

IMMIGRATION & I-9 COMPLIANCE



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4th Circ. Says Frontier Must Bargain I-9 Switch With CWA

The Fourth Circuit ruled that Frontier Communications Corp. should have negotiated with a Communications Workers of America union prior to making employees complete new immigration forms saying the company still has to bargain over impacts from federal law compliance.

- Workers' submission of personal identification documents;
- Time allotted for employees to finish the I-9 form; and
- Assistance the employer could have provided to help those "who struggled to complete the process on time.

I-9 News: Covid Relief Extended To July 31, 2023

- ▶ On March 19, 2020, DHS announced that it would exercise its discretion to defer the physical inspection requirements associated with Form I-9. This policy only applies to employers and workplaces that are *operating remotely*. This flexibility has been extended until July 31, 2023.
- ▶ Employers are still required to inspect Section 2 documents remotely (such as over video link, fax, or email) and obtain, inspect, and retain copies of these documents within three business days of the employee's return to work in order to complete Section 2 of Form I-9.
- ▶ Employers should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information section. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 Additional Information on the Form I-9, or to Section 3 as appropriate.

DHS Considering Permanent Remote Hire Rule

1. DHS is considering implementing a permanent rule that would continue to allow virtual inspection of I-9 records for remote employees.
2. The proposed rule contemplates mandatory fraud document training and anti-discrimination training for employers.
3. The agency may establish criteria or conditions for employers to participate in future programs that do not require the physical examination of Form I-9 documentation, which may include participation in E-Verify or prohibiting participation for employers who have been fined or assessed penalties after a governmental audit.

I-9 Fines Increased

- The penalties now range from \$252 to \$2,507 (previously \$237 to \$2,360) for the first offense for substantive violations or uncorrected technical errors.
- The range is now \$1,161 to \$2,322 for second and subsequent paperwork offenses.
- ICE is Seeking to Hire More Investigators

New I-9 Form on the Horizon

New features of the upcoming I-9 form will include:

- Compressing Sections 1 and 2 from two pages to one page.
- Moving Section 3 to a separate Reverification and Rehire Supplement
- Updating the List of Acceptable Documents to include a link to List C documents issued by USCIS.
- If a virtual inspection rule becomes permanent, then the new I-9 might have a new box to check to indicate if the employer has conducted a virtual examination of I-9 forms.
- Employers may continue to use the I-9 edition of 10/21/19.
- Tedious requirement for employers to write “N/A” in every empty box is likely to be dropped.

Types of I-9 Violations

TECHNICAL/PAPERWORK V. SUBSTANTIVE ERRORS

Completing the Form I-9: Section One Areas

- The employee must accurately complete this section on the date of hire; it is the employer's responsibility to ensure that the employee completes this section correctly. The I-9 form can be completed before day 1 if an offer is *extended and accepted* by the employee.
- Citizenship or immigration status must be properly checked in Section 1 boxes (e.g., US citizen, permanent resident, temporary worker).
- Permanent Residents must provide their Alien Numbers/USCIS No. in Section 1.
- Temporarily authorized workers, such as DACAs, H-2As, and individuals with Employment Authorization Documents must provide their Alien Numbers/USCIS No or I-94 number and the date their temporary authorization expires.

Typical Work Authorization Documents



Forma I-94 & Visa

Form I-94 Departure Record. The form is filled out with the following information:

- Document Number: 742831632 01
- U.S. Immigration and Naturalization Service
- SEP 13 1991
- ADMITTED: B-2
- ENTERED: MARCH 12, 1992
- Family Name: DOE
- First Name: JOHN
- Country of Citizenship: ENGLAND
- Birth Date: 01/01/1991
- See Other Side
- STAPLE HERE

Form I-94 Record of Changes. The form is filled out with the following information:

- Warning - A nonimmigrant who accepts unauthorized employment is subject to deportation.
- Important - Retain this permit in your possession; you must surrender it when you leave the U.S. Failure to do so may delay your entry into the U.S. in the future. You are authorized to stay in the U.S. only until the date written on this form. To remain past this date, without permission from immigration authorities, is a violation of the law.
- Surrender this permit when you leave the U.S.:

 - By sea or air, to the transportation line;
 - Across the Canadian border, to a Canadian Official;
 - Across the Mexican border, to a U.S. Official.

