



NEW PUERTO RICAN BIRTH CERTIFICATE LAW COLLIDES WITH I-9 EMPLOYMENT VERIFICATION PROCESS

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On July 1, 2010, the Vital Statistics Office of the Commonwealth of Puerto Rico began issuing new birth certificates to U.S. citizens born in Puerto Rico. The new birth certificates are more "secure," although it is not clear how these new birth certificates are more secure than their predecessors.

On September 23, 2010, Puerto Rico Governor Luis G. Fortuño extended the validity of birth certificates issued before July 1, 2010 to U.S. citizens born in Puerto Rico until October 30, 2010, according to Secretary of State, Kenneth D. McClintock, "to assure that no citizen who truly needs a certificate for a transaction in the foreseeable future will be left without a valid certificate as a result of the measures taken by the government of Puerto Rico, in coordination with the Federal government, to combat the massive fraud that was causing thousands of American citizens born in Puerto Rico to be the victims of ID theft."

As of October 31, 2010, no birth certificates issued before July 1, 2010 can be presented for any purpose.

The new law was based on collaborations with the U.S. Department of State and the U.S. Department of Homeland Security to address the fraudulent use of Puerto Rico-issued birth certificates ("PR birth certificates") to unlawfully obtain U.S. passports, Social Security benefits, and other federal services, and to commit other types of identity theft and fraud. For additional information on how to apply for a new birth certificate from Puerto Rico, please go to <http://www.prfaa.com/birthcertificates/>.

In order to prevent the Vital Statistics Office in Puerto Rico from being overwhelmed during this transition, Secretary McClintock recommended to the public that only Puerto Ricans "who plan to make some transaction in November, December, or January, which would require a new birth certificate should request one during the 37 days before their old certificate expires."

McClintock also reminded the public that the new birth certificates must be maintained by the U.S. citizen for life. "You can be asked to show your birth certificate so it can be copied or information taken from it but the new birth certificate issued after July 1, 2010 should be held by the citizen for life, not filed away in a school or other place where it can be stolen to steal the identity of an American citizen born in Puerto Rico."

Impact of new birth certificate law on I-9 process

For new employees, all certified copies of PR birth certificates are acceptable for Form I-9 purposes through September 30, 2010. Beginning October 1, 2010, only certified copies of PR birth certificates issued on or after July 1, 2010 are acceptable for Form I-9 purposes. Therefore, beginning on October 1, 2010, if an employee presents a PR birth certificate during the I-9 verification process, the employer must look at the date the certified copy of the PR birth certificate was issued to ensure that it is still valid.

Employers are not required to reverify the employment eligibility of existing employees who presented a certified copy of a PR birth certificate for Form I-9 purposes and whose employment eligibility was verified on Form I-9 before October 1, 2010. In fact, this practice is specifically prohibited.

The new I-9 process is similar for employers awarded a federal contract that contains the Federal Acquisition Regulation (FAR) E-Verify clause, which have special Form I-9 rules for the verification of existing employees. If an employer subject to FAR chooses to complete new Form I-9s for existing employees, all certified copies of PR birth certificates are acceptable prior to October 1, 2010 for Form I-9 purposes. Beginning October 1, 2010, however, only certified copies of PR birth certificates issued on or after July 1, 2010, are acceptable for Form I-9 purposes. FAR employers are also prohibited from asking an employee to present a new certified copy of a PR birth certificate, if the employee presented a certified copy of a PR birth certificate before July 1, 2010 that was valid and acceptable for the Form I-9 at the time it was presented.

The new law prohibits all employers from keeping original certified copies of birth certificates issued in Puerto Rico, but allows employers to keep photocopies of these documents. Employers are not required to make photocopies of identity and work authorization documents for I-9 purposes, except in the context of E-Verify when copies of certain documents are required to be made (e.g. resident alien cards, and work authorization cards). If an employer chooses to make photocopies of documents their employees present when completing an Form I-9, they must do so for all employees, regardless of national origin or citizenship status, to avoid a possible allegation of discrimination.

