

Date: March 10, 1998

From: Mike Cronin, Acting Associate Commissioner, Programs

Subject: Standard Employment Authorization: Prohibition on Local Variations;  
Use of Receipts; Timely Adjudication; Interim Employment Authorization

Since the late 1980s, the Service has been taking steps to standardize the documentation it issues as evidence of employment authorization. Those efforts will enter a new phase in coming months as the Service engages in rulemaking affecting the employment verification requirements at 8 CFR part 274a. A proposed rule was published on February 2, which proposes to reduce the list of documents permitted for employment eligibility verification (Form I-9). A companion rule is being drafted which will modify the process for applications for employment authorization. The Service's documentation practices will come under increased scrutiny during this period. This memorandum is intended to reinforce existing policy and to clarify policy where needed. As detailed in this memorandum, Service offices must:

- Cease immediately any practice involving the endorsement of any application or petition receipts, notices, or letters -- including Form I-797 and documents on Service letterhead -- with a statement that the document constitutes evidence of employment authorization, unless otherwise specifically directed by Headquarters in a prescribed manner and for a prescribed period of time;

- Monitor applications for employment authorization to ensure that applications are adjudicated within 90 days as required by regulation;

- Respond appropriately to requests for interim employment authorization, as outlined below in the section entitled, "Interim Employment Authorization - 8 CFR 274a.13(d)."

#### Evidence of Employment Authorization

The Immigration and Nationality Act (Act) requires employers to verify the identity and eligibility to work of all individuals hired for employment in the United States after November 6, 1986. Prior to the enactment of these requirements, the Service's employment authorization documentation practices did not significantly affect the general public. In the 10 years that these requirements have been in effect, the Service has worked to simplify the verification (Form I-9) process for employers and standardize the documents it issues. In 1989, a policy memorandum entitled "Issuance of Employment Authorization Documentation" directed that "local variations in form or content for employment authorization are not acceptable and should be discontinued." Later that year, the Service began to issue the Employment Authorization Document, Form I-688B. In 1990, in its third review of the implementation of employer sanctions, the General Accounting Office (GAO) reported that employer confusion over the "multiplicity" of acceptable documents for employment verification contributed to discrimination against authorized workers. (See Immigration Reform: Employer Sanctions and the Question of Discrimination, March 29, 1990, General Accounting Office, GAO/GGD-90-62.)

That finding led to a long-term effort by the Service, and ultimately by Congress, to reduce the number and variety of documents acceptable for employment verification. In section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Congress shortened the list of acceptable documents and placed certain

restrictions on the Attorney General's authority to add to the list by regulation. The Service's proposed rule to implement section 412(a) was published for public comment on February 2 (INS# 1890-97, Reduction in the Number of Acceptable Documents and Other Changes to Employment Verification Requirements, 63 FR 5287).

This memorandum reinforces the Service's policy prohibiting local variations in employment authorization documentation. Service offices must immediately cease endorsing receipts, notices, or letters -- including Form I-797 and documents on Service letterhead -- with statements that the document constitutes evidence of employment authorization, absent specific direction from Headquarters prescribing the manner and period of time. If this prohibition raises issues concerning a specific directive which appears to require endorsement of employment authorization on a receipt, notice, or letter, the directive should be referred through regions to Headquarters for clarification.

Use of the Receipt Rule - 8 CFR 274a.2(b)(1)(vi)

The "receipt rule" at 8 CFR 274a.2(b)(1)(vi) permits an individual to present a receipt if the individual has applied for a replacement document. Some Service offices have erroneously informed the public that this rule covers certain Service receipts, such as a receipt for Form I- 129 (Petition for a Nonimmigrant Worker), Form I-751 (Petition to Remove Conditions on Residence) or Form I-765 (Application for Employment Authorization). The receipt rule has also been misinterpreted as authorizing employment during the 90-day adjudication period prescribed at 8 CFR 274a.13(d). The latter provision, discussed further under "Interim Employment Authorization," addresses situations in which an individual has applied for an employment authorization document and the Service has not adjudicated it within 90 days. It does not authorize employment during the 90-day period while the application is pending.

An interim rule was published in the Federal Register on September 30, 1997, which amends the receipt rule. The circumstances covered by the current receipt rule are limited to the following:

Application for a replacement document. A person may present a receipt showing application for a replacement document. A replacement document means a replacement for a document that was lost, stolen, or damaged; A receipt for an application for initial work authorization or an extension of expiring work authorization is not acceptable. After 90 days, the person must present the actual document

INS Form I-94 indicating temporary evidence of permanent resident status. A lawful permanent resident may present the arrival portion of the Form I-94 (Arrival/Departure Record) that the Service has marked with a temporary I-551 stamp and has affixed by dry seal with the alien's picture in accordance with the OIs. The Service may issue this document if an alien is not in possession of his or her passport and requires evidence of lawful permanent resident status. After 180 days, the person must present Form I-551, the Permanent Resident Card.