- Students planning to return to the U.S. within 30 days to return to the same school, use "Arrival-Departure" on page 2 of Form I-20 prior to surrendering this permit.
- Record of Changes
- Port: _____
- Date: _____
- Carrier: _____
- Flight #/Ship Name: _____
- Departure Record
- For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

Form I-94

Form I-94 serves as documentation of legal entry in the U.S. and as a work permit for certain immigration categories, such as H-2A, H-2B, TN, H-1B, L-1, E-2, and other work visas.

U.S. Visa for Monterrey. The visa is filled out with the following information:

- Issuing Post Name: MONTERREY
- Control Number: 20190560940001
- Given Name: [REDACTED]
- Passport Number: [REDACTED]
- Sex: M
- Birth Date: [REDACTED]
- Visa Type/Class: R H2A
- Nationality: MEX
- Entries: M
- Issue Date: 27FEB2019
- Expiration Date: 31OCT2019
- Annotation: 1011
- PN: [REDACTED]
- P#: [REDACTED]
- VNUS: [REDACTED]
- G281210000MEX8707187M1910315H5MTR0ZJOB041187

Receipts for Permanent Residents

Generally, permanent residents are not permitted to be reverified simply because their card expires, with exceptions.

- Conditional residents may be rechecked when their two-year card expires. The presentation of a receipt for the filing of a petition to convert the resident from conditional status to permanent status is valid for I-9 purposes.
- Permanent residents who extend their cards after the 10-year period expires also may present a receipt to confirm continued employment.

Department of Homeland Security
U.S. Citizenship and Immigration Services

I-797, Notice of Action

UNITED STATES OF AMERICA

I-751 RECEIPT NOTICE

Receipt Number : [REDACTED]
Reference Number: [REDACTED]
Petitioner: [REDACTED]

Receipt Date: 10/31/2016
Receipt Time: 10:12

**** THE ABOVE RECEIPT NUMBER MUST ACCOMPANY ALL INQUIRIES ****

Amount Received: \$590.00

Your conditional resident status is extended for a period of one year. During the one-year extension you are authorized employment and travel. (This extension and authorization for employment and travel does not apply to you if your conditional resident status has been terminated.)

In order to further process your petition, you will be receiving an Application Support Center (ASC) appointment notice with a specific time, date, and location to capture your fingerprints, photo, and signature. You MUST wait for your appointment notice before going to the ASC for biometric processing.

NOTE: Conditional resident applicants, including conditional resident dependents residing overseas pursuant to military or government orders WILL NOT RECEIVE an ASC appointment notice. To complete biometric processing, these applicants must submit the required items listed on the I-751 form instructions.

If you have not already done so, provide supporting documents to assist USCIS in processing your petition and to establish eligibility to remove the conditional basis of your permanent residence. PLEASE INCLUDE A COPY OF THIS RECEIPT NOTICE WITH ANY SUPPORTING DOCUMENTS YOU SUBMIT.

Upon receipt of your ASC appointment notice, you can find the status of your case on-line at www.uscis.gov. To view the status of your case, enter the application number found at the top of the ASC appointment notice. NOTE: The I-751 form type will be listed as "CR189" under the application type in our case status on-line tool.

NOTE: If you checked box "g" or "f" under Part 2 - Basis for Petition, you may NOT file a change of address request through the USCIS web site or by calling the National Customer Service Center. If you or your parent were subjected to battery or extreme cruelty, contact the appropriate USCIS Service Center where you originally filed your Form I-751 for specific address change instructions.

