AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

December 23, 2024

Samantha Deshommes, Chief
Office of Policy and Strategy
Regulatory Coordination Division
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Dr.
Camp Springs, MD 20588-0009

Submitted via https://www.regulations.gov

RE: Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Employment Authorization (Form I-765)
OMB Control Number 1615-0040
Docket ID USCIS-2005-0035

Dear Chief Deshommes:

The American Immigration Lawyers Association (AILA) submits the following in response to above-referenced Agency Information Collection (AIC) concerning the Form I-765 Application for Work Authorization, published in the Federal Register on October 22, 2024.[1]

AILA, established in 1946, is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA members' collective expertise and experience makes AILA particularly well-qualified to offer views that will benefit the public and the government.

As an initial matter, we would like to recommend the following technical revisions to both the Form I-765 and its instructions:

[1] 89 FR 84373 (October 22, 2024).

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1. **Form I-765**

- Page 1, Part 1.c. This "reason for applying" option lumps together replacing a lost, stolen, or damaged document with replacing an EAD for an error not caused by USCIS. USCIS should separate "replacing a lost, stolen, or damaged EAD" and "replacing an EAD for an error not caused by USCIS." Thus, a new selection option in the Form would provide for a choice when an EAD replacement is requested based on an error not caused by USCIS and not due to loss, theft, or damage. In addition, we request that the receipt for the I-765 application due to loss, theft, or damage clearly note that reason. If this suggestion is implemented, then affected employees will be able to present receipts clearly noting reasons for the receipt to qualify as a replacement of a List A document for Form I-9 purposes. https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents/receipts This suggestion eases compliance for both the employer and employees

- Page 2, Part 2.5. Insert "Most recent" before Form I-94 to clarify request.
- Page 2, Part 2.9. Insert after "list additional countries" the phrase for which you also hold citizenship" before "in the space" for clarification.
- Page 2, Part 2.10. Insert link to website address where the category codes are listed. This option was also used for the Form I-9, List C employment eligibility options pursuant the U.S. Department of Homeland Security (DHS) frequent updates for ease of reference. This option can help address challenges related to rapid changes and reduce dated or erroneous references.

- Page 3, Part 2, 11.e. Why is information also from "USCIS systems" being authorized to be provided to the Social Security Administration (SSA)? The form and instructions should clarify the privacy protections that apply to the applicant based on the additional release of this data to SSA by USCIS.

Instructions

- Page 2, Form I-765 Filing Categories. Paragraph 1, first sentence, should add "for completion of Form I-9" after "to their employer" to clarify what form is being referenced.
- Page 2, Form I-765 Filing Categories, Paragraph 2. Add regulatory cite to 8 CFR §274a.12(c).
    - After paragraph 3, add regulatory cite to 8 CFR §274a.12(a).
    - Paragraph 4, after "documentation" in the first line, insert (e.g. Form I-94 appearing on cbp.gov or on a Form I-797A approval notice issued by USCIS) to provide a typical example for ease of understanding.
- Page 3, for consistency, change the "you" to "they" in the first sentence on the page. In addition, for purposes of clarity, add the following sentence at the end of the first paragraph: "As an example, while an L-2 spouse or an E-1 or E-2 spouse is work authorized incident to status based on their correctly issued Form I-94 admission record alone, if they file for an extension of status in the U.S. with USCIS using the current I-539 form required; they will not benefit from an automatic extension of their underlying status."

- Paragraph 2, change the word "list" to "lists" in line 1 for noun verb agreement. Also, consider the use of "evidence" or "information" in lieu of "documentation" to avoid confusion over the numerous uses of the term "documentation" both in relation to initial and "additional" information requirements.

- Page 6, item 3, A. This use of the (a)(12) and (c)(19) categories for TPS causes confusion for employers and employees. Clarify that for employment eligibility, employers may accept either category to reduce confusion that the receipt's EAD code must match the current category noted on the EAD to benefit from automatic extension. See M-274 Handbook for Employers, Section 5.1.
- Page 9, Employment-Based Nonimmigrant Categories, number 1: fix typographical error by changing 1B-1 to B-1.
- Page 9, Employment-Based Nonimmigrant Categories, number 4, spouses of E-1, E-2, E-3: change last sentence from "E spouses who are employment authorized incident to status may choose to apply for an EAD to obtain evidence of identity and employment authorization by submitting Form I-765 along with" to "*E spouses who are employment authorized incident to status should consider applying for an EAD to obtain evidence of identity and employment authorization by submitting Form I-765 along with.*"
- Page 10, top, 5. Spouses of an L-1 Intracompany Transferee: change "L-2 spouses may choose to apply for an EAD to obtain evidence of identity and employment authorization by submitting Form I-765 along with" to "*L-2 spouses may choose to apply for an EAD to obtain evidence of identity and employment authorization by submitting Form I-765 because the timely filing of a Form I-539 extension of L-2 status with USCIS does not benefit from the automatic extension of work authorization."*
- Page 23, top, #1: change "If you are a citizen or national of more than one country, type or print the name of the foreign country that issued your last passport." to "If you are a citizen or national of more than one country, type or print the name of the foreign country that issued your most recent passport."
- Page 23, Section including: "You are not required to request a social security card using this application." Change "However, you must have an SSN properly assigned in your name to work in the United States." to "However, you will want to obtain an SSN as soon as possible upon entering the United States." This change recognizes that an SSN is not an absolute requirement to start work in the U.S.
- Add instruction in "Specific Instructions" Section for Part 2, item #10: add a link to the USCIS website list of EAD categories currently found at Checklist of Required Initial Evidence for Form I-765 (for informational purposes only) to aid applicants in selecting the correct EAD category for themselves at Part 2, item #10 of the form.

