

UNDERSTANDING IMMIGRATION ISSUES IN THE HIRING PROCESS

Prepared by:

Kainen, Escalera & McHale, P.C.

21 Oak Street, Suite 601

Hartford, CT 06106

Telephone: (860) 493-0870

Facsimile: (860) 493-0871

www.kemlaw.com

https://twitter.com/kem_law

<https://www.facebook.com/kainenescaleramchale>

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I. I-9 FORMS

1. The Immigration and Nationality Act prohibits employers from knowingly employing any unauthorized alien.
2. All employers must complete Form I-9 for each new employee within three (3) business days of the date employment begins and maintain the form in its files for three (3) years after the date of hire or one (1) year after the date the employee's employment is terminated, whichever is later.
3. The Form I-9 should not be completed as part of the application process, as it contains age, national origin, and alienage information, which may not be considered in making employment-related decisions.
4. The Department of Homeland Security's U.S. Citizenship and Immigration Services division ("USCIS") issued an updated I-9 form which employers are required to use effective January 22, 2017.
5. The form can now be completed electronically and printed for signature. In the electronic version, the form contains "pop-up" instructions and some auto-fill features that will help users complete the form correctly. A link to the full instructions and a "start over" button are also featured on the electronic version, which also may be printed for manual completion. The electronic version also contains some other useful features, such as matching the documents that may be entered with the employee's representation of status in Section 1. Employers should also be aware that there is a new box in Section 2 that employers are required to fill-in that matches the status box checked by the employee in Section 1. The form also contains a supplement to allow for multiple preparer or translator signatures.
6. The Form I-9 has not been replaced by E-Verify, an online method of quickly determining eligibility to work in the United States. Completing the Form I-9 for each newly hired employee is still required, even if an employer voluntarily opts to use E-Verify.
7. An employer is **not required** to keep copies of the ID documents given by employees during the I-9 verification process. Best practice is not to keep copies of the underlying documents because an employer is not an expert at determining whether an ID is fake, but the Department of Homeland Security ("DHS") is. So, if I-9's are ever audited by DHS and an employer has kept copies of the underlying IDs, DHS will be able to determine if the ID was fake and if they do, the employer will probably be fined because DHS would say that employer should have known it was fake too.

8. It is unlawful for employers to give preference to U.S. citizens in hiring or employment opportunities, unless these are legal or contractual requirements for particular jobs.

II. VISAS

1. Foreign workers must obtain permission to legally work in the United States.
2. Employers are not required to sponsor employees/applicants for visas.
3. If an employer seeks to sponsor employees/applicants for visas, there are a variety of employment categories that may be available to foreign workers. Each category has its own special requirements, conditions and authorized periods of stay. There are also special rules restricting overall length of continuous stay in the United States and switching categories.
4. One critical distinction that must be made is between temporary (nonimmigrant) and permanent (immigrant) workers.
5. Nonimmigrant workers include temporary workers seeking entry into the United States temporarily for a specific, business related purpose. Nonimmigrants enter the United States for a temporary timeframe and are restricted to the activity or work for which they were authorized to enter the United States.
6. Common Nonimmigrant Visas Include:

B Visa: Available to foreign visitors for business or pleasure who maintain a permanent foreign residence and have the means to avoid taking a source of income in the United States during such visit.

E Visa: Traders (E-1) and Investors (E-2). These visas are granted to individuals based on reciprocity agreements between the United States and foreign countries. E-1 visas are granted to individuals coming to the United States to engage in trade between the United States and the foreign state from which they are from. E-2 visas are granted to persons coming to the United States to develop and direct the operations of entities in which such persons have invested substantial amounts of capital.

H-1B Visas: Available to specialty occupation workers, who are in an occupation that requires application of highly specialized knowledge and attainment of a bachelors degree or higher in the specialty occupation (or equivalent experience on a three-for-one basis) in a position in which the employer requires such degree.

L Visa: Available to intracompany transferees. L-1 visas are available for executives, managers or persons with specialized knowledge (employed for one year or more in the foreign company) who are coming to the United States to render services to the same company or affiliate/subsidiary thereof.

7. **Immigrant workers.** There are approximately 140,000 immigrant visas available each year to individuals (and their spouses and children) who permanently seek to immigrate to the United States based on their work skills. The preference categories for permanent worker visas are:

Preferences	General Description	Labor Certification Required?
First Preference EB-1	Reserved for persons of extraordinary ability in the sciences, arts, education, business, or athletics; outstanding professors or researchers; and multinational executives and managers.	No
Second Preference EB-2	Reserved for persons who are members of the professions holding advanced degrees or for persons with exceptional ability in the arts, sciences, or business.	Yes, unless applicant can obtain a national interest waiver
Third Preference EB-3	Reserved for professionals, skilled workers, and other workers.	Yes
Fourth Preference EB-4	Reserved for "special immigrants," which includes certain religious workers, employees of U.S. foreign service posts, retired employees of international organizations, alien minors who are wards of courts in the United States, and other classes of aliens.	No
Fifth Preference	Reserved for business investors who invest \$1 million	No

EB-5	or \$500,000 (if the investment is made in a targeted employment area) in a new commercial enterprise that employs at least 10 full-time U.S. workers.	
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