

# REFUGEEWORKS

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## From the RefugeeWorks Forum, Posted by Tom Pabst, Refugee Services Program Specialist, ORR

2007 Changes to the DHS Form I-9 Employment Eligibility Verification Form  
Reduction of the Number of Acceptable Documents and Other Changes to Employment Verification Requirements

From Interpreter Releases □ Vol. 84, No. 28, July 23, 2007, page 1704:

Reduction of the Number of Acceptable Documents and Other Changes to Employment Verification Requirements

Section 412(a) of IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act) requires a reduction in the number of documents that may be accepted in the employment verification process. Section 412(d) clarifies the applicability of (INA) Sec. 274A to the federal government. Section 610 of the Regulatory Flexibility Act requires agencies to review rules that have a significant economic impact on a substantial number of small entities every 10 years. USCIS is conducting this review in conjunction with IIRIRA implementation. The Department of Justice published a proposed rulemaking on February 12, 1998 (key sections below), to implement Secs. 212(a) and (d) of IIRIRA and propose other changes to the employment verification process identified through that review. A revised Form I-9, Employment Eligibility Verification, was included with the proposed rulemaking. The comment period closed on April 3, 1998. DHS intends to publish a final rule this year (2007). It should be noted that this action supersedes the previously published regulatory action titled Reduction in the Number of Documents Accepted for Employment Verification. In order to avoid confusion, this regulatory action is being referenced under the current RIN, which captures all prior actions related to employment verification. Final Action: date to be determined (No. 1078).

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FROM: [Federal Register: February 2, 1998 (Volume 63, Number 21)]

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 274a and 299

[INS No. 1890-97]  
RIN 1115-AE94

Reduction in the Number of Acceptable Documents and Other Changes  
to Employment Verification Requirements

agency: Immigration and Naturalization Service, Justice.

action: Proposed rule.

Below are key portions of the 51 page FR Notice:

IIRIRA, enacted on September 30, 1996, makes several amendments to the employer sanctions provisions of section 274A of the Immigration and Nationality Act. This rule proposes to implement the amendments in:

(1) Section 412(a) of IIRIRA, which requires a reduction in the number of documents that may be accepted in the employment verification process;

The Immigration Reform and Control Act (IRCA), enacted in 1986, amended the (Immigration and Nationality) Act to require persons or entities to hire only persons who are eligible to work in the United States. The Act, as amended, requires persons or entities to verify the work-eligibility and identity of all new hires. The Employment Eligibility Verification form, Form I-9, was designated for that purpose. Newly hired individuals must attest to the status that makes them eligible to work and present documents that

# REFUGEE WORKS

THE NATIONAL CENTER FOR REFUGEE EMPLOYMENT AND SELF-SUFFICIENCY

establish their identity and eligibility to work. Employers, and recruiters or referrers for a fee (as defined in section 274A(a)(1)(B)(ii) of the Act and 8 CFR 274a.2(a)), must examine the documents and attest that they appear to be genuine and to relate to the individual. They may not specify a document or combination of documents that the individual must present. To do so may violate section 274B of the Act.

The statutory framework, currently implemented by regulation at 8 CFR 274a.2, provides for three lists of documents: documents that establish both identity and employment eligibility (List A documents), documents that establish identity only (List B documents), and documents that establish work eligibility only (List C documents).

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The proposed rule includes the statement that only original, unexpired documents that appear on their face to be genuine and to relate to the individual presenting the documents can be accepted by employers and recruiters or referrers for a fee. These requirements apply to all three lists (A, B, C) of documents, as well as to acceptable receipts. Currently, the regulations permit use of expired United States passports and expired identity documents. The proposed rule will require any document presented to be unexpired.

