

STAFFING COMPANIES AND US IMMIGRATION: I-9S FOR OFFSITE WORKERS, H-1B SPONSORSHIP, AND OTHER CHALLENGES

Karen M. Kett

(313) 965-3457

kkett@clarkhill.com

Michael P. Nowlan

(313) 965-8666

mnowlan@clarkhill.com

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CONTACT INFORMATION



Michael Nowlan, BBA, JD
Immigration Law Attorney
(313) 965-8666
mnowlan@clarkhill.com



Karen Kett, BA, JD
Immigration Law Attorney
(313) 965-3457
kkett@clarkhill.com

Clark Hill PLC is one of the 200 largest law firms in the nation, with over 10 offices around the US. The Immigration Practice Group handles client cases nationally, with offices in Detroit and Washington DC, and over 150 years of combined immigration law experience.

DISCUSSION TOPICS

- I-9 Issues
- Temporary Visa Sponsorship
 - H-1Bs
 - TNs
- Permanent Residence Sponsorship (Green Cards)

I-9 ISSUES

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I-9 BASICS

- Form I-9 – Confirms Employment Authorization in the US
- Employers must have one for all employees hired since November 7, 1986
- Current two page form – <http://www.uscis.gov/sites/default/files/files/form/i-9.pdf>
- Employee completes Section 1 on or before first day of hire
- Employer has three business days, after the day of hire, to complete Section 2 and examine original documents (four day rule)
- Employer, or its agent, reviews original documents and completes Section 2
- May not accept expired documents
- Must not hire persons who lack valid work authorization – actual & constructive knowledge
- Handbook – <http://www.uscis.gov/sites/default/files/files/form/m-274.pdf>
- I-9 Central – <http://www.uscis.gov/i-9-central>

I-9S – STAFFING COMPANY ISSUES

- I-9 statute and regulations specifically state that an employer cannot use a subcontractor relationship (staffing company or independent contractor) to hire someone they have reason to believe is not work authorized
- If an individual is an employee of a staffing company working onsite at a customer, the staffing company has liability if the employee is not work authorized, and the customer may have liability as well
- Customers may try to require staffing companies to use E-Verify and may want to review the staffing companies' Form I-9s and / or review the staffing companies' hiring practices – watch for provisions in contracts with customers

I-9 OFFSITE EMPLOYMENT - USING AGENTS FOR REMOTE HIRES

- Who completes Section 2? “Employer”
- Person completing Section 2 must be the individual who examined the **original** documents from the employee
- Cannot use video or “Face Time” to examine documents
- Can be an agent of the employer – sister company, onsite customer, notary public, or any unrelated neutral third party
- M-274 confirms that the employer is “still liable for any violations in connection with the form or the verification process”
- On the I-9 – e.g. Fred Smith, Agent of ABC company, and HQ address
- Some I-9 software companies provide a solution

I-9S – ALIENS AUTHORIZED TO WORK

- Staffing companies frequently sponsor foreign nationals for work visas and are potentially more likely to hire F-1 students, persons with green cards, or spouses of persons with work visas who have EAD cards
- Aliens authorized to work is the area where the most errors occur
- High risk for missing expiration of status
- Following slides explain how to complete the Form I-9 correctly for this type of employee

FILING OUT THE I-9 – F-1 CPT STUDENTS

List A

Identity and Employment Authorization

Document Title:	French Passport
Issuing Authority:	France
Document Number:	#00XX00000
Expiration Date (if any)(mm/dd/yyyy):	05/13/2020
Document Title:	I-94
Issuing Authority:	DHS
Document Number:	00000000000
Expiration Date (if any)(mm/dd/yyyy):	D/S
Document Title:	Form I-20
Issuing Authority:	DHS
Document Number:	N0000000000
Expiration Date (if any)(mm/dd/yyyy):	06/30/2015

- F-1 CPT (Curricular Practical Training) workers are foreign national students who are allowed to work for a specific company for a semester
- They pay the school for enrollment during the semester, but are also paid by the US employer
- The student must have a valid passport and I-94 card
- Most importantly, the Form I-20 must list the duration of the CPT employment and include your company name on the last page of the I-20
- Watch for hour per week limitations

FILING OUT THE I-9 – F-1 OPT STUDENTS

List A Identity and Employment Authorization	
Document Title:	EAD
Issuing Authority:	DHS
Document Number:	XXX000000000
Expiration Date (if any)(mm/dd/yyyy):	08/31/2015
Document Title:	
Issuing Authority:	
Document Number:	
Expiration Date (if any)(mm/dd/yyyy):	
Document Title:	
Issuing Authority:	
Document Number:	
Expiration Date (if any)(mm/dd/yyyy):	

