

Insights, News & Events

FEDERAL IMMIGRATION OFFICIALS SMOOTH PATH FOR SPOUSES OF HIGHLY SKILLED WORKERS TO RECEIVE WORK AUTHORIZATIONS

Insights

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Federal immigration officials just released helpful guidance that eases the process of spouses of highly skilled workers to receive their work authorization documentation, no doubt welcome news for employers across the country. The November 12 policy guidance issued by the United States Citizenship and Immigration (USCIS) to amend its Policy Manual addressed the automatic extension of employment authorization for certain H-4, E, and L nonimmigrant dependent spouses, rescinding restrictive previous guidance. This move comes not long after the USCIS entered into a settlement agreement promising to provide significant changes to the employment authorization process for the spouses of H-1B and L-1 employees. Thousands of spouses have been suffering from long-delayed processing times for employment authorization renewals, including many who have lost employment, so this policy guidance should bring some immediate relief. What do employers need to know about this new development?

What is the Issue?

Spouses of workers with H-1B, L-1 and E visas are granted non-immigrant statuses. Those statuses do not automatically come with permission to work in the United States. Rather, H-4, E, and L nonimmigrant-

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dependent spouses must apply for an Employment Authorization Document (EAD). In the past, the EAD approval process took upwards of two to three months. However, the EAD approval process – which includes new applications and renewal applications – now takes anywhere between eight months to a year due to the significant backlog and other administrative challenges.

Because H-4, E, and L nonimmigrant-dependent spouses cannot work with expired work authorization, this has caused widespread job loss and economic hardship to many such spouses. This has also affected employers, leaving them with no other option but to let go of employees who are affected by these EAD processing delays.

What Are the Changes?

Last week's guidance most significantly creates two changes in the process:

- ***Automatic 180-day EAD extensions:*** Similar to the way Adjustment of Status-based EAD are handled, H-4, E, and L nonimmigrant dependent spouses will now qualify for an automatic extension of their EAD for up to 180 days from the "Card Expires" date on the face of their current EAD card. In order to qualify for an automatic extension, the applicant must:
 - timely file an application to renew H4 based Employment Authorization Document (EAD);
 - have an unexpired Form I-94 confirming valid E, L, or H-4 derivative status; and
 - continue to have valid status beyond their EAD expiration date.

It is important to note that automatic extensions will continue until the earlier of the end date on the I-94 showing valid status; 180 days from the expiration date on the previous EAD; or the date when the pending EAD is either approved or denied.

- ***E and L spouses:*** Under the new policy guidelines, L-2 and E spouses are now considered automatically authorized for employment and will not be required to apply for work authorization. Unfortunately, the current version of the I-94 does not distinguish E and L spouses from E and L children. Changes to the Form I-94 will occur within reasonable period to indicate that the bearer is an L-2 spouse or E visa-dependent spouse, which can be used as a List C document for Form I-9 purposes. L2 and E spouses must still present evidence of work authorization to their employers to comply with I-9 rules.

How Does this Impact Employers?

This is great news for employers. With regard to pending EAD extensions, if a foreign national was unable to provide a renewed EAD card at the time of the expiration of the current EAD card prior to this settlement and policy guidance revision, employers could not continue that individual's employment until a valid EAD card was presented. Thanks to the new policy guidance, you can continue employment for up to 180 days past the expiration date. Note, however that, despite the policy changes, Fisher Phillips will continue to advise clients to file EAD extension applications as early as possible.

How Do Employers Complete Form I-9s For Pending EAD Extensions with H-4 and L-2 Visa Holders?

In order to comply with the new policy guidance:

- For H-4 visa holders: To complete Form I-9, employees must present a facially expired EAD indicating Category C26; Form I-797C, Notice of Action for Form I-765 with Class requested indicating "(c)(26)" and showing that the I-765 EAD renewal application was filed before the EAD expired; and unexpired Form I-94, Arrival-Departure Record showing valid H-4 nonimmigrant status.
- For L-2 visa holders with pending EAD extensions: To complete Form I-9, employees must present a facially

expired EAD indicating Category A18; Form I-797C, Notice of Action for Form I-765 with "Class requested" indicating "(a)(18)" and showing that the I-765 EAD renewal application was filed before the EAD expired; and unexpired Form I-94, Arrival-Departure Record, showing valid L-2 nonimmigrant status.

- For E spouses with pending EAD extensions: To complete Form I-9, employees must present a facially expired EAD indicating Category A17; Form I-797C, Notice of Action for Form I-765 with "Class requested" indicating "(a)(17)" and showing that the I-765 EAD renewal application was filed before the EAD expired; and unexpired Form I-94, Arrival-Departure Record, showing valid E nonimmigrant status.

Similar to pending AOS EAD extensions, employers will be required to reverify work authorization at the earlier of the end date on Form I-94, date the I-765 is approved or denied, or the 180th day of the EAD auto-extension period.

When Do the New Rules Go Into Effect?

The automatic 180-day EAD extensions for H-4, E, and L nonimmigrant dependent spouses went into effect immediately starting November 12. With regard to work authorized incident to status for E and L2 spouses, Department of Homeland Security has yet to update the current version of the I-94 to distinguish between E and L spouse and E and L children, including future I-9 guidance.

Fisher Phillips will continue to monitor developments will provide additional guidance as it becomes available. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our [Immigration Practice Group](#).