2. **Substantive Comments to Form I-765: Reducing the Burden to Applicants**

Fundamentally, we appreciate and support the key objectives of U.S. Citizenship and Immigration Services (USCIS), as outlined in the AIC, to explore technology and internal process opportunities to reduce the burden to those "applying for initial employment authorization, seeking evidence of existing employment authorization, or employment authorization incident to status or an

Employment Authorization Document (EAD)." We also understand that the estimated number of potential paper and electronic based EAD applications, also referenced in the AIC, totals approximately 6.155 million. Thus, a strategic review of the circumstance in which this form must be used presents a significant opportunity for burden reduction for both USCIS and applicants.

As an immediate opportunity to increase efficiency for its stakeholders, we encourage USCIS to conduct a fundamental assessment of the following: its current regulations relating to employment authorization at 8 CFR §274a.12; the Handbook for Employers (M-274); the I-9 Central website, and all related online guidance and policies. Employers should not have to navigate a multi-faceted web of resources, as is presently the case, to comply with the verification of identity and work authorization mandated by 8 CFR §274.a1 through 10.

In addition, employees should not be subject to the hardships created by the inadequate allocation of agency resources for timely adjudications of EADs, which recently resulted in the issuance of a final rule authorizing a permanent increase of the automatic extension period for EADs to 540 days.[2]

3. **Form I-765: Reducing the Pool of Applicants**

While it makes sense to alleviate pressure on the EAD production system by extending the automatic extension period, USCIS should also consider reducing the pool of applicants required to apply affirmatively for an EAD by adding those categories providing individuals with work authorization "incident to status" under 8 CFR §274a to the list of categories for which an EAD is not required.

For example, USCIS issued a policy announcement on November 12, 2021 to clarify that E and L nonimmigrant spouses would be employment authorized based on their E or L nonimmigrant status.[3] On January 31, 2022, USCIS and U.S. Customs and Border Protection (CBP) started issuing new Forms I-9 with the following new Categories of Admission (COA) codes: E-1S, E-2S, E-3S, and L-2S. The Form I-94 admission records issued with these codes were then approved by USCIS to be used as Form I-9, List C work authorization documentation. Although E and L spouses are authorized to work for any employer, their primary E and L nonimmigrant spouses are authorized to work only for a specific employer.[4] If the regulations related to E and L primary nonimmigrants or the regulations applicable to those nonimmigrants authorized to work incident to status [5] were updated to note that spouses of E and L primary nonimmigrants may be authorized to work for any employer with satisfactory proof of dependent status, then the automatic extension policy could appropriately apply to dependent E and L spouses.

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[2] See "DHS Announces Permanent Increase of the Automatic Extension Period for Certain Employment Authorization Document Renewal Applicants," (Release Date Dec. 10, 2024) https://tinyurl.com/yc4vznr2 For I-485 Adjustment of Status based EAD requests (c9 category), the processing times posted range from 5 to 7.5 months for 80% of cases completed, which is certainly an improvement. https://egov.uscis.gov/processing-times/ .

[3] See "USCIS Updates Guidance on Employment Authorization for E and L Nonimmigrant Spouses, " (Release Date Mar. 18, 2022) https://tinyurl.com/2sjkyuv9 .

[4] See 8 CFR §274a.12(b)(5) and (b)(12).

[5] See 8 CFR §274a.12(a).

At present, a timely filed extension of stay for an L or E dependent spouse does not effectuate an extension of work authorization and this fact results in the possibility of a potential gap of employment authorization for those authorized to work "incident to status." In order to avoid a potential gap in work authorization, spouses of E and L nonimmigrants are often forced to apply for an EAD to benefit from an automatic extension of work authorization under the A17 or A18 categories, respectively.