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The Service recognizes that the requirement that individuals present unexpired documents may impose a cost on persons seeking employment. The Service anticipates and encourages public comment on this point. The Service is especially interested in the views of employers and recruiters or referrers for a fee concerning whether such a requirement simplifies verification for them, and of persons involved in assisting welfare recipients in transitioning to work concerning the burden imposed by the requirement. To that end, what follows is some of the analysis underlying our decision. Replacing an expired United States passport is expensive (\$55, plus an additional \$30 for expedited service). Because a passport remains valid for 10 years, however, some employers have questioned whether an expired passport is a reliable identification document. They note that a person's appearance can change a great deal in 10 years. In addition, the Service does not believe that continuing to permit employees to present expired passports would be of help to most low income individuals, those for whom the cost of replacement documents would be the most serious issue, because they would be unlikely to have obtained a passport in the first place. Finally, the Service believes that most employers would prefer a simple requirement that documents be unexpired to a list that included exceptions to the rule. The Service also researched the cost of obtaining an identity document in 10 states representing a wide range geographically and in population size. The cost of an identification card was the primary focus, because an individual who needs to drive must have an unexpired driver's license for that purpose, and otherwise an individual would not need to obtain a driver's license solely for verification purposes. In all but one of the states contacted, the cost of an identification card is lower than the cost of a driver's license. The charge for the card in those states ranges from \$4 to \$15 and averages around \$10. In four states, the identification card does not expire, so it represents a one-time cost and the requirement that documents be unexpired would not be an issue.

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The proposed rule permits the employer, or recruiter or referrer for a fee, to complete the Form I-9 prior to the date that an individual begins work, so long as the Form I-9 is completed after the hiring commitment is made and this practice is uniformly applied to all employees.

Section 274a.3(a)--Documents That Establish Both Identity and Employment Authorization (List A)

Section 412(a) of IIRIRA eliminates three documents from the statutory list:

- (1) Certificate of United States citizenship;
- (2) certificate of naturalization; and
- (3) an unexpired foreign passport with an endorsement that indicates eligibility for employment.

The documents remaining on the list by statute are: a United States passport, resident alien card, alien registration card, or other document designated by the Attorney General.

The Service (now DHS) proposes to amend the current regulations to limit the documents that establish both identity and employment authorization to the following documents. Documents preceded by an asterisk are proposed to be added by regulation. The other documents are listed in the law, as amended by IIRIRA. Documents proposed for List A are:

# REFUGEE WORKS

THE NATIONAL CENTER FOR REFUGEE EMPLOYMENT AND SELF-SUFFICIENCY

- (1) A United States passport;
- (2) An Alien Registration Receipt Card or Permanent Resident Card, Form I-551;
- \* (3) A foreign passport with a Temporary I-551 stamp;
- \* (4) An employment authorization document issued by the Service which contains a photograph (Form I-766, Form I-688, Form I-688A, or Form I-688B); and,
- \* (5) In the case of a nonimmigrant alien authorized to work only for a specific employer, a foreign passport with an Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status and the name of the approved employer with whom employment is authorized, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

The proposed rule does not designate the certificate of United States citizenship, certificate of naturalization, re-entry permit, and refugee travel document as acceptable List A documents. Holders of these documents can easily obtain other acceptable documents which are more readily recognized by employers.

b) Documents that establish identify only (List B).

(1) Acceptable List B documents.

(i) A driver's license or identification card issued by a state (as defined in section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by section 101(a)(29) of the Act), provided that the document contains a photograph or the following identifying information: name, date of birth, sex, height, color of eyes, and address;

(ii) A Native American tribal document; or

(iii) In the case of a Canadian nonimmigrant alien or alien with common nationality with Canada who is authorized to work only for a specific employer, a driver's license issued by a Canadian Government authority or a Canadian federal or provincial identification card.

What Documents Are Being Removed From List B and Why?

The Service proposes to remove the following documents from List B:

- (1) An identification card issued by Federal or local authorities;
- (2) A school identification card with a photograph;
- (3) A voter's registration card;
- (4) A United States military card or draft record;
- (5) A military dependent's identification card;
- (6) A United States Coast Guard Merchant Mariner Card; and
- (7) For individuals under age 18 who are unable to produce an identity document, a school record or report card, clinic doctor or hospital record, and daycare or nursery school record.

Section 274a.3(c)--Documents That Establish Employment Authorization Only (List C)

How Does IIRIRA Affect List C Documents?

Section 412(a) of IIRIRA amends section 274A(b)(1)(C) of the Act by removing the certificate of birth in the United States (or other certificate found acceptable by the Attorney General as establishing United States nationality at birth) from the list of acceptable documents that may be used to establish employment authorization for compliance with the employment verification requirements. Acceptable List C documents are: a social security account number card (other than one which specifies on its face that the issuance of the card does not authorize employment in the United States) or other documentation found acceptable by the Attorney General that evidences employment authorization.

What Documents Will Be on List C Under the Proposed Rule?

