

# Immigration Compliance Alert

## Recent Developments in Business Immigration Law

### All U.S. Employers Must Use New I-9 Form Starting April 3, 2009

United States law requires that every employer complete Form I-9, Employment Eligibility Verification ("I-9 Form"), for each new employee within three days of hire. While completing the Form, the employee is required to present original documents that demonstrate both identity and authorization to work in the United States. A list of acceptable documents for I-9 purposes is set forth on the back of the Form. Failure to complete the Form can result in fines and imprisonment for the employer.

All employers in the United States will soon be required to use a new version of the I-9 Form. Additionally, new regulations will become effective that change the list of acceptable documents for I-9 purposes. The most important change is that expired documents will no longer be acceptable. Each document presented must be unexpired, unless it does not

have an expiration date (such as a Social Security card). The new Form and regulations were scheduled to go into effect on February 2, 2009. However, on January 30, 2009, the U.S. Department of Homeland Security issued a notice delaying the effective date of the Form and regulations until April 3, 2009, due to a White House request to review pending regulations.

Section 1 of the Form, which is completed by the employee, requires that the employee indicate his or her immigration status in the U.S. A new category has been added to Section 1: "A noncitizen national of the United States." This is likely to cause confusion, as this term is not defined on the Form itself. Noncitizen nationals of the United States are: individuals who were born in American Samoa; certain residents of the Northern Mariana Islands who are not U.S. citizens; and certain individuals who were born abroad to noncitizen U.S. nationals. Though U.S. nationals do not possess full U.S. citizenship, they are not

considered "aliens" under immigration law. They may enter and work in the United States without restriction.

The regulation revises the list of documents that employers may accept to establish a worker's identity and employment authorization, known as List A documents. The following documents have been added to List A on the new edition of Form I-9:

1. Foreign passports containing the I-551 permanent residence notation printed on a machine-readable

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immigrant visa (previously, List A included only the I-551 passport stamp and I-551 permanent resident card);

2. The new U.S. Passport Card; and
3. Passports and certain other documents for citizens of the Federated States of Micronesia and the Republic of the Marshall Islands.

Eliminated from List A are several now-obsolete employment authorization documents. However, Form I-766, the current version of the employment authorization document, remains on List A.

### Update on Federal Contractor Regulations Requiring E-Verify

New rules were scheduled to go into effect on January 15, 2009 that would require most federal government contractors to use E-Verify, an electronic employment eligibility verification system operated by the U.S. Department of Homeland Security. E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) allows employers to electronically confirm the biographical data of employees pursuant to a Memorandum of Understanding entered into among the employer, the U.S. Department of Homeland Security and the Social Security Administration.

Due to pending litigation involving these regulations, implementation has been **delayed until May 21, 2009**. We will continue to keep you apprised of developments in this area.

### Reminder: H-1B Petitions May Be Filed on April 1, 2009 for the Next Fiscal Year

Employers—please note that all petitions for new H-1B visas should be filed with DHS on **APRIL 1, 2009** to ensure that they have a chance of being adjudicated. Employers should identify any employees or prospective employees requiring H-1B status for the upcoming fiscal year as soon as possible. The U.S. government limits the number of new H-1B visas for professionals to 65,000 each year, with limited exceptions. Because demand exceeds supply, DHS has developed a lottery selection process to determine which petitions will be adjudicated. This year's demand is expected to be high, and the entire year's supply of H-1B visas is expected to be exhausted on April 1—the first day that petitions may be filed for the 2010 Fiscal Year. Due to new Labor Condition Application procedures, employers should take increased processing times into account when planning to submit H-1B visa petitions. Employers should not wait until the final weeks before April 1,

2009 to identify possible H-1B visa employees.

### Reductions in Force—Immigration Tips for Employers

In these tough economic times, many employers are reducing their workforces. Companies that employ foreign nationals have additional obligations when terminating employees with H-1B (Specialty Occupation) status. The regulations require that the employer compensate the H-1B employee at the prevailing wage until there is a “bona fide” termination of employment. A bona fide termination does not occur until the employer has advised the Department of Homeland Security (“DHS”) that the employment relationship has been terminated and has provided the employee with payment for his or her travel home. A recent court decision awarded back pay and interest to an employee due to the employer's failure to comply with these requirements in a timely manner. The employee was terminated in March; the employer did not notify the government that the employment had ended until late September. The employer was ordered to pay the employee his salary (plus interest) from March until November, the date the petition was revoked by DHS. Lesson learned: Termination is not termination until DHS knows about it!

OMB No. 1615-0047; Expires 06/30/09

Department of Homeland Security  
U.S. Citizenship and Immigration Services

**Form I-9, Employment Eligibility Verification**

Read instructions carefully before completing this form. The instructions must be available during completion of this form.

