



Employers Breathe Sigh of Relief as Immigration Officials Extend Employment Authorization for Many Workers

Insights

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Thanks to a new rule published yesterday, a broad group of nonimmigrant workers waiting for their employment authorization cards will have their temporary work authorizations extended for 540 days from their expiration date – an incredibly welcome development for employers in dire need of qualified help. The Department of Homeland Security’s final rule, effective May 4, will help prevent eligible renewal applicants from experiencing a lapse in employment authorization or documentation while their applications remain pending. What do you need to know about this promising development?

What’s Gone Wrong?

U.S. Citizenship and Immigration Services (USCIS) has faced many operational challenges over the past year dealing with processing times for Employment Authorization Documents (commonly known as EAD, formally known as Form I-765). The agency employed emergency measures to maintain its operations through the height of the COVID-19 pandemic, which greatly exacerbated administrative challenges and staffing shortfalls. When you combine that with a sudden increase in Form I-765 filings, employers have seen processing times for Form I-765 increasing to frustratingly high levels. In fact, the delays had been growing to the point where the 180-day automatic extension period for renewal applications had become insufficient in most cases.

As a result of longer-than-normal processing times, some applicants’ automatic extension periods have already expired. For many others, they are in imminent danger of expiring. More and more renewal applicants are losing their jobs as a result. Employers are suddenly faced with finding replacement workers during a time when the U.S. economy is experiencing more job openings than available workers. Indeed, as of December, there were nearly 11 million job openings and only 6 million unemployed workers.

USCIS to the Rescue

Recognizing the critical need for relief, federal immigration officials announced a new rule that should put employers’ minds at ease. The new rule increases the automatic extension period applicable to expiring EADs for certain renewal applicants who have filed Form I-765. Thanks to this development, the extension period will increase from up to 180 days to up to 540 days from the expiration date stated on their EADs.

This increase will be available to eligible renewal applicants with pending Forms I-765 as of May 4, 2022. It includes those applicants whose employment authorization may have lapsed following the initial 180-day extension period. It also includes any eligible applicant who files a renewal Form I-765 during the 540-day period beginning on or after May 4 and ending October 26, 2023.

This temporary increase to the automatic extension period will avoid the immediate harm that otherwise would have affected tens of thousands of EAD renewal applicants – and their employers. It would have been impossible for USCIS to process all of the pending EAD renewal applications before the end of the current 180-day automatic extension period, but this new rule solves the problem for the next year and a half.

Even better news: USCIS is already taking steps to more permanently address backlogs for EAD applications and other form types. While this temporary increase will provide a reprieve, it will also allow USCIS to work towards returning to pre-pandemic processing times for necessary documentation.

What Should Employers Do?

As a result of this announcement and new rule, any employers with eligible renewal applicants with pending Forms I-765 as of May 4, including those with applicants whose employment authorization may have lapsed following the initial 180-day extension period, are in luck. As are employers with eligible applicants who file a renewal Form I-765 during the 540-day period beginning on or after May and ending October 26, 2023.

The criteria for receiving this increased automatic extension have not changed from the criteria applicable for an extension of up to 180 days. Qualifying individuals must:

- have timely filed an application to renew their employment authorization and/or EAD on Form I-765, Application for Employment Authorization, before the EAD expires (except certain employees with Temporary Protected Status (TPS), and the Form I-765 EAD renewal application remains pending;
- have been issued a Form I-797C, Notice of Action, issued for the corresponding Form I-765 EAD renewal application that states an eligibility category that is the same as the eligibility category stated on the front of the EAD except:
- in the case of an EAD and I-797C, Notice of Action, each may contain either an A12 or C19 TPS category code as the category codes do not have to match; and
- for H-4 (C26), E (A17) and L-2 (A18) dependent spouses, whose Form I-797C must be accompanied by an unexpired Form I-94 indicating H-4, E, or L-2 nonimmigrant status;
- be within one of these eligibility categories that qualify for the automatic extension: A03, A05, A07, A08, A10, A17*, A18*, C08, C09, C10, C16, C20, C22, C24, C26*, C31, and A12 or C19. The eligible categories are published on the USCIS Automatic EAD Extension page. Some category codes on

categories are published on the USCIS Automatic EAD Extension page. Some category codes on the EAD may include the letter 'P' such as C09P. Employers should disregard the letter 'P' when comparing the category code on the EAD with the category code on the Form I-797C, Notice of Action.