IMPERFECTIONS OF E-VERIFY

Glitches in Passport and Visa Number Acceptance

E-Verify, which compares information from the Employment Eligibility Verification Form I-9 against federal government databases to verify workers' employment eligibility, is a free web-based system operated by the U.S. Department of Homeland Security ("DHS") in partnership with the Social Security Administration ("SSA"). DHS continues to seek ways to enhance E-Verify in order to guard against errors, enforce compliance, promote proper usage, and enhance security. E-Verify advancements over the past few years have included new processes to reduce typographical errors and new features to reduce initial mismatches. In May 2008, for example, DHS added access to naturalization database records which increased the program's ability to automatically verify naturalized citizens' status. In addition, in 2009, DHS incorporated passport and visa data from the U.S. Department of State ("DOS") in the E-Verify process to reduce mismatches among foreign-born citizens, as well as to confirm an employee's U.S.

citizenship if the SSA information could not confirm U.S. citizenship, which often occurs for recently naturalized U.S. citizens.

Upcoming initiatives to further enhance E-Verify include enhancing the photo matching process, also known as the photo screening tool, which is an automated step in the E-Verify system which prompts employers to compare an employee's DHS-issued photo document (presented during the I-9 process) with a photo displayed in E-Verify. At present, the photo screening tool will only "activate" when an employee presents a recent version of a permanent resident card (I-551) or employment authorization document (EAD) as proof of employment authorization. Beginning on September 26, 2010, E-Verify will include photos from U.S. passports, and next year, it is anticipated that state driver's licenses will also be added, but no timeline has been announced as of yet. While normally, employers are not required to make photocopies of the identity and work authorization documentation that employees provide to them during the I-9 verification process, beginning on September 26, 2010, if an employer receives a U.S. passport from an employee to establish identity and work authorization, the employer must make a photocopy of the page(s) that show identity and validity as part of the photo screening process.

Passport Glitches

When E-Verifying a U.S. passport, employers have reported a glitch in the E-Verify program: the U.S. Passport number must always contain nine (9) digits with no letters. Similarly, the U.S. Passport Card number must always begin with the letter "C" followed by eight numeric digits. Recently issued passports and passport cards do follow these conventions, however, this has not always been the case.

For example, in the context of E-Verifying existing employees for new projects under the Federal Acquisition Regulation ("FAR"), thousands of covered federal contract employees with existing I-9s that have been on file for years exhibit different passport number conventions, but the E-Verify system does not accept them. In addition, U.S. citizens living abroad who renew their passports at their local U.S. consulate or Embassy sometimes receive new passports that still retain the older passport convention.

DHS has instructed its E-Verify employers to add leading zeros (if applicable) and strip out letters (if appropriate) so the system will accept the number. This "solution" will render the program useless for automated verification purposes but at least employers will be able to complete the E-Verification process.

Visa Numbers Glitch

Employers who use the E-Verify program to verify a foreign national who presents a foreign passport with an I-94 Arrival/Departure Record may notice a field where the "Visa Number" or "Visa Foil Number" is requested. On June 24, 2008, the U.S. Citizenship and Immigration Services ("USCIS") provided guidance stating that employers could reduce the probability of a tentative nonconfirmation ("TNC") on a foreign employee who presented a foreign passport by providing the visa number. You can find the USCIS guidance at <http://tinyurl.com/2ertld4>.

As with the passport number, the E-Verify program has a data requirement for visa numbers that does not apply for all visas that are issued. E-Verify requires visa numbers to be 8 digits without letters,

however, some consulates and embassies are issuing visa numbers that begin with a "C" followed by 7 digits. Fortunately, the visa number is an optional field so employers are able to skip over this problem for the time being. Another option would be to replace the "C" with a zero, which seems to work, according to some practitioners and employers.

It is obvious that E-Verify still has a long way to go in terms of reaching its goals and in terms of system implementation. On January 28, 2010, USCIS released a report conducted by an outside research firm, Westat, on the accuracy of E-Verify with respect to identifying illegal workers, among other classes of workers run through the E-Verify system. The Westat report stated that 54% of the unauthorized workers run through E-Verify result in an authorization to work. Westat and USCIS attribute this high number to identify fraud – unauthorized workers who use and submit documents of a person who is authorized to work.