

US IMMIGRATION CLIENT ALERT

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April 2, 2009

New I-9 Handbook Imposes Obligations that May Delay Employment Eligibility Verification for Certain H-1B Beneficiaries

EXECUTIVE SUMMARY

A new Form I-9 and a new Handbook for Employers containing instructions for completing the form are scheduled to become effective tomorrow, April 3, 2009. According to the new Handbook, H-1B beneficiaries who change employers must present a Form I-797 filing receipt for the new H-1B petition as evidence of employment authorization. F-1 students who are authorized to work after expiration of optional practical training and before a change of status to H-1B takes effect must present an updated Form I-20 and proof of a timely-filed H-1B petition and request for change of status as evidence of employment authorization.

The new Form I-9, Employment Eligibility Verification, and new Handbook for Employers containing instructions for completing Form I-9 are expected to become effective tomorrow, April 3, 2009. The new form and handbook are available at <http://www.uscis.gov/i-9>.

The Handbook imposes a new requirement that H-1B employees who change employers must present a Form I-797 filing receipt for the new H-1B petition as evidence of employment authorization for I-9 purposes. This requirement is a departure from the longstanding practice of permitting "credible evidence" of the petition filed by the new employer, as the law permits the H-1B beneficiary to begin working for the new employer upon filing of the new petition. H-1B petitioners and intended beneficiaries should be aware that there may be delays in the issuance and mail delivery of the I-797. Employers are encouraged to work closely with FRAGOMEN professionals to anticipate possible delays.

The new Handbook also requires F-1 students who are authorized to work in the "cap gap" period between the expiration of an optional practical training period and the effective date of a change of status to H-1B to present a new Form I-20 along with evidence of a timely-filed H-1B petition and request to change status to demonstrate employment eligibility. The Handbook appears to conflict with a Student and Exchange Visitor Program (SEVP) Fact Sheet issued last month, which stated that an updated Form I-20 is not required for a student to continue working. According to agency instructions in the Handbook and in a guidance memorandum recently posted to the USCIS website, F-1 students authorized to work during the cap gap must present proof of a timely-filed H-1B petition and change of status, such as an express mail receipt and a copy of the petition, to their designated school officials (DSO) to obtain a cap-gap I-20. The initial updated I-20 will authorize the student's status and work authorization through June 1,

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2009. If the H-1B petition is eventually accepted for processing by U.S. Citizenship and Immigration Services and a Form I-797 filing receipt is issued, the student will need to return to the DSO with a copy of the receipt to obtain a further updated I-20 showing a continued extension.

Employers should be mindful that a DSO's ability to timely issue the new I-20 will depend upon how quickly USCIS updates its database to reflect the filing of an H-1B petition and change of status, and how accurate the information in the database is. Therefore, employers are encouraged strongly to work closely with FRAGOMEN professionals in anticipation of delays related to the government's processes.

If you have questions about this Client Alert, please contact Patrick Shen, Fragomen's Director of Global Compliance, at (202) 349-2078, or your designated FRAGOMEN professional.

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