The Service proposes to limit acceptable List C documents to the following:

- (1) A social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States);
- (2) A Native American tribal document; and
- (3) In the case of a nonimmigrant alien authorized to work only for a specific employer, an Arrival-Departure Record, Form I-94, containing an endorsement of the alien's nonimmigrant status and the name of the approved employer with whom employment is authorized, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-

# REFUGEE WORKS

THE NATIONAL CENTER FOR REFUGEE EMPLOYMENT AND SELF-SUFFICIENCY

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The Social Security Administration (SSA) issues cards with the legend stated in the regulations, "not valid for employment purposes," to individuals from other countries who are lawfully admitted to the United States without work authorization, but who need a number because of a Federal, state, or local law requiring a social security number to get a benefit or service. In 1992, SSA began issuing cards that bear the legend "valid for work only with INS authorization" to people who are admitted to the United States on a temporary basis with authorization to work. This proposed rule amends the language in the regulations to mirror the language in the Act and IIRIRA and to clarify that cards bearing either restrictive legend are not acceptable List C documents.

What Documents Are Being Removed From List C and Why?

The Service proposes to eliminate the following documents as acceptable for establishing employment authorization:

- (1) A Certification of Birth Abroad issued by the Department of State, Form FS-545;
- (2) A Certification of Birth Abroad issued by the Department of State, Form DS-1350;
- (3) A birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal;
- (4) A United States citizen Identification Card, INS Form I-197;
- (5) An Identification card for use of a resident citizen in the United States, INS Form I-179; and
- (6) An unexpired employment authorization document issued by the Service.

The IIRIRA provides for additions to List C by regulation of "other documentation found acceptable by the Attorney General that evidences employment authorization." The Service recognizes that elimination of the birth certificate, in particular, may generate public comment. The Service notes, however, that Congress specifically eliminated this document from the list, based on its concern that "Birth certificates, even if issued by lawful authority, may be fraudulent in that they do not belong to the person who has requested that one be issued. This problem is exacerbated by the large number of authorities--numbering in the thousands--that issued birth certificates." (See H.R. Rep. No. 104-469, at 404-05 (1996).) In addition to believing that eliminating the birth certificate is consistent with Congressional intent, the Service has additional reasons for taking this action. Service officers have expressed concern by the lack of uniform controls among the states over the issuance of replacement birth certificates. Officers are encountering situations in which unauthorized aliens have used fraudulently obtained birth certificates

[[Page 5296]]

to falsely claim United States citizenship and gain employment. The other documents proposed for removal also pose burdens to employers because it can be difficult for employers to assess whether they appear genuine on their face. The certifications of birth abroad, issued by the State Department, are not commonly recognized documents with which the general public is familiar. The Service no longer issues the citizen identification cards which were on the list. Legitimate holders of the documents being removed are all eligible for an unrestricted social security card, which allows them to establish their eligibility to work in the United States. The Service believes that employers will find a shorter list of documents easier to work with. In this proposed rule, the existing general category of documents characterized as "employment authorization documents issued by the Service" is no longer designated as an acceptable List C document. This general category was included in the current regulations while the Service was taking steps to standardize the employment authorization documents that it issues. The Service has taken several steps to issue uniform documentation. The Service introduced the I-688B EAD in 1989. The I-766 EAD, introduced in February of 1997, represents further improvement because the centralized process is more secure and efficient. These documents are List A documents which establish both identity and eligibility to work. Moreover, with his proposed rule, the Service announces additional steps, such as the endorsement of Form I-94 when it is issued to a nonimmigrant who is authorized to work for a specific employer. The Service believes that a general category for Service-issued employment authorization documents is no longer necessary.

#### **In What Circumstances are Receipts Acceptable?**

The proposed rule permits the use of receipts in three instances:

- (1) a receipt for an application for a replacement document,
- (2) A temporary I-551 stamp on a Form I-94, and
- (3) A refugee admission stamp on a Form I-94.

# REFUGEE WORKS

THE NATIONAL CENTER FOR REFUGEE EMPLOYMENT AND SELF-SUFFICIENCY

The third instance is when the departure portion of Form I-94 contains a refugee admission stamp. The Service recognizes the importance of newly admitted refugees being able to seek employment promptly upon arrival in the United States. The Service has been working with SSA to ensure prompt issuance to refugees of social security cards which carry no employment restrictions. In most instances, the Service believes that refugees will receive social security cards timely and will be able to present them to employers. The Service also intends to give refugees the option of obtaining an I- 766 EAD, but recognizes that in most instances refugees will be able to obtain a social security card faster. Refugees may wish to obtain an I- 766 EAD so that they will have a Service-issued document with a photograph. In order to ensure that refugees are still able to work if they encounter delays in obtaining cards from either SSA or the Service, the Service proposes a special receipt rule. Under this rule, a Form I-94 with a refugee admission stamp will be a receipt evidencing eligibility to work valid for 90 days from the date of hire. It will not be a receipt for a specific document. The refugees will be permitted to present either an unrestricted social security card or an I-766 EAD at the end of the 90-day receipt period. If the refugee presents a social security card, the refugee will also need to present a List B document. If the refugee presents an I-766 EAD, he or she does not need to present another document.