**ANTI-DISCRIMINATION NOTICE:** It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

**Section 1. Employee Information and Verification** (To be completed and signed by employee at the time employment begins.)

|                                  |       |                |                                |
|----------------------------------|-------|----------------|--------------------------------|
| Print Name: Last                 | First | Middle Initial | Maiden Name                    |
| Address (Street Name and Number) |       | Apt. #         | Date of Birth (month/day/year) |
| City                             | State | Zip Code       | Social Security #              |

**I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.**

I attest, under penalty of perjury, that I am (check one of the following):

- A citizen of the United States
- A noncitizen national of the United States (see instructions)
- A lawful permanent resident (Alien #) \_\_\_\_\_
- An alien authorized to work (Alien # or Admission #) \_\_\_\_\_ until (expiration date, if applicable - month/day/year)

|                      |                       |
|----------------------|-----------------------|
| Employee's Signature | Date (month/day/year) |
|----------------------|-----------------------|

**Preparer and/or Translator Certification** (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

|   |            |
|---|------------|
| Preparer's/Translator's Signature                       | Print Name |
| Address (Street Name and Number, City, State, Zip Code) |            |
| Date (month/day/year)                                   |            |

**Section 2. Employer Review and Verification** (To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

| List A                          | OR | List B | AND | List C |
|---------------------------------|----|--------|-----|--------|
| Document title: _____           |    | _____  |     | _____  |
| Issuing authority: _____        |    | _____  |     | _____  |
| Document #: _____               |    | _____  |     | _____  |
| Expiration Date (if any): _____ |    | _____  |     | _____  |
| Document #: _____               |    | _____  |     | _____  |
| Expiration Date (if any): _____ |    | _____  |     | _____  |

**CERTIFICATION:** I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) \_\_\_\_\_ and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

|   |            |                       |
|---|------------|-----------------------|
| Signature of Employer or Authorized Representative  | Print Name | Title                 |
| Business or Organization Name and Address (Street Name and Number, City, State, Zip Code) |            | Date (month/day/year) |

**Section 3. Updating and Reverification** (To be completed and signed by employer.)

|                             |  |
|-----------------------------|--|
| A. New Name (if applicable) | B. Date of Rehire (month/day/year) (if applicable) |
|-----------------------------|--|

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

|                       |                   |                                 |
|-----------------------|-------------------|---------------------------------|
| Document Title: _____ | Document #: _____ | Expiration Date (if any): _____ |
|-----------------------|-------------------|---------------------------------|

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

|  |                       |
|--|-----------------------|
| Signature of Employer or Authorized Representative | Date (month/day/year) |
|--|-----------------------|

**LISTS OF ACCEPTABLE DOCUMENTS**

All documents must be unexpired

| LIST A<br>Documents that Establish Both<br>Identity and Employment<br>Authorization   | OR                                    | LIST B<br>Documents that Establish<br>Identity  | AND | LIST C<br>Documents that Establish<br>Employment Authorization  |  |
|---|---------------------------------------|---|-----|---|--|
| 1. U.S. Passport or U.S. Passport Card  |                                       | 1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address |     | 1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States |  |
| 2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)  |                                       | 2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address                |     | 2. Certification of Birth Abroad issued by the Department of State (Form FS-545)  |  |
| 3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa  |                                       | 3. School ID card with a photograph   |     | 3. Certification of Report of Birth issued by the Department of State (Form DS-1350)  |  |
| 4. Employment Authorization Document that contains a photograph (Form I-766)  |                                       | 4. Voter's registration card  |     | 4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal     |  |
| 5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as 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 |                                       | 5. U.S. Military card or draft record   |     | 5. Native American tribal document  |  |
|   |                                       | 6. Military dependent's ID card   |     |   |  |
|   |                                       | 7. U.S. Coast Guard Merchant Mariner Card   |     |   |  |
|   |                                       | 8. Native American tribal document  |     |   |  |
|   |                                       | 9. Driver's license issued by a Canadian government authority   |     |   |  |
| 6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI   |                                       | <b>For persons under age 18 who are unable to present a document listed above:</b>  |     | 6. U.S. Citizen ID Card (Form I-197)  |  |
|   |                                       | 10. School record or report card  |     | 7. Identification Card for Use of Resident Citizen in the United States (Form I-179)  |  |
|   |                                       | 11. Clinic, doctor, or hospital record  |     |   |  |
|   | 12. Day-care or nursery school record | 8. Employment authorization document issued by the Department of Homeland Security  |     |   |  |

**Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)**

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### About Vedder Price

Vedder Price P.C. is a national, business-oriented law firm with over 260 attorneys in Chicago, New York and Washington, D.C.

### The Vedder Price Business Immigration Group

Vedder Price provides a full range of business immigration services. Building on the firm's expertise in corporate compliance and best practices, we work with clients to develop policies and internal processes to ensure compliance with federal and state-level immigration laws and minimize exposure to civil and criminal immigration enforcement. We provide proactive advice to best position a company and its workforce before and after corporate changes, including acquisitions, mergers, divestitures and reorganizations. The firm assists clients in obtaining temporary and permanent immigration status for their executive, managerial and professional employees in virtually every visa category. Together with the firm's tax, benefits, executive compensation, estate planning and employment lawyers, we help clients develop and service their global workforce.

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