- OI
 - F-1 OPT (Optional Pract.) workers are foreign national students who are allowed to work for any employer, but can only work for the duration of their EAD card
 - They could be enrolled and have a EAD for just a short time (like the summer), or may have an EAD for one full year – track the exp date
 - Generally, employment on an EAD ends when the current EAD expires – as there is no work authorization allowed while an extension is pending
 - F-1 students who completed a degree in a STEM field can apply for an additional 17 months of employment, before the one year EAD expires, but only if they work for an E-Verify employer – note proposed STEM changes
 - STEM OPT EAD employees can work while the extension is pending – a rare exception

FILING OUT THE I-9 – ALL OTHER EAD WORKERS

List A Identity and Employment Authorization
Document Title: EAD
Issuing Authority: DHS
Document Number: XXX000000000
Expiration Date (if any)(mm/dd/yyyy): 08/31/2015
Document Title:
Issuing Authority:
Document Number:
Expiration Date (if any)(mm/dd/yyyy):
Document Title:
Issuing Authority:
Document Number:
Expiration Date (if any)(mm/dd/yyyy):

- All other EAD workers will present an EAD that is valid until a certain date – and so EAD expiration dates need to be tracked by the employer
- These could be L-2, E-1 E-2 or E-3 visa holders who are spouses of the main sponsored worker, or persons going through the green card process
- These workers must be reverified on or before the EAD expires
- The worker could bring in different documents when being reverified, like an unrestricted SSN card
- Unrestricted SSN cards are allowed for reverification, even without another identify document, because the first identity document was already provided (the first EAD card)
- Generally, employment on an EAD ends when the current EAD expires – as there is no work authorization allowed while an extension is pending

FILING OUT THE I-9 – H-1B, TN OR L-1 WORKERS

List A

01

Identity and Employment Authorization

Document Title: Passport
Issuing Authority: Republic of India
Document Number: J12345678
Expiration Date (if any)(mm/dd/yyyy): 09/01/2020
Document Title: I-94 card
Issuing Authority: US CBP
Document Number: 12345612345
Expiration Date (if any)(mm/dd/yyyy): 09/30/2015
Document Title:
Issuing Authority:

- H-1B, TN and L-1 workers are sponsored by employers
- Generally, the status must be approved before the person can work for the sponsor – no TN or L-1 work authorization while a change of employer is pending
- H-1Bs can work when new application filed – “H-1B portability.” The Fed Ex delivery confirmation is enough – employers do not have to wait for the I-797 receipt, but it is preferred when time permits, and write it on I-9
- Only the foreign passport and I-94 card are needed for the I-9
- Issuing authority can be US CBP (entering the US for the first time with a visa) or USCIS with a COS or EOS
- Do not need to update the I-9 each time the employee receives a new I-94 card
- But watch passport expirations for shortened I-94 cards
- Online CBP I-94 - <https://i94.cbp.dhs.gov/I94/request.html>

FILING OUT THE I-9 – EXTENSIONS OF H-1B, TN OR L-1 WORKERS

List A

Identity and Employment Authorization

01

Document Title: Passport
Issuing Authority: Republic of India
Document Number: J12345678
Expiration Date (if any)(mm/dd/yyyy): 09/01/2020
Document Title: I-94 card
Issuing Authority: US CBP
Document Number: 12345612345
Expiration Date (if any)(mm/dd/yyyy): 09/30/2015
Document Title:
Issuing Authority:

- Under 8 CFR 274a.12(b)(20), persons who have a timely filed extension of status can continue working for up to 240 days after the current I-94 expires (not permitted for E-3s)
- The M-274 handbook recommends that employers:
 - Write “240-Day Ext.” and enter the date they submitted Form I-129 to USCIS in the margin of Form I-9 next to Section 2
 - Employers must reverify the employee’s employment authorization in Section 3 once they receive a decision on the H-1B petition, or by the end of the 240-day period, whichever comes first
- The foreign passport does not need to be valid upon reverification
- Portability and extensions – update Section 3 when approved
- Maintaining a current passport is necessary for foreign nationals – but not for reverification

FILING OUT THE I-9 – REVERIFICATION

Section 3. Reverification and Rehires <i>(To be completed and signed by employer or authorized representative.)</i>			
A. New Name <i>(if applicable)</i> Last Name <i>(Family Name)</i> First Name <i>(Given Name)</i>		Middle Initial	B. Date of Rehire <i>(if applicable)</i> <i>(mm/dd/yyyy)</i> :
Doe Jason		A	03/28/2015