*Only certain employees who file a Form I-765 renewal application within categories A17, A18, and C26 are eligible for an automatic extension. See A17, A18, and C26 guidance below.

Employees who present employers with a Form I-797C, Notice of Action, referring to an automatic EAD extension of up to 180 days are eligible for the extension of up to 540 days when the above eligibility requirements are met.

Forms I-797C, Notice of Action, issued May 4 through October 26, 2023 will refer to an automatic EAD extension of up to 540 days. The temporary automatic extension increase will no longer apply to employment authorization and/or EADs associated with Form I-765 renewal applications filed after October 26, 2023 and USCIS will return to issuing Forms I-797C, Notice of Action, for Form I-765 renewal applications that contain notice of automatic extensions of up to 180 days.

Updating Form I-9 for an Employee with An Existing 180-Day Automatic Extension

If your current employee's Form I-9 as of May 4, 2022 shows an EAD that was automatically extended by 180 days, the employee is eligible to receive an additional extension of 360 days as provided in the temporary final rule, for a total of 540 days counted from the "Card Expires" date stated on the face of the EAD. Employees whose EAD Category Codes are A17, A18 and C26 may not necessarily receive the full 360-day extension, and this is explained below in the **For Category Codes A17, A18, and C26** guidance.

You must update the employee's Form I-9 no later than the date the employee's 180-day automatic extension ends. If you retain copies of your employees' documents, you may use those copies to determine the employee's eligibility and/or accurately calculate the increased automatic extension. Employers are not required to re-examine documents. However, your employee may present their Form I-797C, Notice of Action, EAD and, if applicable, Form I-94 again if you need to re-examine the "Card Expires" date and the category code(s) to determine eligibility and/or accurately calculate the increased automatic extension. Your employee's Form I-797C, Notice of Action, may refer to an automatic EAD extension of up to 180 days – but is now acceptable evidence of the extension of up to 540 days, provided the above-described eligibility requirements are satisfied.

Based on your employee's Form I-9 documentation history, their EAD 180-day automatic extension date may be located in the Document Expiration Date field or Additional Information field in Section 2. Add 360 days to this date and enter the new EAD expiration date in the Section 2 Additional Information field. You may also determine the automatic extension date by adding 540 days to the "Card Expires" date shown on the EAD.

Employers may keep a copy of the USCIS webpage describing the temporary EAD extension of up to 540 days with the employee's Form I-9.

For Category Codes A17, A18, and C26

This guidance applies to employees who fall within category codes A17, A18, or C26 and therefore are either an H-4, E, or L-2 dependent spouse, including E-1S, E-2S, E-3S and L-2S class of admission codes on Form I-94. Your employee's automatic extension period cannot exceed the Form I-94 end date. Under this circumstance, it may be true for your employee that the extension may be greater than 180 days but less than the additional 360 days. Your employee's Form I-797C, Notice of Action, may refer to an automatic EAD extension of up to 180 days but is now acceptable evidence of the extension of up to 540 days, but not to exceed the Form I-94 end date, and the above-described eligibility requirements are satisfied. In the Additional Information field of Section 2, enter either the Form I-94 end date or the EAD "Card Expires" date plus up to 360 days, whichever date is earlier.