INS Form I-94 indicating refugee status. A refugee may present the departure portion of the Form I-94 containing a refugee admission stamp. After 90 days, the person must present either an unrestricted social security card (along with a List B identity document) or an INS Form I-766, employment authorization document. (A technical correction will be made to add Form I-688B to the documents that may be presented after 90 days.)

Nonimmigrants - 8 CFR 274a.12(b)

There has been some confusion concerning documentation for nonimmigrant classes listed in the regulations under 8 CFR 274a.12(b), "Aliens authorized for employment with a specific employer incident to status." Form I-797 is evidence of neither status nor work authorization for individuals in these classes. They are issued Form I-94, either at a Port-of-Entry or by the service center, as evidence of status and authorization to work.

#### Continuing Employment for Certain Nonimmigrants - 8 CFR 274a.12(b)(20)

The regulations at 8 CFR 274a.12(b)(20) permit aliens in specified nonimmigrant categories enumerated in that paragraph, whose employment is incident to status with a specific employer, and who have properly filed an application for an extension of nonimmigrant stay, to continue employment with the same employer for a 240-day period. Commonly referred to as the "grace period," this provision applies only to the categories specified in the regulation, not to all nonimmigrants. Form I-797 receipts for extensions of nonimmigrant stay should not be endorsed as evidence of employment authorization, even though the employer may rely upon it as evidence of the filing of the application. If the Service adjudicates the application during the 240-day period and denies the application, the employment authorization shall terminate upon notification of the denial decision, not at the end of the 240-day period.

#### Interim Employment Authorization - 8 CFR 274a.13(d)

The regulations at 8 CFR 274a.13 outline procedures for persons who must file an application for an employment authorization document on Form I-765. The regulations provide for interim employment authorization in the case of failure to complete the adjudication within 90 days. The Service's goal is to promptly adjudicate the application, where possible, rather than issue an interim EAD. Officers should be aware that the regulations have not been updated to reflect current processing practices. Because the regulations discuss the responsibilities of the District Director, individuals whose applications have not been adjudicated within 90 days may direct their request to a district office, even in situations where a service center has jurisdiction over the case. Service offices must work cooperatively to assist in resolution of situations where the interim EAD provision appears to be triggered. The appropriate response is to take the following steps:

- Check to determine which office has jurisdiction over the case.

- See if a decision has been rendered or can be rendered immediately based upon the inquiry of the officer receiving the request.

- If the application has been located and can be adjudicated and approved immediately, or the application has been approved and is in a production queue, inform the individual how long it will take for them to receive the EAD and ask if they can wait. If the individual cannot wait, e.g., employer verification or reverification is imminent, issue an interim EAD valid for 240 days (if the individual makes the inquiry at an office that lacks the capability to issue an EAD, direct the individual to the nearest office with that capability and advise the office of the need to issue the card).

- If the application has been located and the decision is a denial, inform the individual that they will receive a denial notice by mail.

- If no decision was made and the decision cannot be rendered immediately, e.g., the file cannot be located, but there is evidence that an application was properly filed, issue an interim EAD valid for 240 days and ensure that the office with jurisdiction sends

a notice advising the individual of what it needs in order to adjudicate the 1-765 application.

Service centers and district offices are encouraged to establish procedures for making expedited referrals in these situations. Offices should also develop internal procedures to ensure that interim EAD requests are directed promptly to the appropriate adjudication unit.

#### Standard Validity Periods

Validity periods for Forms I-688B and I-766 are specified by Service policy. Unless otherwise specifically directed by Headquarters for a specified class, Service centers must follow the "Service Centers Processing Guide for Form I-765," issued by Assistant Commissioner Michael L. Aytes on May 2, 1997. This document updates the validity period chart that was included in policy guidance entitled, "Validity Date of Employment Authorization Document (EAD)," issued by (then) Executive Associate Commissioner James A. Puleo on December 7, 1994. Similarly, unless otherwise specifically directed by Headquarters for a specified class, district offices must continue to follow the December 1994 policy guidance.

#### Distribution of this Instruction

Please ensure that all Service personnel under your direction who adjudicate employment authorization requests, enforce employer sanctions, and provide information to the public are provided with a copy of this directive and understand its provisions. Questions concerning this instruction may be directed to MayBurn DeBoe, HQOPS, at (202) 514-5014 or by cemail to Marion Metcalf, HQPGM.

This memorandum has the concurrence of the Offices of Field Operations, Naturalization Operations, Policy and Programs, and General Counsel.