C. If employee's previous grant of employment authorization has expired, provide the information for the document from List A or List C the employee presented that establishes current employment authorization in the space provided below.		
Document Title:	Document Number:	Expiration Date <i>(if any)</i> <i>(mm/dd/yyyy)</i> :
EAD	XXX1987654321	06/30/2019

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 <i>(mm/dd/yyyy)</i> :	Print Name of Employer or Authorized Representative:
<i>Alice Smith</i>	03/28/2015	Alice Smith

- Reverification is needed whenever the work status of an alien who is authorized to work will expire – on or before status expires (unless outside the US)
- All reverification must be done on the latest version of the I-9 form
- US citizens and LPRs never need reverification – unless the LPR presented only an I-551 stamp for evidence of work status
- This section should also be used when a name change has occurred
- See the M-274 handbook for the rules regarding rehires

TEMPORARY VISA SPONSORSHIP

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H-1B VISAS

- US employers frequently use the H-1B visa category to quickly hire foreign nationals
- Staffing companies that place workers in positions in IT, engineering or other technical fields often hire H-1B workers
- The foreign national must have a US Bachelor's Degree (or equivalent) and must work in a job that requires that type of Bachelor's Degree
- The H-1B visa must be sponsored by a US employer
- A petition for H-1B status must be filed with the US Citizenship and Immigration Services (USCIS) Regional Service Center no more than six months before the requested start date
- A foreign national can hold more than one H-1B at once
- New H-1B visas limited in number to 65,000 plus an additional 20,000 for those with a US Masters – lottery held in April for an October start date
- Employees who already hold H-1B status (and used a cap number) can transfer to a different employer without going through the lottery again

H-1B VISAS – STAFFING COMPANY ISSUES

- End Customer Letters
 - Immigration requires proof of the employment from the end client, including letters and contracts
- Offsite Employment and LCA Issues
 - Must list the actual work location and pay prevailing wage for that area
 - If employee's location changes to a different Metropolitan Statistical Area (MSA), an H-1B amendment must be filed (see Matter of Simeio)
 - Must post the LCA (Labor Condition Application) on-site at the work place (not just on intranet)
 - H-1B amendment must be filed for wage decreases
 - Never worked on the H-1B, withdrawn and not withdrawn
 - Method of payment should be reflected on the LCA (if hourly, don't list salaried)

TN VISAS

- Available under NAFTA for Canadians and Mexicans who will be employed in the US in one of the specific occupational categories
- Available only for specific job categories
- US company must sponsor the TN
- TN status is granted for no more than three years, and in theory it may be renewed indefinitely, as long as the position remains temporary
- Canadian citizens can apply at a US Port of Entry, without an appointment, or at a USCIS Regional Service Center
- Mexican Citizens must apply at a US Consulate in Mexico, prior to entry into the US. A US Consulate appointment is always required before TN visa can be approved

TN VISAS – STAFFING COMPANY ISSUES

- End customer letters
 - Requirements vary by consulate and port of entry – trend is toward requiring end customer letters to confirm the work to be performed
- Challenging categories for TNS
 - Management consultants – can't be performing work, only consulting
 - Scientific technicians – need two years of technical school and must work under a degreed engineer (need proof)
 - Computer Systems Analyst – cannot be programmers, requirements vary as to whether a degree or prior work experience is necessary

PERMANENT RESIDENCE SPONSORSHIP (GREEN CARDS)

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PERMS

- PERMs
 - Offsite employment issues
 - Ads run in six different forums
 - Roving and roaming issues
 - Where to run the ads? Home office or in area of employment
- I-140s
 - Ability to Pay
 - May be asked to show assignment will continue indefinitely
 - If I-140 is withdrawn, affects H-1B extension and keeping the priority date

QUESTIONS?

A word cloud centered around the phrase "Thank you!". The words are written in various colors, fonts, and orientations. The most prominent word is "Thank you!" in large, bold, red letters. Other words include "Merci Beaucoup" (green), "La shukran ala wajib" (purple), "Dank u" (yellow), "DO JEH" (dark blue), "A dank aych" (pink), "Grazia" (purple), "Arrigato" (dark red), "Mahalo" (teal), "GRACIAS" (light blue), "leilhi" (pink), "Tapadh" (purple), "Spasibo" (purple), and "tie to" (orange). The word "DANKIE" is written vertically on the left side in a dark red, serif font.

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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