

ORR State Letter #14-02

TO: STATE REFUGEE COORDINATORS
NATIONAL VOLUNTARY AGENCIES
OTHER INTERESTED PARTIES

FROM: Eskinder Negash, Director
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SUBJECT: Employment Eligibility Requirements for Asylees, Refugees, and
other Populations Served by ORR

Purpose of this Letter

The Office of Refugee Resettlement (ORR) funds and administers resettlement programs for refugees, asylees, Cuban and Haitian entrants, foreign victims of severe forms of human trafficking, Lawful Permanent Residents who have held one of those statuses, Amerasians, and Iraqi and Afghan Special Immigrants. In most cases, these special humanitarian populations have the right to work in the United States. These individuals, and the agencies that serve them, should be aware of employment eligibility requirements in the United States and the actions to take if a work-authorized individual encounters difficulties because of immigration status or national origin when applying for or maintaining employment. ORR in the Department of Health and Human Services and the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the Department of Justice have jointly prepared this State Letter to provide information on employment eligibility requirements with an emphasis on special considerations for asylees and refugees and other populations served by the ORR Refugee Resettlement Program.

This ORR State Letter supersedes ORR State Letter # 01-30, titled "Employment Eligibility Requirements."

This State Letter provides:

1. background information on employment eligibility in the United States;
2. an overview of the work of OSC;

3. special considerations for refugees, asylees and other populations served by the ORR Refugee Resettlement Program when completing Form I-9 and when working for an E-Verify employer; and
4. answers to frequently asked employment eligibility questions.

Background Information

The Immigration and Nationality Act (INA) prohibits the knowing hire of individuals who are not authorized to work in the United States. The INA, consequently, requires employers to verify the identity and employment eligibility of every employee hired after November 6, 1986.¹ Employers who do not comply may be sanctioned. As part of the employment eligibility verification process, all new hires must complete Section 1 of the Department of Homeland Security (DHS) Form I-9 and present to their employer documentation establishing identity and work eligibility.

DHS also administers E-Verify, which is an electronic employment eligibility verification program that allows an employer to submit information from an employee's Form I-9 into an electronic system that verifies identity and employment eligibility by checking government databases. Not all employers are required to use E-Verify but many choose to do so.

Congress recognized that the employment verification requirements and potential employer sanctions might discourage some employers from hiring individuals who look or sound "foreign." Therefore, the INA also contains an anti-discrimination provision that prohibits immigration-related unfair employment practices. Employers who discriminate may be required to pay back wages and civil penalties, and to hire or rehire the employee.

Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)

OSC enforces the INA's anti-discrimination provision, which prohibits: citizenship status and national origin discrimination with respect to hiring, firing, and recruiting or referring an individual for a fee, as well as discriminatory documentary practices in the I-9 Form and E-Verify processes (also called "document abuse"), and retaliation.

Citizenship Status Discrimination. Citizenship status discrimination occurs when an employer treats individuals differently in hiring, firing, or recruitment or referral for a fee because of their citizenship or immigration status. For example, an employer who refuses to hire non-U.S. citizens or

¹ In the Commonwealth of the Northern Mariana Islands (CNMI), employers must complete the Form I-9 for all employees hired after November 27, 2011.

has more stringent hiring requirements for non-U.S. citizens than for U.S. citizens may be committing citizenship status discrimination unless there is a law, regulation, executive order or government contract that requires a preference for U.S. citizens. Employers are also prohibited from refusing to hire refugees and asylees because their work authorization documentation may contain an expiration date.

National Origin Discrimination. National origin discrimination occurs when an employer treats individuals differently in hiring, firing, or recruitment or referral for a fee because of their place of birth, country of origin, ancestry, native language, or accent. For national origin discrimination, OSC has jurisdiction over employers with 4 to 14 employees. The U.S. Equal Employment Opportunity Commission (EEOC) has jurisdiction over employers with 15 or more employees.

