

A “Marked” License Is Not Proof of Immigration Status

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Many states recognize that expanding immigrants’ access to driver’s licenses is a matter of public safety, since it is in the public interest for drivers to be trained, tested, licensed, and insured. As a result, eight states, plus the District of Columbia and Puerto Rico, passed laws in 2013 authorizing issuance of licenses that do not require proof of lawful immigration status.¹ The licenses available under the new laws, passed to comply with the federal REAL ID Act of 2005, are marked as not valid for federal official purposes or are otherwise distinguishable from regular licenses.

These laws provide an avenue for eligible undocumented drivers to obtain a license,² but the marked licenses are *not* proof that a driver is undocumented. Here’s why:

Citizens or lawfully present immigrants may be eligible for the marked licenses.

States have chosen a variety of approaches in deciding who is eligible for a marked license. Some states (e.g., Vermont) explicitly allow U.S. citizens to obtain such licenses, and some (e.g., Colorado) require many lawfully present immigrants—such as people who are in the U.S. on business or professional visas, or who have been granted withholding of removal, or who were paroled into the U.S. for humanitarian reasons—to obtain them.

Some people who were issued a marked license when they were ineligible for a regular license might have since acquired an eligible immigration status or proof of U.S. citizenship.

The immigration status process is fluid. A person may have been issued a marked license when she was undocumented, or when her immigration status entitled her only to a marked license, or when she could not yet prove that, though born abroad, she had derived U.S. citizenship from, for example, being the child of a U.S. citizen. But when her immigration status changes and she is able to prove that she is eligible for a regular license, or she obtains proof of U.S. citizenship, she may still have a marked license.

The U.S. Dept. of Homeland Security (DHS) has made clear that no conclusions about a person’s citizenship or immigration status can be drawn based on the type of license the person has.

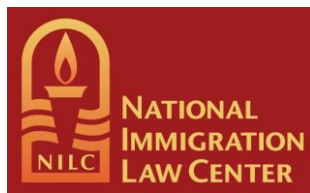
Having a non–REAL ID-compliant or a marked license does not indicate that the license-holder is not lawfully present. As DHS explains, there are a variety of reasons why a person may not have or obtain a REAL ID-compliant license:

A “Not for Federal Identification” or a similar mark means that the issuing state offers its residents the option to obtain a driver’s license or identity card which is not compliant with

¹ New Mexico, Utah, and Washington were already issuing driver’s licenses or driving privilege cards to immigrants regardless of their immigration status. Oregon’s law, enacted in 2013, was repealed by referendum in 2014.

² The laws are permissible under the REAL ID Act, which sets standards, including proof of lawful presence, for driver’s licenses to be accepted for official federal purposes. For more information about REAL ID, see www.nilc.org/document.html?id=1040.

LOS ANGELES (Headquarters)
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax



WASHINGTON, DC
1121 14th Street, NW, Suite 200
Washington, DC 20005
202 216-0261
202 216-0266 fax

REAL ID and that the license holder has chosen to exercise that option. A variety of reasons may underlie that choice, including personal preference, religious conviction, or the inability or decision not to provide original documents needed to verify identity, citizenship, or lawful status in the United States. *No inferences or assumptions should be drawn about the particular reason an individual possesses a card with this mark, including inferences or assumptions about the person's citizenship or immigration status.*³

Presentation of a “marked” license is acceptable as an identification document for employment purposes, as long as it is accompanied by current proof that the person is work-authorized.

U.S. Citizenship and Immigration Services (USCIS) recognizes that a marked license is acceptable to prove a new hire's identity when completing the I-9 employment eligibility verification process (the process for verifying whether a newly hired employee is authorized to work in the U.S.).

. . . The notation "FEDERAL LIMITS APPLY," "NOT ACCEPTABLE FOR OFFICIAL FEDERAL PURPOSES" or a similar notation on the front or back of a state-issued driver's license indicates it does not meet the standards for the issuance and production of a compliant card under the REAL ID Act

A driver's license with this type of notation is, however, an acceptable List B document if it contains a photograph or identifying information such as name, date of birth, sex, height, color of eyes, and address. An employer must examine the document presented by its employee and determine whether it meets Form I-9 requirements. . . .⁴

Of course, the employer must also require that the new employee present proof that he or she is work-authorized, but the employer may not assume that the worker is undocumented simply because he or she has a marked license, and may not refuse to accept a marked license as proof of identity.⁵ The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has warned employers that concluding that a person with a marked license is undocumented may constitute discrimination:

To the extent a driver's license or state identification card presented for I-9 purposes satisfies the criteria to be considered a List B document, and is paired with an unexpired List C document, an employer is cautioned against concluding that an individual is not legally authorized to work in the United States based on a perception that a List B document is “statistically issued to predominantly undocumented individuals.” An employment-authorized individual whose List B document was rejected because an employer made this assumption may allege discrimination on the basis of national origin or citizenship status in violation of the antidiscrimination provision by filing a discrimination charge with OSC.⁶

THEREFORE, GOVERNMENT AND PRIVATE AGENCIES, entities, or individuals should not make any assumptions about the citizenship or immigration status of people whose driver's licenses are “marked,” and should not discriminate against them on that basis.

³ *REAL ID Frequently Asked Questions for the Public* (DHS, Jan. 11, 2015), www.dhs.gov/real-id-public-faqs, emphasis added.

⁴ *Frequently Asked Questions: I-9 Central: List B Documents – Identity* (USCIS, Nov. 6, 2014), www.uscis.gov/faq-page/i-9-central-list-b-documents-identity#t17079n48243.

⁵ *Id.*

⁶ Letter to Nataliya Binshteyn, Esq., from Office of Special Counsel for Immigration-Related Unfair Employment Practices, U.S. Dept. of Justice, Feb. 7, 2014, www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2014/179.pdf.