guidance and incorporate the guidelines into the employer's internal I-9 audit policies. The ICE Form I-9 audit guidance document can be found [here](#).

While not required by law, many employers have adopted "best practice" policies, which include a periodic internal audit of its Forms I-9 to ensure ongoing compliance with employer sanctions and anti-discrimination provisions of the INA. While the ICE guidance will not insulate an employer from potential liability under either provision, adopting the I-9 audit practices outlined in the guidance should reduce the risk of employer liability related to the internal Form I-9 audit process.

Emma Arrives for the Holidays

United States Citizenship and Immigration Services (USCIS) has added a new helpful friend to its evolving website. On December 2, 2015, USCIS invited the public to meet Emma, the new computer-generated assistant who can help answer your immigration questions and take you to the right section of the website. Named after Emma Lazarus, the poet who authored the *The New Colossus*, known for its famous words "Give me your tired, your poor, your huddled masses yearning to breathe free," displayed at the Statue of Liberty, Emma is designed to help make immigration information more accessible by providing immediate responses to questions pertaining to USCIS' services, and soon it will be able to interact with the public in Spanish as well.

For more information on Emma and her abilities, please click [here](#). To start up a conversation with this new friend, visit the [USCIS website](#) and click on "Ask a Question."