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## Immigration Blog

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# Six Changes in DHS, ICE Created by COVID-19 Pandemic

By Amy L. Peck on December 21, 2020

The Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) have allowed some flexibility due to the COVID-19 pandemic. Here are some of the changes in effect:

- Virtual Inspection

Since March 2020, employers may inspect Section 2 documents virtually, e.g., over video link, by fax, or by email. This policy applies only to employers with workplaces that are operating remotely and if employees are not physically present at the workplace. Employees who are onboarded virtually must report for in-person verification once the employer's normal operation resume or the employee is physically present at the work location, whichever is earlier. This policy has been extended until December 31, 2020 – but may be extended further.

- EAD Approval Notices

Although an employee always may choose which documentation to produce, individuals whose sole work authorization document is an Employment Authorization Document (EAD) must present an unexpired EAD card for I-9 purposes. However, due to the USCIS backlog in producing the EAD cards and subsequent litigation forcing the government's hand, certain new employees and those needing to reverify their employment authorization may present Form I-797 approval notices instead of EAD cards if: the Form I-797 Approval Notice Date is between December 1, 2019, and August 20, 2020, and the employee can present (or has previously presented) an acceptable List B identity document. This will be in effect until February 1, 2021. Then the employee will need to present either a List A (such as an EAD card) or a new List C document.

- TPS Beneficiaries

The DHS has announced automatic extension of work authorization until October 4, 2021, for certain Temporary Protected Status (TPS) beneficiaries due to pending litigation. Beneficiaries from El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan who are covered will need to present their expired EAD card along with the Federal Register notice announcing the automatic extension. For employees whose work authorization must be renewed, Section 2 should be updated. Reverification will not be required until October 5, 2021.

- Deferred Action for Childhood Arrivals (DACA)

The termination of DACA has been set aside, but DHS did not return to the “status quo ante.” For a brief time, DHS refused to issue EAD cards to DACA beneficiaries for more than one year at a time, instead of the usual two years. Now, due to a court order, DHS must issue two-year renewals. USCIS has stated it will take appropriate steps to provide evidence of the full two-year employment authorization under DACA to individuals who were issued documentation on or after July 28, 2020, with a one-year validity period under the defunct policy.

- Expired List B Documents

Because of stay-at-home orders and restrictions on some document renewal services, starting on May 1, 2020, USCIS announced that List B identity documents set to expire on or after March 1, 2020, could be treated the same as if the employee presented a valid receipt for an acceptable document for I-9 purposes. There will be a 90-day grace period once this flexibility terminates.

- H-2B Flexibility

Non-E-Verify employers with properly filed H-2A extension of stay petitions for H-2A workers currently employed by a different company may start employing those employees beginning on or after the date USCIS receives the extension of stay petition, but no earlier than the start date of employment listed on the petition. The extension petition must be filed on or after August 19, 2020, and no later than December 17, 2020. The employee's unexpired I-94 indicating H-2A status along with their foreign passport qualify as a List A document.

Jackson Lewis attorneys are available to assist in navigating these and other new flexibilities, reviewing I-9 documentation, and helping employers to prepare for post-COVID-19 audits.

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