

I-9s and EB-5s: What's the Connection?

Article By:

Kate Kalmykov

Federal immigration laws require employers to verify the identity and work eligibility of their new hires by completing what is known as a **Form I-9**, Employment Eligibility Verification for every employee. Form I-9s must be completed for every new hire within their first three days of employment. During the I-9 process, employees must present to the individual completing the I-9 documents (such as human resources personnel) documents to verify their identity and to prove that they have authorization to work in the United States.

The Form I-9 provides three categories of documents that must be presented in order to complete the verification. The new hire must submit either:

- One “List A” document which established BOTH their identity and work authorization in the U.S. List A documents can include a U.S. passport, green card or Employment Authorization Document (EAD) issued by the USCIS
- One List B document that establishes the new hires’ identity such as a driver’s license or a military ID card AND one List C document which establishes work authorization in the U.S. such as a Social Security Number card or a U.S. birth certificate

Employers charged with verifying employees status in the U.S. for I-9 purposes are only required to determine whether the documents presented to them reasonably appear to be valid and belonging to the individual who submitted it. If the employer believes that the documentation presented to them is acceptable, then they do not have to take other measures to verify the employee’s work eligibility and identity. In fact, the Department of Justice (DOJ) has repeatedly cautioned employers against “pre-screening” applicants or over documenting on the Form I-9, as it is considered to be discriminatory.

For employer concerned about compliance with I-9 requirements given the increase in audits and investigations by Immigration and Customs Enforcement (ICE), there is an option to use a voluntary internet based system developed by the Department of Homeland Security in conjunction with the Social Security Administration, known as E-Verify. This system allows employers to run the information provided to them by new hires in the I-9 process against a variety of governmental databases. The system will confirm to the employer whether or not the employee is work authorized or if there is a discrepancy in information that needs to be resolved known as a “tentative non-confirmation.”

So why are I-9s relevant in the context of the EB-5 immigrant investor visa? For individual EB-5 applicants who must create ten U.S. jobs per employee, USCIS often requests the I-9s of the new commercial enterprise to determine whether or not the investor has satisfied the ten job per investor requirement of the EB-5 program. In the regional center context, certain centers may rely on direct employment by the project company. This is common in certain industries such as manufacturing, hospitality, assisted living or restaurants where the project company may hire a number of direct employees for operations. Although these jobs are considered “indirect” by USCIS because they are not employees of the new commercial enterprise, if the underlying economic model uses the direct project jobs to calculate total jobs (including indirect and induced employment) employment by the project company must be proven at the I-829 stage, often through the use of I-9s.

Once I-9s get into the hands of USCIS at the I-829 level we have seen that the Service itself has run employees through E-Verify. In instances, where it was determined that the employees were not U.S. workers in the EB-5 context, i.e. U.S. citizens or permanent residents, even if all reasonable measures have been taken by the employer in accordance with the procedures outlined by USCIS, those jobs have still been excluded from the job count for I-829 purposes. This causes a conflict for employers who follow the procedures outlined for them in their employment verification practices in accordance with federal guidance, including the [M-274 Handbook for Employers](#). Employers may also find themselves between a rock and a hard place in proving the immigration status of the employee to satisfy USCIS EB-5 requirements while taking care to not violate the anti-discrimination provisions of the Immigration and Nationality Act found at §274B.

Moreover, turning I-9s over to the USCIS fraught with technical or substantive violations could also bring unwanted scrutiny by its sister agency ICE on the company’s documents. Those with violations could face civil penalties. Likewise, employers who knowingly hire or continue to employ unauthorized workers can face criminal and civil liability. Since taking office the Obama Administration has made an example of many companies by issuing Notices of Inspection for their I-9s and imposing civil fines for substantive and technical violations. As more and more investors reach the I-829 stage, it is expected that I-9s submitted to show job creation will receive more scrutiny in an effort to ensure compliance.

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