How to Complete Form I-9 for EADs Automatically Extended Based on a Pending Form I-765 Renewal Application

New Employees

New employees presenting an EAD that has been automatically extended must complete Section 1 as follows:

- Select "An alien authorized to work until;" and
- Depending on the "Received Date" on Form I-797C, enter the appropriate date (either 540 days or 180 days from the "Card Expires" date on the EAD) as the expiration date of employment authorization. Employees whose status does not expire, such as refugees or asylees, should enter N/A as the expiration date.

In Section 2, the employer must:

- Enter EAD in the Document Title field.
- Enter the receipt number from Form I-797C, Notice of Action, in the Document Number field.
- In the Expiration Date field, enter the date 540 days from the "Card Expires" date on the EAD if the "Received Date" on Form I-797C is on or before Oct. 26, 2023 or enter the date 180 days from the "Card Expires" date on the EAD if the "Received Date" on Form I-797C is after Oct. 26, 2023.

For automatic extensions of up to 540 days (which reflects a temporary increase to the normal automatic extension of up to 180 days), you should enter EAD EXT in the Additional Information field and may keep a copy of the USCIS webpage describing the temporary extension of up to 540 days with the employee's Form I-9.

Rehired Employees

For employees rehired within three years from the date you completed the employee's previous Form I-9 and who qualify for this extension, you may choose to either complete the Form I-9 following the process described above, or update their previous Form I-9 and enter the appropriate automatic extension expiration date in Section 3.

Current Employees

For a current employee whose employment authorization and/or EAD has been automatically extended and who presents a Form I-797C, Notice of Action, you must enter the appropriate automatic extension expiration date in the Section 2 Additional Information field. Employers should also enter EAD EXT in the same field and may keep a copy of the USCIS webpage describing the temporary extension of up to 540 days with the employee's Form I-9, if applicable.

Employees Who Experienced a Gap in Employment Authorization and/or EAD Validity Before May 4, 2022

For new or rehired employees who received an automatic extension that expired before May 4, 2022, and whose employment authorization and/or EAD validity resumed on May 4, 2022, as a result of the temporary increase in the automatic extension period to up to 540 days, employers should follow the process applicable to new or rehired employees described above.

I-9 Guidance for Employees under Category Codes A17, A18, and C26

Employees with EADs with Category Codes A17, A18, and C26 require additional documentation supplementing the Form I-797C, Notice of Action, to show that the EAD has been automatically extended. These employees must present a Form I-94, Arrival-Departure record indicating unexpired nonimmigrant status (E-1, E-1S, E-2, E-2S, E-3, E-3S, H-4, L-2 or L-2S), along with a Form I-797C, Notice of Action, that shows a timely-filed EAD renewal application stating the "Class requested" as "[A17]," "[A18]," or "[C26]," and the EAD that appears expired on the face of the card as having been issued under the same category (that is, Category A17, A18, or C26).

For a new employee, in Section 2, you must:

- Enter EAD in the Document Title field.
- Enter the receipt number from Form I-797C, Notice of Action, in the Document Number field.
- In the Expiration Date field, enter the date that is 540 days from the "Card Expires" date on the EAD if the "Received Date" on Form I-797C is on or before Oct. 26, 2023, or the end date of the Form I-94, whichever is earlier. If the "Received Date" on Form I-797C is after Oct. 26, 2023, enter the date that is 180 days from the "Card Expires" date on the EAD or the end date of the Form I-94, whichever is earlier.

- Enter the Form I-94 document information in the second set of List A Document entry fields.

To calculate the new expiration date:

- Add 540 or 180 days to the EAD “Card Expires” date, whichever time period is applicable depending on the “Received Date” on Form I-797C.
- Compare the 540-day or 180-day auto-extended date to the Form I-94 end date.
- Whichever date is earlier is the new EAD expiration date.

You should enter EAD EXT in the Additional Information field in Section 2. If applicable, you may keep a copy of the USCIS webpage describing the temporary EAD extension of up to 540 days with the employee’s Form I-9. Employers must reverify employment authorization at the end of the automatic extension period.

Conclusion

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](#).

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