P. O. BOX 30111
LAGUNA NIGUEL, CA 92607-0111
(800) 375-5283

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Form I-797 (Rev. 01/31/05) N

Completing the Form I-9: Section 2 Areas

- Employee must present one document from List A, establishing both identity and employment eligibility.
- Employee may alternatively present one document from List B (establishing identity) and List C (establishing employment eligibility).
- All documents must be unexpired at the time of hire.
- Within three days of the employee's date of hire, employers are required to confirm (1) the employee's identity and (2) that they are authorized to work using Section 2 of Form I-9.

LISTS OF ACCEPTABLE DOCUMENTS		
LIST A Documents that Establish Both Identity and Employment Eligibility	OR	LIST B Documents that Establish Identity
1. U.S. Passport (unexpired or expired)		1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address
2. Certificate of U.S. Citizenship (INS Form N-560 or N-561)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address
3. Certificate of Naturalization (INS Form N-550 or N-570)		3. School ID card with a photograph
4. Unexpired foreign passport, with I-551 stamp or attached INS Form I-94 indicating unexpired employment authorization		4. Voter's registration card
5. Permanent Resident Card or Alien Registration Receipt Card with photograph (INS Form I-151 or I-551)		5. U.S. Military card or draft record
6. Unexpired Temporary Resident Card (INS Form I-688)		6. Military dependent's ID card
7. Unexpired Employment Authorization Card (INS Form I-688A)		7. U.S. Coast Guard Merchant Mariner Card
8. Unexpired Reentry Permit (INS Form I-327)		8. Native American tribal document
9. Unexpired Refugee Travel Document (INS Form I-571)		9. Driver's license issued by a Canadian government authority
10. Unexpired Employment Authorization Document issued by the INS which contains a photograph (INS Form I-688B)		For persons under age 18 who are unable to present a document listed above:
		10. School record or report card
		11. Clinic, doctor or hospital record
		12. Day-care or nursery school record
	AND	LIST C Documents that Establish Employment Eligibility
		1. U.S. social security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
		2. Certification of Birth Abroad issued by the Department of State (Form PS-545 or Form DG-1350)
		3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
		4. Native American tribal document
		5. U.S. Citizen ID Card (INS Form I-197)
		6. ID Card for use of Resident Citizen in the United States (INS Form I-179)
		7. Unexpired employment authorization document issued by the INS (other than those listed under List A)

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

Form I-9 (Rev. 10/4/00) Page 3

Completing the Form I-9: Section 2 Areas

- Employers sometimes accept documents that are insufficient for I-9 purposes, such as a Mexican matricula consular.
- Employers typically do not properly and fully describe the List A, B, and C documents.
- Employer should always sign and date the I-9 form in a timely manner within 3 days of the employee's start date.

General Reverification Guidelines

- Employees who indicate that they are U.S. citizens, permanent residents, asylees, or refugees should never be reverified since they have work authorization incident to their status.
- Employees who indicate that they have temporary permission until a specific date should be reverified by that date.

Employers Must Track Expiration of Employment Authorization Documents

- Commonly, employers fail to track expiration of temporary employment authorization and either forget to conduct a reverification, or conduct an untimely reverification. Either way, the fines are stiff.

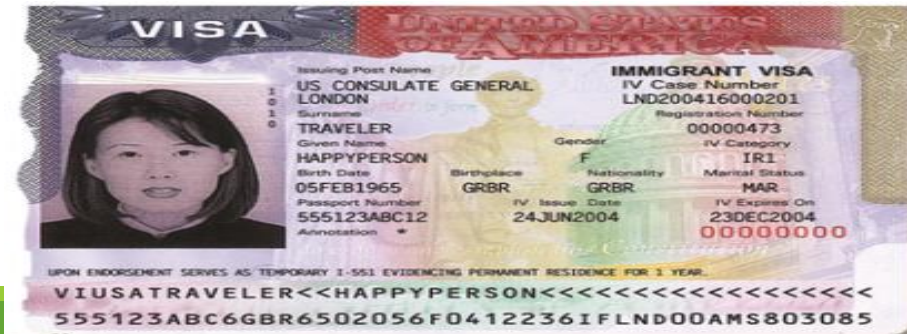


EADs are commonly presented by DACAs, Individuals in Deportation Proceedings, Applicants for Permanent Residency, TPS beneficiaries, F-1 Students, Refugees/Asylees, and other temporarily authorized foreign nationals.

