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## New Puerto Rican Birth Certificates & Driver's Licenses Marked Not Valid as ID – Is the I-9 Process Affected?

**Employers should prepare for the effects of Puerto Rico's new birth certificate law**

After September 30, 2010, all Puerto Rican-born individuals seeking to apply or petition for U.S. immigration or citizenship benefits, including a first-time U.S. passport, will be required to obtain a new security-enhanced birth certificate. This requirement follows the enactment of Puerto Rico's new birth certificate law – Law 191 of 2009 (as Amended), which went into effect on July 1, 2010, and provides for the immediate issuance of new birth certificates and the upcoming invalidation of the old ones.

The stated purpose of the new law, which is the product of collaboration between the Government of Puerto Rico, the Department of Homeland Security (DHS) and the Department of State (DOS), is to protect the identity and credit of Puerto Rican-born individuals while addressing national security threats. These threats are posed by a robust black market through which perpetrators have allegedly exploited common Hispanic last names shared by many Puerto Ricans through the theft of original birth certificates and their subsequent use to commit fraud and illegally obtain a host of government and private sector documents and benefits such as driver's licenses, passports and Social Security numbers – a problem that was said to have increased over time.

This new law ends the long-standing practice in Puerto Rico of public and private entities frequently requiring the submission and retention of original birth certificates for various transactions, the improper storage of which allegedly led to rampant theft and the fueling of the black market. Under the new law, requiring the submission, retention and/or storage of an original birth



certificate is now a criminal misdemeanor that would also carry civil liability for damages incurred by affected individuals. Now, only digital or paper photocopies of a birth certificate are acceptable.

Under the new law, all Puerto Rican birth certificates not issued pursuant to it will become invalid after September 30, 2010, per an amendment that allows a three-month window to ease the burden on individuals in need of immediate transactions requiring a birth certificate. Accordingly, United States Citizenship and Immigration Services (USCIS) will continue to accept certified copies of the old birth certificates through September 30, even if an immigration application or petition is actually adjudicated after that date. USCIS has stated that it will notify individuals who submit a filing with an invalid birth certificate after the September 30 deadline, and will provide them with the opportunity to submit the new one.

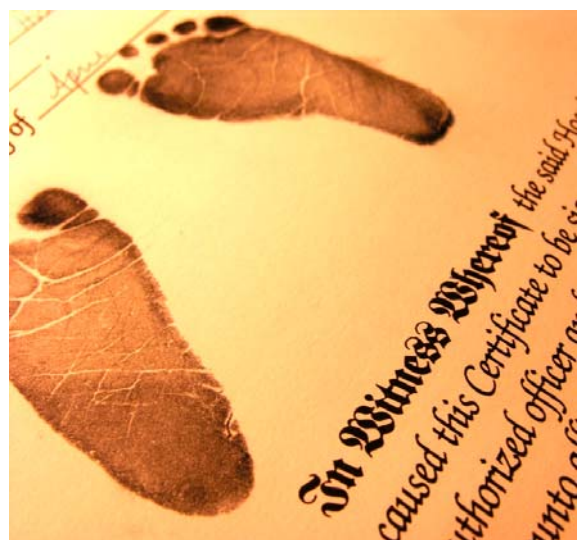
The Government of Puerto Rico is attempting to make individual compliance with the new requirement as painless as possible for Puerto Ricans living in Puerto Rico as well as stateside. Its efforts have included the option to complete the entire application process online through [www.pr.gov](http://www.pr.gov), the hiring of 47 temporary workers at Puerto Rico's Demographic Registry to speed up the processing of the new birth certificate applications in addition to extended work-week and weekend hours for agency employees, and an informational outreach campaign launched by the Puerto Rico Federal Affairs Administration. Additionally, the \$5.00 fee that each applicant must pay for the new birth certificate will be waived for veterans and applicants over the age of 60. In July, the Government provided additional assistance by partnering with document provider VitalChek to provide an expedited method for ordering the new certificates.

The new birth certificates can be ordered *online* at [www.vitalchek.com](http://www.vitalchek.com) or *by phone* through VitalChek's 24/7 bilingual call center at (866) 842-6765. An express processing fee and shipping costs apply for this service.

The Puerto Rico Federal Affairs Administration has emphasized that Puerto Rican-born individuals need not rush to obtain the new birth certificate right away unless they have immediate transactions to conduct that would require it. All individuals are encouraged to apply at some point after the initial rush period so that they have the updated document for their records and for future transactions. **Finally, while the new law does not impact current U.S. passports and state-issued driver's licenses, it does affect individuals applying for these benefits for the first time.**

### What Does this Mean for Employers Completing Form I-9?

The new Puerto Rican birth certificates are acceptable "List C" documents for Form I-9 purposes. Although there is the prohibition described above regarding retaining a Puerto Rico birth certificate, it does not



apply to employers wishing to retain *photocopies or scans* (for electronic I-9s) as part of the I-9 process. While the practice of “copying” documents continues to be one of concern to employers, we generally recommend adopting a clear and consistent policy that allows for retaining the underlying identity and work eligibility documents in order to possibly reduce liability in the unfortunate occurrence of a Form I-9 audit.<sup>1</sup>

## Final Points to Remember

It bears noting that the new Puerto Rican birth certificate law invalidates the birth certificate only and does not change a person’s citizenship status. During the final weeks prior to July 1, 2010, temporary birth certificates with an expiration date were issued to those who were waiting for the new one after applying. If the hire presents this temporary birth certificate for I-9 purposes, it may be accepted as a “receipt” and thus the standard receipt protocol for reverification within 90 days should be followed.

For more information on Law 191 and its requirements, visit the Puerto Rico Federal Affairs Administration website [here](#).

## Driver’s Licenses Marked Not Valid as ID - Is there an I-9 Issue?

The Form I-9 “List of Acceptable Documents” clearly states that a driver’s license or ID card issued by a state or U.S. outlying possession is one of the acceptable “List B” “Documents that Establish Identity” for purposes of documenting the legal work status of hires. According to the Form I-9 list, a valid, **unexpired** driver’s license or ID card is acceptable for I-9 purposes “provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address.” But what happens when a hire presents such a license that also contains the notation “Not for identity purposes?” Several states began issuing such licenses and astute employers began inquiring on the impact as it relates to acceptable I-9 documents.

LISTS OF ACCEPTABLE DOCUMENTS All documents must be unexpired				
LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		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		1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		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		2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Certification of Report of Birth issued by the Department of State (Form DS-1350)
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form		5. U.S. Military card or draft record		5. Native American tribal document
		6. Military dependent's ID card		6. U.S. Citizen ID Card (Form I-197)
		7. U.S. Coast Guard Merchant Mariner Card		7. Identification Card for Use of Resident Citizens in the United States (Form I-179)
		8. Native American tribal document		8. Employment authorization document issued by the Department of Homeland Security
		9. Driver's license issued by a Canadian government authority		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		For persons under age 18 who are unable to present a document listed above:		

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

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<sup>1</sup> The scope of this article does not include a discussion on the costs and benefits of copying underlying documents for I-9 purposes. Employers are not required by the immigration regulations to maintain photocopies of underlying documents, however, those that do are directed to keep them together with the Form I-9.

By way of background, why do some individuals have this notation on their driver's licenses or state-issued ID cards? The answer goes back to the *9/11 Commission Report*, authored by the congressionally created 9/11 Commission formed in 2002 on the heels of the September 11, 2001, terrorist attacks. As a recommended global strategy for combating terrorism, the 9/11 commission issued the recommendation that:

"[s]ecure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists." National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report 390 (2010) available at <http://www.gpoaccess.gov/911/pdf/sec12.pdf>.

Congress agreed with the 9/11 Commission's recommendation and adopted it through the controversial REAL ID Act of 2005 [Pub. L. No. 109-13, 119 Stat. 231, 302-323 (2005)], which in part sets forth minimum standards for state-issued driver's licenses and ID cards to bring them up to enhanced security standards, e.g., through incorporating prescribed machine readable technology and physical security features. The law and subsequent regulations issued by the DHS require that state-issued driver's licenses and ID cards that are not in full compliance with the REAL ID standards "clearly state on their face and in the machine readable zone that the card is not acceptable for official purposes; and [h]ave a unique design or color indicator that clearly distinguishes them from driver's licenses and identification cards that meet the standards . . ." 6 C.F.R. §37.71(a). Such licenses are not acceptable for Federal "official purposes."

As to whether the above affects the I-9 process, we reached out to USCIS for an opinion and found that the agency does still consider these licenses valid for I-9 purposes and employers may continue to accept them from their hires under "List B." Under the regulations at 6 C.F.R. § 37.3, "official purpose" is narrowly defined as "accessing Federal facilities, boarding Federally-regulated commercial aircraft, and entering nuclear power plants." Apparently, discussions ensued during the REAL ID rulemaking regarding whether the term "official purpose" should be broader and include I-9 employment verification, given the Secretary's authorized discretion in the matter. However, DHS representatives ultimately decided that it should *not* be broader, and that "official purpose" should have the narrowest possible definition allowable under the statute. Ostensibly, this was done in an effort to minimize the burden of the rulemaking on the States.

With this history in mind, no one is disputing the apparent contradiction between having State driver's licenses marked as unusable for identification purposes as required by compliance with a Federal law,<sup>2</sup> and having DHS agree that these same licenses are an acceptable form of identification for purposes of Form I-9, even though completing a Form I-9 is clearly a federal purpose. However, it logically follows that given that completing a Form I-9 is not an "official purpose" as defined under the REAL ID regulations and there is nothing in the 274a.2

<sup>2</sup> "Section 202(d)(11) of the REAL ID Act provides for State issuance of licenses that don't comply with REAL ID standards as long as they are marked as not acceptable for Federal identification purposes:

(11) In any case in which the State issues a driver's license or identification card that does not satisfy the requirements of this section, ensure that such license or identification card--

(A) clearly states on its face that it may not be accepted by any Federal agency for federal identification or any other official purpose; and

(B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose.

regulations that provides a basis for saying these licenses are not acceptable “List B” documents, the necessary conclusion is that driver’s licenses specifically marked as unacceptable evidence of identity for federal “official purposes,” are in fact acceptable as Form I-9 “List B” identity documents.

Confusing? Sure. Reasonable? Yes. Easy to digest? Not really. Clearly, this is something that requires acceptance at face value.

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This *GT Alert* was written by Dawn M. Lurie and Christina Pitrelli. Questions about this information can be directed to:

- [Dawn M. Lurie](mailto:luried@gtlaw.com) – 703.903.7527 | [luried@gtlaw.com](mailto:luried@gtlaw.com)
- Any member of [Greenberg Traurig’s Business Immigration & Compliance Team](#) listed on the next page
- Or your [Greenberg Traurig](#) attorney

[Greenberg Traurig’s Business Immigration and Compliance Group](#) extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment related issues, particularly I-9 employment eligibility verification matters and E-Verify related issues. In addition to assisting in I-9 and H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies, company protocols and performs internal I-9 compliance inspections. GT has also defended businesses involved in large-scale government worksite enforcement actions, high stakes administrative I-9 Audits and Department of Labor Wage and Hour investigations. Our seasoned attorneys provide counsel on a variety of compliance-related issues, including IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers’ responsibilities when faced with traditional no-match situations, as well as more serious workplace identity theft or other alleged misrepresentations made by employees. Our national footprint, combined with a broad based platform, provide seamless integration with our partners practicing in government contract, deemed export, labor & employment, tax, white collar defense, litigation as well as other areas of the law.

## Greenberg Traurig's Business Immigration and Compliance Group

**Atlanta**

678.553.2100  
Joe D. Whitley

**Austin**

512.920.7200  
Kevin Lashus  
Maggie Murphy  
Sujata Ajmera

**Dallas**

972.419.1250  
Peter Wahby

**Houston**

713.374.3500  
Martha Schoonover  
Adelaida Vasquez

**Los Angeles**

310.586.7700  
Mahsa Aliaskari  
Jennifer Biloshmi<sup>†</sup>

**Miami**

305.579.0500  
Oscar Levin

**New York**

212.801.9200  
Marcela Bermudez  
Patricia Gannon  
Christina Pitrelli

**Tysons Corner**

703.749.1300  
Lindsey Baldwin  
Kristin Bolayir<sup>†</sup>  
Patty Elmas<sup>†</sup>  
Dawn Lurie  
Laura Reiff  
Glenn E. Reyes<sup>†</sup>  
Rebecca Schechter  
Martha Schoonover

**Washington, D.C.**

202.331.3100  
Laura Reiff  
Montserrat Miller

<sup>†</sup>Not admitted to the practice of law.

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