(@Page 21)

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(page 33):

Sec. 274a.2 Why is employment verification required and what does it involve?

(a) Why employment verification is required. It is unlawful for a person or entity to hire or to recruit or refer for a fee an individual for employment in the United States without complying with section 274A of the Act and Secs. 274a.2 through 274a.5. The Act requires the person or entity to verify on a designated form that the individual is not an unauthorized alien.

(1) Designation of Form I-9 and Form I-9A. The Employment Eligibility Verification form, Form I-9, has been designated by the Service as the form to be used in complying with the employment verification requirements.

. A person or entity that hires, or recruits or refers for a fee, an individual for employment must ensure that the individual properly:

(i) Completes section 1 on the Form I-9. If an individual is unable to complete the Form I-9 or needs it translated, someone may assist him or her. The preparer or translator must provide the assistance necessary for the individual to understand the Form I-9 and complete section 1 and have the individual initial and sign or mark the Form in the appropriate places. The preparer or translator must then complete the "Preparer/Translator" portion of the Form I-9; and (ii) Presents to the employer, or recruiter or referrer for a fee, documentation, described in this paragraph, that establishes the individual's identity and eligibility to work. An individual has the choice of which document(s) to present. Acceptable documentation is: (A) An original unexpired document that establishes both identity and employment authorization (List A document described in Sec. 274a.3(a)); or

(B) An original unexpired document that establishes identity (List B document described in Sec. 274a.3(b)) and a separate original unexpired document which establishes employment authorization (List c document described in Sec. 274a.3(C)); or

(C) If an individual is unable to present a document listed in Secs. 274a.3(a), (b), or (c) and is hired for a duration of 3 or more business days, an acceptable receipt (listed in Sec. 274a.3(d)) instead of the required document. A receipt is valid for a temporary period, specified under Sec. 274a.3(d). The individual must present the required document at the end of such period.

(2) Document review and verification. An employer, or recruiter or referrer for a fee, must:

(i) Physically examine the documentation presented by the individual establishing identity and employment eligibility as set forth in Sec. 274a.3 and ensure that the document(s) presented appear to be genuine and to relate to the individual. Employers and recruiters or referrers for a fee may not specify which document or documents an individual is to present. To do so may violate section 274B of the Act;

**(d) Receipts--(1) Acceptable receipts and their validity periods.**

(i) A receipt for an application to replace a document described in paragraph (a), (b), or (c) of this section because the document was lost, stolen, or damaged. Documentation acknowledging receipt of an application for an initial grant or extension of a document described in paragraph (a) or (c) of this section is not a receipt for this purpose, except for a receipt for the application of a timely filed application for an extension of nonimmigrant stay as provided in Sec. 274a.12(b)(2). The individual must present the replacement document within 90 days of the

# REFUGEE WORKS

THE NATIONAL CENTER FOR REFUGEE EMPLOYMENT AND SELF-SUFFICIENCY

hire or, in the case of reverification under Sec. 274a.2(d) or Sec. 274a.5(b), within 90 days of the date employment authorization expires or the date of rehire.

(ii) The arrival portion of Form I-94 marked with an unexpired Temporary I-551 stamp and affixed with a photograph of the individual. The individual must present the Form I-551 within 180 days of the hire or, in the case of reverification under Sec. 274a.2(d) or Sec. 274a.5(b), within 180 days of the date employment authorization expires or the date of rehire.

(iii) The departure portion of Form I-94 marked with an unexpired refugee admission stamp. The individual must present either an unexpired Employment Authorization Document (Form I-766 or Form I-688B) or a social security account number card that does not contain employment restrictions and an identity document described in paragraph (b) of this section within 90 days of the hire or, in the case of reverification under Sec. 274a.2(d) or Sec. 274a.5(b), within 90 days of the date employment authorization expires or the date of rehire.