- In Niche, Inc., OCAHO fined the employer \$63,850 because it continued to employ workers after their Employment Authorization Documents (EADs) had expired and the employer failed to re-verify these workers who, in fact, had timely acquired new EADs.

The Receipt Rule

- Receipts or acknowledgements by USCIS that an employee has requested for the first time a particular status authorizing employment *are not acceptable* because there is no guarantee that the application will be granted.
- Exceptions:
 - Replacement documents (90 days);
 - I-94 cards with temporary I-551 stamps (by expiration of I-551 stamp or I-94 card); and
 - I-94 cards with refugee/asylee admission stamps (90 days).
 - Certain receipts presented by employees for extension of work status.



Auto Extensions of Employment Authorization Documents (EADs) in Certain Circumstances

- Foreign nationals in certain employment eligibility categories who file an EAD renewal may receive automatic extensions of their expiring EAD for up to 540 days.
- Renewal application must be filed before expiration of the employee's EAD on file with the I-9 form.
- Rule only applies to certain categories, such as for individuals with applications that are pending for permanent residency, individuals who are in deportation proceedings, VAWA self-petitioners, refugees, asylees and a few other select categories.

Some Visa Categories Get Auto 240 Day Extension

CW-1, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, R-1, TN, A-3, E-1, E-2, E-3, G-5, and I.

Reverifying or Updating *Rehired* Employees

-
- If you rehire employees within three years from the date you completed their previous Form I-9, you may either use that form or complete a new one.
 - If a rehired employee's basis for employment eligibility remains the same as indicated on the I-9, the employer must perform an update by recording the employee's name in Section 3, the rehire date and then sign/date.
 - Reverify: If a rehired employee's basis for employment eligibility has changed/expired, the Company must record the following on the I-9:
 - Employee Name
 - Date of rehire;
 - List A or List C document information; and
 - Sign/date.

