AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Mr. Michael Aytes
Acting Deputy Director
United States Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

Via E-Mail

RE: Effective Date of I-9 Interim Rule
73 Fed. Reg. 76505 (December 17, 2008)

Dear Mr. Aytes:

The American Immigration Lawyers Association believes that implementation of the interim final I-9 regulations and I-9 form, currently scheduled to go into effect on February 2, 2009, is inconsistent with paragraph 3 of the Memorandum for the Heads of Executive Departments and Agencies published at 74 Fed. Reg. 4435 (January 26, 2009), directing a 60-day extension of the effective date of regulations that have been published in the Federal Register, but which have not taken effect. The interim final I-9 regulation and revised I-9 form do not go into effect until February 2, 2009. Because of substantial concerns with respect to the adequacy of proposed changes to the I-9 regulations and the I-9 form itself, we urge the USCIS to suspend the effective date of the interim final rule and the accompanying I-9 for 60 days, pending full review of comments submitted in response to the interim rule published at 73 Fed. Reg. 76505 (December 17, 2008).

Among the inadequacies in the proposed interim final regulation and the proposed form is a failure to address documentation of employment authorization for aliens who are authorized to work, but who present special circumstances, for whom DHS has provided no guidance whatsoever to an employer regarding how to complete the I-9 form or how to record an extension of work authorization. Just a few examples include Temporary Protected Status aliens with automatic grants of renewed work authorization; H-1B temporary workers who port to a different H-1B employer; and, select non-immigrant workers who receive an automatic grant of continued work authorization for 240 days pending an extension request. With the effective date just days away, the above-noted unanswered questions continue to exist.

Making effective the inadequate I-9 regulation and I-9 form at this time imposes exceptional burdens and costs on employers, and will result in a tremendous amount of work related to the implementation of this newest form and instructions, such as amending electronic application systems; amending paper application systems; amending HR processes to announce the new form; training of HR staff on the new regulations, form and instructions; amending lists, notices, hand-outs and guidelines of acceptable documents for employment; amending re-verification policies and procedures to reflect these changes; coordination and amendment to guidance regarding E-Verify compliance; amending checks and balances regarding all the new systems; and, amending the proper procedures for using the new I-9 form and instructions in conjunction with the new FAR regulations. All of these actions, and others not listed, will have to be repeated when the USCIS again revises the I-9 regulations and I-9 form to address the well-known inadequacies in the proposed interim final rule and proposed form revision.

In addition to the burdens on employers, implementing the interim final regulations and proposed I-9 revisions now will impose unwarranted burdens on the Service. Inadequacies in the interim final regulations and the revised I-9 form will need to be addressed in the foreseeable future. It makes little sense to implement the interim final rule and proposed I-9 revisions, when the Service will ultimately need to undertake another revision of the regulations and form to bring both in compliance with the law, incurring not insubstantial administrative and technology costs associated with the development and implementation of any regulatory change, and particularly changes that have such widespread implications and which pose not insubstantial technical challenges.

We believe that the delay in implementation will result in an opportunity to reflect upon the unanswered questions and the eventual adoption and implementation of better I-9 regulations, form and instructions.

As the Service notes in the supplementary information accompanying the interim final regulation, these regulations have been in development since legislation that was passed in 1998, and comments received to prior proposed rulemaking, as well as questions posed by stakeholders and employers in the past decade, informed the Service in the current rulemaking. As this rule has been in development for a decade, the small delay of 60 days would not appear to create any harm or damage, and in fact creates an opportunity for improvement. Finally, in light of the issues noted above, the delayed coordinated implementation is likely to result in less accidental bars to valid employment.

For these reasons, AILA urges the USCIS to delay implementation of the interim final regulations and I-9 form.

Sincerely,

Charles H. Kuck
President

Jeanne A. Butterfield
Executive Director

cc: Hon. Janet Napolitano
Secretary, Department of Homeland Security

Peter Orszag
Director, Office of Management and Budget