Document Abuse. Employers commit document abuse when, during the I-9 or E-Verify processes, they request more or different documents than are required to establish a worker's identity and eligibility to work in the United States based on the worker's citizenship or immigration status or based on the worker's national origin. Employers also commit document abuse when they reject I-9 documents that appear to be reasonably genuine on their face and to relate to the individual, based on the worker's citizenship or immigration status or national origin. For example, during the I-9 process, employers may not require non-U.S. citizens to present a specific document to establish identity and eligibility to work while allowing citizens the opportunity to present the full range of acceptable documents.

Retaliation. It is also an immigration-related unfair employment practice for an employer to intimidate, threaten, coerce, or retaliate against an individual who intends to or has filed a charge with OSC, or has provided testimony or otherwise assisted OSC in an investigation, proceeding, or hearing.

Individuals who believe they have suffered discrimination may call the OSC toll-free Worker Hotline at 1-800-255-7688 (TTY: 1-800-237-2515 for the hearing impaired). Employers seeking assistance on how to avoid discrimination may call the OSC toll-free Employer Hotline at 1-800-255-8155 (TTY: 1-800-237-2515 for the hearing impaired). Telephone interpreters are available in numerous languages. Callers seeking to obtain OSC's educational materials may also call either hotline. Additional information, including electronic versions of OSC educational materials and information about registering for free OSC educational webinars, is available on OSC's website: www.justice.gov/crt/about/osc.

Special Considerations for Refugees, Asylees and other Populations Served by the ORR Refugee Resettlement Program When Completing the Form I-9 and When Working for an E-Verify Employer

The Form I-9 contains three sections as well as Lists of Acceptable Documents providing employees with a choice for which documentation to present. Refugees, asylees and other populations served by the ORR Refugee Resettlement Program should be aware of particular issues that may affect them when completing Form I-9 and when their employer uses E-Verify.

Section 1. The employee should complete Section 1 of the I-9 Form. The employee may be assisted by a translator. Form I-9 may be officially completed in Spanish in Puerto Rico only. However, the Spanish version of the Form I-9 may be used as a guide for employees completing the Form I-9 in English. The employee must attest that he or she is work-authorized and enter his or her signature and the date where required.

The Social Security number field is optional. If the employer uses E-Verify, however, the employee must provide his or her Social Security number in the Social Security number field. If the employee has not yet received his or her Social Security number, the employer must allow the employee to work as long as the employee has satisfied all other I-9 Form requirements. In this case, the employee must provide his or her Social Security number for the employer as soon as the employee receives it.

The fields asking for an employee's email address and telephone number are optional. An employee who provides this information may be contacted in the future by DHS to notify the employee about important notices received from the E-Verify system, allowing the employee to take steps to resolve any mismatches of information in government databases.

Section 2. Employees are responsible for presenting documents that establish identity and employment eligibility. However, employees have the right to choose which document or combination of documents to present from the lists of acceptable documents attached to the I-9 Form. The latest version of the Form I-9 is available at www.uscis.gov/i-9-central. Employees may present either one document from List A (which establishes both identity and employment eligibility) or one document from List B (which establishes identity) and one document from List C (which establishes employment eligibility). For example, an asylee or refugee may present an unexpired Employment Authorization Document (List A document) or an unexpired state identification card (List B document) paired with an unrestricted Social Security card (List C document).

The employer is responsible for reviewing documentation presented by the employee, and then certifying that the document presented appears to be reasonably genuine and to relate to the employee. The employer may not refuse to accept valid documents or require an employee to present a specific document, such as a DHS-issued document, to be hired.

Section 3. In some cases, the employer is responsible for updating and reverifying some employees' work authorization. Generally, this occurs only for those employees who have checked the box in Section 1 stating that they are an alien authorized to work until a particular date or for those who show a document that only proves temporary work authorization, such as an Employment Authorization Document. To reverify work authorization, the employee must present one document from List A or one document from List C. However, as with initial hire, the employer may not require more or different documents or require a specific document from the employee.

Frequently Asked Questions

1. Must non-U.S. citizens provide a DHS-issued document, such as Form I-766, to fulfill the Form I-9 document requirements?