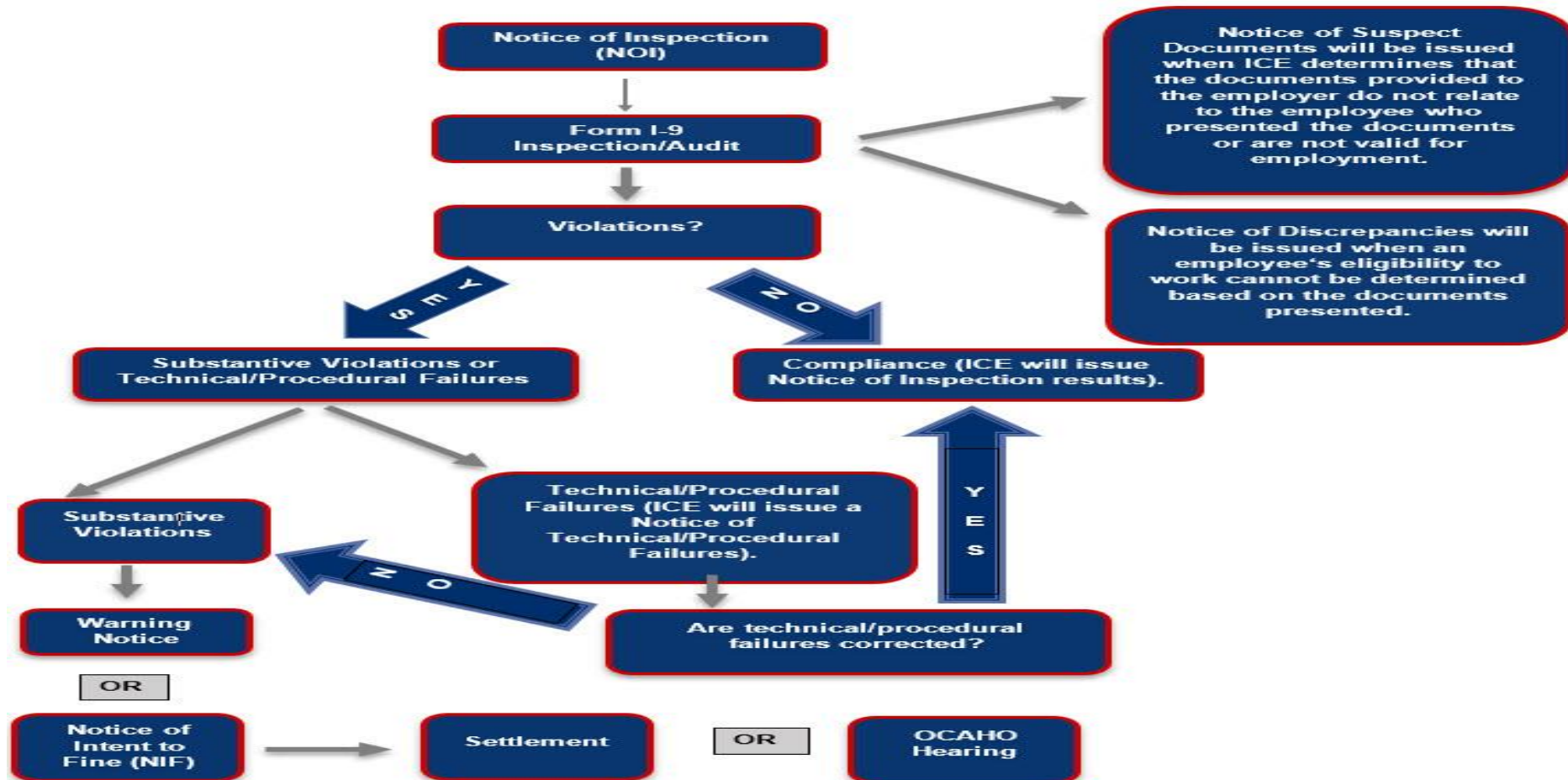
Re-verifying or Updating *Rehired* Employees

- The Company can reverify a current employee's employment authorization in Section 3 of the original I-9, or on a new I-9.
- If the previously executed Form I-9 is not the current version of the form, you must complete Section 3 on the current version of the form.
- Employees rehired after three years of the original completion of the Form I-9 must complete a new Form I-9.

Seasonal Ag Employment Exception to I-9 Rule

- An I-9 form is required for almost every hire, except in the case of certain interruptions of employment. In case of an interruption in employment, you should determine whether the employee is continuing in their employment and has a reasonable expectation of employment at all times.
- For example, a seasonal agricultural employee on layoff who intends to return the next season may not require a new I-9 form.

New ICE Audit Flow Chart



ICE's Enhancement Matrix

Enhancement Matrix			
Factor	Aggravating	Mitigating	Neutral
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

CA Notice to Employees of ICE Audit

Pursuant to [Labor Code section 90.2\(a\)](#), employers are required to provide notice to employees of any inspection of I-9 Employment Eligibility Verification forms or other employment records by an immigration agency by posting a notice within 72 hours of receiving the notification of inspection

I-9 Scenarios

Q: An ICE agent shows up at your workplace and wants to request the I-9 for an employee named Susana Ana Ortiz Ochoa?

Retention and Storage of Form I-9

- Employers must retain Form I-9 for 3 years from the date of hire or one year from the date of termination, whichever is later in time. Companies should put into place a regular purging system for destruction of I-9s after the forms meet the retention period.
- Never purge I-9s after being selected for an audit.
- Employers may use a paper system, an electronic system or a combination of paper and electronic systems to store Form I-9.

