

Insights, News & Events

AUTOMATIC 540-DAY EXTENSION OF CERTAIN EAD RENEWALS WILL EXPIRE FOR FOREIGN NATIONAL WORKERS IN OCTOBER: WHAT SHOULD EMPLOYERS DO TO PREPARE?

Insights
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By the end of October, a temporary rule that has been allowing certain foreign nationals to receive an increased period of automatically extended authorization to work in the United States for the past year will expire – and could leave employers scrambling. But if you begin to prepare now, you can ensure your operations run smoothly and put your foreign national workforce in a position to succeed despite the October 26 expiration date. What do employers need to know about this upcoming deadline?

What Happened?

Due to processing delays in USCIS processing of applications to extend employment authorization documents (EADs) filed using USCIS Form I-765, certain foreign nationals were experiencing gaps in employment authorization. These gaps were occurring despite an already existing 180-day automatic extension of employment authorization (for certain immigration categories) when an extension was timely filed.

Service Focus

Immigration

In an attempt to alleviate this problem, USCIS increased the automatic extension of employment authorization to 540 days in 2022. This temporary increased extension has been available to eligible applicants whose applications remain pending, and that filed a Form I-765 application to extend their employment authorization:

- before May 4, 2022, whether or not the 180-day automatic extension had since expired; or
- between May 4, 2022, and October 26, 2023.

Unfortunately, the automatic 540-day extension for eligible applicants will expire on October 26, meaning the time to start preparing for that expiration is now.

What Does This Mean for Employers?

If an applicant files an I-765 requesting an extension of employment authorization in an eligible category on or before October 26, the applicant will still qualify for an automatic extension of employment authorization of up to 540 days.

Applicants that file an I-765 requesting an extension of employment authorization in an eligible category after October 26, 2023, will only be eligible for an automatic extension of up to 180 days.

To determine the application filing date, applicants should look at the receipt date listed on the receipt notice (Form I-797C) issued by USCIS.

Which Categories Are Eligible for an Automatic Extension?

A list of categories that are eligible for an automatic extension is available on the USCIS website. But, as of the date of this Insight, the categories include the following:

- (a)(3): Refugee
- (a)(5): Asylee

- (a)(7): N-8 or N-9
- (a)(8): Citizen of Micronesia, Marshall Islands, or Palau
- (a)(10): Withholding of Deportation or Removal Granted
- (a)(12): Temporary Protected Status (TPS) Granted
- (a)(17): Spouse of principal E nonimmigrant with an unexpired I-94 showing E (including E-1S, E-2S and E-3S) nonimmigrant status
- (a)(18): Spouse of principal L-1 Nonimmigrant with an unexpired I-94 showing L-2 (including L-2S) nonimmigrant status
- (c)(8): Asylum Application Pending
- (c)(9): Pending Adjustment of Status under Section 245 of the Act
- (c)(10): Suspension of Deportation Applicants (filed before April 1, 1997)
Cancellation of Removal Applicants
Special Rule Cancellation of Removal Applicants Under NACARA
- (c)(16): Creation of Record (Adjustment Based on Continuous Residence Since January 1, 1972)
- (c)(19): Pending initial application for TPS where USCIS determines applicant is *prima facie* eligible for TPS and can receive an EAD as a "temporary treatment benefit"
- (c)(20): Section 210 Legalization (pending I-700)
- (c)(22): Section 245A Legalization (pending I-687)
- (c)(24): LIFE Legalization
- (c)(26): Spouses of certain H-1B principal nonimmigrants with an unexpired I-94 showing H-4 nonimmigrant status

- (c)(31): VAWA Self-Petitioners

In addition to filing pursuant to an eligible category, the category on the current EAD needs to match the “Class Requested” listed on the applicant’s receipt notice.

For Temporary Protected Status (TPS) beneficiaries or pending applicants, the EAD and the receipt notice must contain either the A12 or C19 category, but the categories do not need to match each other (there are other rules that that can automatically extend to TPS work authorization).

As a reminder, H-4, E, and L-2 dependent spouses, must present an *unexpired* Form I-94 indicating H-4, E, or L-2 nonimmigrant status (including class of admission codes) with the receipt notice to establish proof of employment authorization to an employer when verifying employment eligibility. The majority of individuals (but not all) with an unexpired I-94 showing that they currently hold valid E-1S, E-2S, E-3S, and L-2S status are considered work authorized incident to status, and should no longer require a separate EAD for employment authorization.

What Should Employers Do?

This may be a good time for employers to review company records to determine which employees are working pursuant to an EAD and need to file an extension application soon. If they are eligible to their extension file prior to October 26, it would probably be a good idea for them to do so. For those employees that don’t file in time, or are not eligible to file an extension prior to October 26, employers should make a note of the end of that employee’s automatic extension (once the application is filed), as well as notify the employee of the change in policy so they are aware of the shorter automatic extension period.

Conclusion

If you have employees who are filing or have filed an EAD extension, or are unsure whether your foreign

national employees are authorized to work given this change, contact your FP attorney, the author of this Insight, or any one of our [Immigration team attorneys](#). Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox.