



# CALIFORNIA FARM BUREAU FEDERATION

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February 6, 2015

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The Honorable Alejandro Mayorkas  
Deputy Secretary of Homeland Security  
3801 Nebraska Avenue, NW – Stop 1  
Washington DC 20528-0001

Re: Request for Advice on California's New "AB 60" Driver's License

Dear Deputy Secretary Mayorkas:

California Farm Bureau Federation and the other organizations named at the end of this letter collectively represent the interests of tens of thousands of agricultural employers in California. These organizations all urge Homeland Security to issue clear and appropriate guidance on actions an agricultural employer in California should take upon presentation to the employer by an employee of a new type of California driver's license that is being issued to persons who cannot submit satisfactory proof of legal presence in the United States.

According to information on the U.S. Department of Homeland Security website (URL: [dhs.gov/real-id-enforcement-brief](http://dhs.gov/real-id-enforcement-brief)), California is a REAL ID Act compliant/extension state, meaning that basic Class C driver's licenses issued by California meet the Act's minimum security standards for license issuance and production.

One of those standards requires that a state, before issuing a driver's license to a person, require the person to provide valid documentary evidence that the person is lawfully present in the United States. (REAL ID Act of 2005, § 202(c)(2)(B).)

On January 1, 2015, the California Department of Motor Vehicles began issuing a new type of driver's license to applicants who cannot submit satisfactory proof of legal presence in the United States but who otherwise meet all qualifications for the issuance of a driver's license. (Cal. Vehicle Code, § 12801.9, subd. (a).) Because it is issued to persons who cannot prove lawful presence, this new type of driver's license is of course not compliant with the REAL ID Act.

Accordingly, at the insistence of DHS, the front of a so-called AB 60 driver's license (named for the California Assembly bill that authorized the license) bears the

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phrase FEDERAL LIMITS APPLY, and the back of the license states, among other things, it “is not acceptable for official federal purposes.”<sup>1</sup> Except for those two differences, an AB 60 driver’s license is indistinguishable from a basic Class C driver’s license.

As indicated by the questions below, the inclusion of these phrases on an AB 60 driver’s license poses compliance issues and thus potential legal liabilities for an employer who is shown the license by an employee with respect to the employee’s claims of identity and employment eligibility in the Form I-9 employment eligibility verification process.

To enable them to comply with their legal obligations and thus avoid legal liability for non-compliance, affected employers need to know ICE’s positions on those issues. To that end, ICE’s reply to this letter will be shared with several groups representing the interests of agricultural employers in California; those groups will in turn publicize to their respective members the advice rendered by ICE in reply to the questions below.

Accordingly, DHS’s advisory opinion is respectfully requested on these questions:

**Question 1: Is an AB 60 driver’s license a document that establishes identity for the purpose of the USCIS Form I-9 employment eligibility verification process?**

*Discussion:* The above-cited phrases that appear on an AB 60 driver’s license—and especially the latter indicating the license is not valid for official federal purposes—could be construed as meaning the license is not acceptable for use in the Form I-9 process, specifically as a document presented by an employee to establish identity.

But militating against that conclusion is item 1 in List B (Documents that Establish Identity) of the **Lists of Acceptable Documents** on page 9 of Form I-9. Item 1 states that one document that establishes identity is a “[d]river’s license or ID card issued by a State ... provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address.” An AB 60 driver’s license meets all of those requirements; thus it would seem to qualify as a document that establishes identity in the Form I-9 process.

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<sup>1</sup> The statute authorizing and directing the issuance of the AB 60 driver’s license provides in pertinent part: “The license shall bear the following notice: ‘This card is not acceptable for official federal purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits.’” (Cal. Veh. Code, § 12801.9, subd. (d)(2).) Except for its first sentence, that notice is virtually identical to the notice that appears on the back of a basic California Class C driver’s license, to wit: “This license is issued as a license to drive a motor vehicle; it does not establish eligibility for employment, voter registration, or public benefits.” (Cal. Veh. Code, § 12800.5, subd. (b).)



This passage on page 61 of USCIS *Handbook for Employers: Guidance for Completing Form I-9* [Pub. M-274 (rev. 03/08/13) N] supports that conclusion:

Some states may place notations on their drivers' licenses that state the card does not confirm employment authorization. For Form I-9 purposes, these drivers' licenses, along with every other state's, establish the identity of an employee. When presenting any driver's license, the employee must also present a List C document that establishes employment authorization.

Another strong indicator that an AB 60 driver's license is valid for the Form I-9 process is the definition of the term *official purpose* under the REAL ID Act and especially the regulation implementing that definition.

Section 201(3) of the REAL ID Act provides: "The term *official purpose* includes but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary shall determine."

While the Act's definition leaves open the possibility that *official purpose* may encompass activities beyond the three specified in that definition, the implementing regulation makes it clear that the term's scope is limited to only those three: "*Official purpose* means accessing Federal facilities, boarding Federally-regulated commercial aircraft, and entering nuclear power plants." (Title 6, CFR, § 37.3.)

Use of an AB 60 driver's license to establish identity in the Form I-9 process clearly is outside the scope of the regulation's definition of *official purpose*.

**For the foregoing reasons, an AB 60 driver's license clearly seems to be a document that establishes identity in the Form I-9 process.**

It is very important that DHS guidance address this issue, especially if DHS concurs that an AB 60 driver's license establishes identity in the Form I-9 process. I received a reliable report that an ICE agent stationed in San Diego had conferred with ICE's chief counsel on this issue. ICE's chief counsel reportedly informed the agent that an AB 60 driver's license is not an acceptable List B document that establishes identity because FEDERAL LIMITS APPLY is on the card's front. For the reasons discussed above, that conclusion seems to be erroneous. To provide certainty to both law enforcers and employers on this issue, DHS needs to clearly answer Question 1 above.

**Question 2: What effect, if any, does the presentation to an employer by an employee of an AB 60 driver's license have on the employee's claim of employment eligibility?**

*Discussion:* A preliminary matter related to this question is the issue of whether DHS would regard an employer to whom an employee presents an AB 60 driver's license as having constructive (if not actual) notice of the significance of that license—



i.e., that it is issued to persons who cannot submit satisfactory proof of legal presence in the United States.

As noted above, an AB 60 driver's license differs from a basic California Class C driver's license in two respects: its front bears the phrase FEDERAL LIMITS APPLY, and its back states it "is not acceptable for official federal purposes."

Those additional words appear on an AB 60 license solely to alert federal officials that it is not an acceptable form of identification for any of the three purposes specified in the DHS regulation defining *official purpose*, as discussed above.

Federal officials charged with controlling access to the three types of affected areas no doubt must be and are trained to recognize and understand the significance of those additional words with respect to their official duties. But no similar training requirement, either express or implied, applies to an employer with respect to the Form I-9 employment eligibility verification process.

Granted, some employers know that those additional words signify an AB 60 driver's license and what an AB 60 driver's license might mean with respect to an employee's claim of employment eligibility. Further, those employers may choose to train their Form I-9 document reviewers in those regards.

But the law does not require employers or their document reviewers to be document experts charged with knowing the intricacies of documents presented in the Form I-9 process; see *Collins Foods International, Inc. v. U.S. I.N.S* (1991) 948 F.2d 549, 554. The additional words distinguishing an AB 60 driver's license give an employer's lay document reviewer no inherent indication that it is anything other than a State-issued driver's license that, if it reasonably appears on its face to be genuine and to relate to the person presenting it, must be accepted to establish identity.

This is in distinct contrast to certain phrases that may be included on types of documents generally valid to establish employment authorization. For example, a Social Security Account Number card generally establishes employment authorization. But as is noted in item 1 in List C (Documents that Establish Employment Authorization) of the **Lists of Acceptable Documents** on page 9 of Form I-9, a Social Security card including the restriction NOT VALID FOR EMPLOYMENT does not establish employment authorization.

But even if item 1 in List C did not include the exception for that type of card, the phrase itself alerts the document reviewer that the card does not establish employment authorization. Again, that is not the case with the additional words on an AB 60 driver's license.

**In conclusion, DHS should not consider that an employer must, as a matter of law, know that a driver's license with the additional words is an AB 60 driver's license.**

But if DHS rejects this recommendation or if an employer's document reviewer in fact recognizes an AB 60 driver's license as such and knows it is issued to persons



who cannot submit satisfactory proof of lawful status, the question stated at the top of this section arises: What effect, if any, does the presentation of an AB 60 driver's license have on the presenting employee's claim of employment eligibility?

An employee might present to the employer an AB 60 driver's license for any of several purposes.

For example, a newly hired employee might present that license to establish identity in the Form I-9 process.

Or, while having presented another document to establish identity in the Form I-9 process, a newly hired employee might present that license during the hiring process for another purpose, such as to show eligibility to operate a vehicle within the scope of employment. A long-standing employee might present an AB 60 driver's license for that same purpose.

The fact that an AB 60 driver's license is available to driver's license applicants who cannot submit to California's Department of Motor Vehicles satisfactory proof of legal presence in the United States may at first blush seem necessarily at odds with an employee's claim in the Form I-9 process of employment eligibility. Indeed, in many if not most instances, the license holder will not be employment authorized.

An employment-eligible employee may, however, have a legitimate explanation for possessing an AB 60 driver's license.

Consider, for example, a person who was lawfully present in the United States when she initially applied for a California driver's license but who did not possess documents satisfactory to prove that status because her documents, including her Social Security Account Number card, were recently lost, stolen or destroyed.

Needing a driver's license as soon as possible and not wanting to wait for the issuance of replacement documents satisfactory to prove lawful presence to California's DMV, she applies for and is issued an AB 60 driver's license. Soon thereafter, she applies for and receives a replacement Social Security card.

She then applies for employment, using her AB 60 driver's license (at least if the answer to question 1 above is "yes") to establish identity and her replacement Social Security card as a Form I-9 List C document to establish employment authorization.

Or consider as another example a long-standing employee who in the Form I-9 process proved identity and employment eligibility by presenting a Permanent Resident Card (USCIS Form I-551), which the employer accepted because it reasonably appeared on its face to be genuine and to relate to the employee. Years later the employee—in fact lacking lawful presence—applies for and is issued an AB 60 driver's license.

He then requests and receives from USCIS deferred action and employment authorization under the Deferred Action for Parents of Americans and Lawful Permanent Residents program. He then presents to his employer his AB 60 driver's license to prove eligibility to operate a vehicle within the scope of employment.

These two scenarios illustrate that an employee's presentation to an employer of an AB 60 driver's license should certainly not mean that the employer must automatically conclude that the employee lacks employment authorization. In other words, because an employee, whether newly hired or long-standing, might be lawfully present despite possessing an AB 60 driver's license, the employee's employer cannot be said to have actual knowledge that the employee lacks employment authorization simply because the employee has presented that license to the employer.

**Rather, it seems that, at most, an employer could ultimately be found to have constructive knowledge that an employee who presented an AB 60 driver's license was not employment eligible only if, based on the totality of the circumstances, the employer were to be determined to have failed to take reasonable steps to resolve the possible discrepancy between the employee's possession of an AB 60 driver's license and claim of employment authorization.**

California's agriculture industry looks forward to promptly receiving from DHS clear, responsive guidance on these issues so that agricultural employers can know what DHS expects of them before they start to hire substantial numbers of employees for the 2015 production season.

Sincerely,



CARL G. BORDEN

Co-submitting organizations (along with California Farm Bureau Federation):

California Fresh Fruit Association  
Grower-Shipper Association of Central California  
Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties  
Ventura County Agricultural Association  
Western Growers





U.S. Citizenship  
and Immigration  
Services

May 19, 2015

Carl G. Borden, Esq.  
Associate Counsel  
California Farm Bureau Federation  
2300 River Plaza Drive  
Sacramento, CA 95833

Dear Mr. Borden:

Thank you for your February 6, 2015 letter to Deputy Secretary Mayorkas. The Deputy Secretary has asked that I respond to your letter on his behalf. The Department of Homeland Security appreciates your interest in AB 60 driver's licenses and the use of these licenses for Employment Eligibility Verification (Form I-9).

AB 60 driver's licenses bear the phrase "Federal Limits Apply" on the front and "Not Acceptable for Official Federal Purposes" on the back. California may issue an AB 60 driver's license to an applicant who does not submit satisfactory proof that his or her presence in the United States is authorized under Federal law but who otherwise meets all qualifications for the issuance of a driver's license. Under 6 CFR § 37.3, which is part of the implementing regulation for the *REAL ID Act of 2005*, driver's licenses such as the AB 60 are not acceptable for certain designated official purposes; these designated official purposes do not include Form I-9 use.

U.S. Citizenship and Immigration Services provides guidance regarding the *REAL ID Act of 2005* and driver's licenses for the Form I-9 online. Your letter has prompted us, in close cooperation with U.S. Immigration and Customs Enforcement, to review this guidance for sufficiency. We have recently posted revised and additional guidance that should further address your concerns. See <http://www.uscis.gov/faq-page/i-9-central-list-b-documents-identity#t17079n47844>.

Thank you again for your letter. Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "León Rodríguez", with a stylized flourish extending from the end.

León Rodríguez  
Director