No. An individual who is not a U.S. citizen does not have to submit a DHS-issued document if he or she can fulfill the Form I-9 requirements with other documents. For example, an asylee who presents an unexpired state driver's license (List B document) and an unrestricted Social Security card (List C document) fulfills the Form I-9 requirements and may not be required to present a DHS-issued document. If the employer does require a DHS-issued document to fulfill the Form I-9 requirements, the asylee should call OSC's Worker Hotline at 1-800-255-7688 (TTY: 1-800-237-2515 for the hearing impaired).

2. What is the "receipt rule" for refugees?

An individual normally must submit a document from List A, or one document from List B and one document from List C. Under the "receipt rule" for refugees, however, during the first 90 days in the U.S., a refugee may meet the Form I-9 requirements by presenting to his or her employer the departure portion of the Form I-94, containing a refugee admission stamp. This submission only completes the Form I-9 temporarily. Within 90 days, the refugee must provide the employer with either (1) an unrestricted Social

Security card and an unexpired List B document or (2) an unexpired employment authorization document issued by DHS.

Note: in addition to the Refugee I-94 receipt, other receipts may be accepted in lieu of original documents for Form I-9 purposes. For instance, all employees may provide receipts for lost, stolen or damaged documents, and lawful permanent residents may present a Form I-94 with a photo and I-551 stamp as a receipt for a List A document. See the USCIS M-274 Handbook for Employers, Instructions for Completing Form I-9, for more information, which is available at www.uscis.gov/i-9-central.

3. Is a Form I-94 with an asylee stamp considered a receipt as well?

No. The Form I-94 with an asylee stamp is considered an unexpired employment authorization document issued by the Department of Homeland Security appearing on List C, item number 8. Therefore, it could be presented in conjunction with a document from List B. An I-94 with an asylee stamp does not expire and should not be reverified.

4. Does an employee need to submit the same proof of identity and employment eligibility at reverification as he or she did on the initial Form I-9?

No. An employee may present an unexpired document that shows either an extension of his or her initial employment authorization or a new unexpired document evidencing work authorization from either List A or List C, including an unrestricted Social Security card. The employee is not required to present proof of identity at reverification.

Note: Of the populations served by the ORR Refugee Resettlement Program, refugees, asylees, Amerasians, and Iraqi and Afghan Special Immigrants are indefinitely authorized to work in the United States and should indicate "N/A" for the status expiration date field in Section 1. They may still be reverified by an employer depending upon the documentation shown for I-9 purposes. If a refugee or asylee presents an unexpired employment authorization document (EAD) for initial verification, the employer will have to reverify the employee's work authorization at the time the EAD expires. However, if an asylee or refugee presents an unexpired List B document, such as a state identification card, paired with an

unexpired List C document, such as an unrestricted Social Security card, there is no basis to reverify the employee.

- 5.** Can an employer refuse to hire an individual because the individual's document has an expiration date?

No. Consideration of a future employment authorization expiration date in determining whether an individual is qualified for a particular job may constitute an immigration-related unfair employment practice.

- 6.** Can an employer postpone the start date of an employee who does not yet have a Social Security Number?

No. Although an employer will eventually need to record a Social Security Number for wage reporting purposes, once an employee has satisfied the I-9 documentation requirements, the employer must allow the employee to work regardless of whether he or she has been issued a Social Security Number. Employers using E-Verify should allow the employee to work but should delay running an E-Verify query until the employee is issued a Social Security Number.

If you have additional questions regarding the Form I-9, employment eligibility requirements, or immigration-related unfair employment practices, please contact the Office of Special Counsel at 1-800-255-7688 (employees), 1-800-255-8155 (employers) or 1-800-362-2735 (TTY for hearing impaired). You may visit OSC and ORR websites at: www.justice.gov/crt/about/osc; <http://www.acf.hhs.gov/programs/orr>. For ORR partners and state/regional contacts, please visit: <http://www.acf.hhs.gov/programs/orr/about/collaborations-and-partnerships>.