Storing I-9s Electronically

- Include controls to ensure the integrity, accuracy and reliability of the electronic generation storage system.
- Include controls to detect and prevent the unauthorized or accidental creation of, addition to, alteration of, deletion of or deterioration of an electronically completed stored Form I-9, including the electronic signature, if used.
- Include controls to ensure an audit trail so that **any** alteration or change to the form since its creation is electronically stored and can be accessed by an appropriate government agency inspecting the forms.
- Include an inspection and quality assurance program that regularly evaluates the electronic generation or storage system, and includes periodic checks of electronically stored Form I-9, including the electronic signature, if used.
- Include a detailed index of all data so that any particular record can be accessed immediately.
- Produce a high degree of legibility and readability when displayed on a video display terminal or reproduced on paper.

I-9 Scenarios

Q: A farm manager sees a new hire at the fields and due to the need for labor, asks the employee to provide work documents. The manager takes a picture with his phone and sends the documents by what's up to HR, who then complete the I-9 form, signs and files the form away.

PEO Liable for I-9 Fines for False Employer Attestation Violations

- Professional Employer Organization violated the I-9 regulations by directing its Payroll Manager to complete 243 I-9s on the inspection of photocopies of identity and employment eligibility documents relating to employees that she had never seen. *U.S. v. Employer Solutions Staffing Group, LLC*, OCAHO Case No. 14A00005 (Jan. 20, 2015).
- Company fined \$227,252 after ICE audit.

Avoiding Discrimination in Hiring Process

You cannot demand that non-U.S. citizens present DHS issued documents. Each individual must be allowed to choose the documents that they will present from the lists of acceptable Form I-9 documents.

You cannot refuse to accept a document, or refuse to hire an individual, because a document has a future expiration date.

You cannot request that an employee who presented an unexpired Permanent Resident Card present a new document when the Permanent Resident Card expires.

You cannot request specific documents for reverification. For example, an employee who presented an unexpired Employment Authorization Document during initial verification should be requested to present any document of their choosing from either from List A or from List C during reverification.

You cannot request to see employment eligibility verification documents *before hire* and completion of Form I-9 because an individual looks or sounds “foreign,” or because the individual states that they are not a U.S. citizen.

DOJ's Immigrant/Employee Rights Seeks to Combat Discrimination Against U.S. Workers

- H-2A and H-2B program users should understand that the Department of Labor is not the only enforcement agency who is investigating violations of the immigration laws.
- The DOJ's Immigrant and Employee Rights Division has been actively suing H-2 programs user for discriminating against U.S. citizens by declining employment in favor of foreign labor.
- DOJ reached a settlement agreement with Carrillo Farm Labor, LLC, an onion farm in Deming, New Mexico. The settlement resolves the department's investigation of complaints that Carrillo Farm discriminated against U.S. citizens due to a hiring preference for foreign visa workers. The Farm will pay \$44,000 in back wages and civil penalties.

Texas Farm Accused of Favoring H-2A Workers

- DOJ joined a non-profit agency lawsuit against a Texas farm for discriminating against U.S. citizens based on citizenship status. The Immigration and Nationality Act's antidiscrimination provision prohibits employers from discriminating against workers based on national origin or citizenship status in the hiring or firing process
- A U.S. citizen with over twelve years experience operating cotton combines and tractors was not hired. The department found reasonable cause to believe that the company did not hire the U.S. citizen because it preferred to hire foreign workers under the H-2A visa program

Construction Company Preferred H-2B Employees Over U.S. Workers

- Barrios Street Realty failed to consider or improperly rejected 73 U.S. workers who applied for positions as sheet metal roofers or laborers, and then solicited foreign H-2B workers to fill these positions.
- Barrios Street Realty must create a back pay fund of \$115,000 to compensate U.S. workers, pay \$30,000 in civil penalties and be subject to monitoring for a three-year period.

I-9 Scenarios

Q: Management wants to move an employee to the payroll of an affiliated division. Can I just transfer the I-9 form?