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FORM I-9 AND H-1B PORTABILITY

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US Citizenship and Immigration Services (USCIS) has revised its Handbook for Employers: Instructions for Completing Form I-9 (M-274). Revised as of January 5, 2011, http://www.uscis.gov/files/form/m-274.pdf., the handbook includes expanded guidance on lawful permanent residents, refugees and asylees, and acceptable documents for employees in temporary protected status (TPS). An update on the most recent changes can be found here, http://blog.cyrusmehta.com/news.aspx?SubIdx=ocyrus2011123211626
The handbook now states that an employee in valid H-1B status who changes (ports) to a new employer can begin to work with the new employer upon filing an H-1B petition with USCIS. The prior version of the handbook required the porting H-1B employee to obtain a Form I-797 (Receipt Notice) from USCIS before beginning work with the new employer. This approach created considerable delay because it often takes USCIS weeks to issue the official I-797. The new requirement is more consistent with INA § 214(n), which requires only a "filing," and this can be proved through an overnight courier delivery confirmation rather than waiting for the I-797 receipt notice.

The new version of the handbook explains that a porting H-1B employee may begin employment by presenting his or her Form I-94/I-94A (Arrival-Departure Record) issued for employment with the previous employer, along with his or her foreign passport, as a List A document. The employer should write "AC21" on the I-9, record the date that the new H-1B petition was submitted to USCIS in the margin next to Section 2 of the I-9, and attach documentation as specified in the handbook.
Unfortunately, there is another aspect of portability that still remains unresolved. INA § 214(n) is broad enough to allow an H-1B worker to exercise portability even though he or she changed to another status. Thus, one who originally entered in H-1B status and then changed to F-1 student status can

still “port” to a new job if a new employer files a petition for H-1B status, along with a request for change of status from F-1 to H-1B. *In Keeping Track: Select Isues In Employer Sanctions and Immigration Compliance* by Gary Endelman and Cyrus D. Mehta, http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus20101218204951&Month=&From=Menu&Page=2&Year=All#_ftn2, the authors make the following observation:

What does E-Verify have to say about work authorization during H-1B portability?

While this paper presents a general overview of E-Verify, the importance of a recent development in the delicate relationship between E-Verify and H-1B portability compels us to mention it if only in passing. In late October 2010, the Verification & Documentation Liaison Committee of the American Immigration Lawyers Association (AILA) received confirmation from E-Verify that it would no longer verify work authorization for an employee who is working for an employer under H-1B portability where the employee previously held H-1B status but has since held an intervening status. See AILA InfoNet Doc. No. 10102268 (posted Oct. 22, 2010). This came as a stunning development. In the past, many AILA members had relied upon the text of Section 105(a) of the American Competiveness in the 21st Century Act (AC 21), now codified at INA § 214(n), to advise that such employees were work authorized based on the clear language of the statute. However, in an unannounced change of policy, AILA recently received reports that E-Verify had been issuing final nonconfirmations for employees working pursuant to H-1B portability who currently hold another status, such as H-4 or F-1. The Committee requested clarification from E-Verify, citing the language in the statute which permits a beneficiary to work if he or she "was previously issued" an H-1B visa or status and meets the other requirements for portability. INA §214(n).

In response to the Committee's inquiry, E-Verify provided the following response:

The Office of Chief Counsel at USCIS has advised us that similarly situated individuals are not employment authorized. … The H-1B Portability Rule does not apply to a nonimmigrant who was in H-1B status at one time, but who is currently in another valid status and for whom a non-frivolous I-129 Petition to obtain H-1B status has been filed. … USCIS has interpreted Section 105 of AC21 (INA section 214(n)) as allowing those who are currently in H-1B status, or who are in a "period

of authorized stay" as a result of a pending H-1B extension petition(s), to begin new employment upon the filing by the prospective employer of a new (H-1B) petition on the alien's behalf. USCIS guidance dated December 27, 2005, states that "porting under INA §214 does not require that the alien currently be in H-1B status as long as he or she is in a 'period of stay authorized by the Attorney General.'" That statement serves to clarify the earlier section specifically referring to an "H-1B alien" and should be read in the context of the particular example given: an alien who was in H-1B status and is now in an authorized period of stay based on a timely filed extension of H-1B status petition on the alien's behalf, and who then seeks to start working for a different H-1B employer upon that employer's filing of a petition. This interpretation is consistent with USCIS guidance to the public on its website (Nonimmigrant Services, H-1B FAQs, page 61) which states:

***Changing employers** - An H-1B worker can change employers, but first the new employer must file a labor condition application and then file a new H-1B petition. If the worker is already an H-1B, he or she can then begin the employment as described in the petition without waiting for USCIS to approve the petition. This is called a "portability provision," and it only applies to someone already in valid H-1B status. Based on this guidance, E-Verify queries will continue to result in nonconfirmations in similar cases."*

The authors strongly believe that the USCIS interpretation underlying the E-Verify protocol is inconsistent with the clear language of AC 21.