Similarly, K-1 nonimmigrant fiancées are authorized to work incident to status by regulation for their period of authorized stay.[6] The Form I-9 options to prove work authorization do not recognize this fact. Thus, the K-1 nonimmigrant must obtain an EAD to prove work authorization. The delays in EAD adjudication make the "incident to status" work authorization reference in the regulation a nullity as the K-1 must rely on the Form I-765 filed with the subsequent I-485 adjustment application to see documentation of their "incident to status" ability to work. Eliminating the need for a K-1 nonimmigrant or the spouse of an immediate relative seeking adjustment of status to obtain an EAD would present a clear opportunity to reduce administrative burdens on stakeholders while at the same time significantly improving government efficiency.

These incongruities highlighted above harm spouses of U.S. citizens and work authorized nonimmigrant spouses. In addition, the situation impedes the global competitiveness of the U.S. for talent in critical areas such as Artificial Intelligence and other technology sectors critical to national security, as the economic realities and personal preferences of these workers often result in both spouses desiring to be in the workforce. Other countries facilitate work authorization of principal workers and their spouses to encourage these talented individuals to remain in their domestic workforce. The U.S. should do no less.

4. **Form I-765: Technology Use**

We support the agency's ongoing development of technology to facilitate the confirmation of work authorization and identity. We anticipate that use of E-Verify, or its enhanced successor, will expand and thus reduce the burden on employers and employees to comply with the seemingly ever-changing immigration status and policy guidance. We share the agency's vision that technology should simplify and improve compliance. Of course, technology advances do not guarantee fool proof accuracy.

USCIS has technology-based options for verification of immigration status via SAVE[11] (for agencies) or via myE-Verify (for individuals).[7] While well intentioned, it has been our experience that, even with legal nonimmigrant or immigrant status, foreign nationals and agencies often experience long delays in verifying their legal status and work authorization.

USCIS, presumably in recognition of E-Verify's limitations, has recently rolled out a limited use of its E-Verify+ service to help streamline the Form I-9 and E-Verify process.[8] The E-Verify+ service intends to shift the burden of identity and work authorization confirmation away from the

[6] See 8 CFR §214.2(k)(3).
[7] See https://myeverify.uscis.gov/ .
[8] See https://www.e-verify.gov/plus .

employer and provides the employee with more control over their personal information. E-Verify+ allows the employee to upload documents establishing both identity and work authorization acceptable for E-Verify and Form I-9 purposes and to address potential mismatch issues directly with USCIS.

The AIC asks about the use of a mobile app or alternate technology for photo capture and/or evidence of work authorization in lieu of the Form I-765 application. The CBP One™ mobile app[9] was created to try to streamline the collection of information from those arriving at a U.S. port of entry seeking entry without a passport or visa.[10] While the concept of a technology-based "one-stop-shop" would seem preferable, the DHS Office of Inspector General issued a Final Report in August of 2024 noting that CBP did not thoroughly plan for risks related to the app.[11] In addition, technology issues have continued to make use of the mobile app challenging for users at best.[12] Thus, at least in the near term, it would seem that a more robust use of the existing myUSCIS account system (used by E-Verify+ or myE-Verify) might provide a less cumbersome and more secure option for issuance of employment documentation.

Form I-765: Digital EAD Option

In an ever-evolving digital world, it is important for DHS to keep pace with the use emerging digital technologies. States are increasingly issuing mobile driver's licenses (mDLs)[13] and presently at least half of all states are believed to be preparing for, or issuing, mDLs. The federal government already accepts mDLs issued by states. For example, the Transportation Security Administration (TSA) currently accepts mDLs issued by 11 states at 27 participating airports and has a goal of accepting mDLs at all airports, with a goal of expanding use of the technology nationwide. This year, TSA published a final rule that would allow continued use of mobile driver's licenses (mDL) for identity verification at TSA airport security checkpoints once REAL ID enforcement begins in May of 2025.[14]

A digital EAD, similar to a mDL, would provide substantial benefits for DHS, employers, and employees. The digital EAD option is far less complex than the troubled CBP One™ app used at the border for a multitude of functions. For DHS, a digital EAD could provide enhanced security and efficiency, reducing the administrative burdens and costs associated with the production of physical EAD cards. In recent years, technology advances have allowed criminals to produce sophisticated counterfeit documents used for identity and work authorization. A digital EAD should reduce the threat of counterfeit credentials, ensuring that only authorized individuals are employed. For employees, a digital EAD can provide a more secure and convenient method of

[9] See https://www.cbp.gov/about/mobile-apps-directory/cbpone .
[10] It has also been expanded to include a variety of features such as: checking border wait times; applying for a provisional I-94; checking trusted traveler program status; and requesting the inspection of agriculture or biological products for travelers.
[11] See, "CBP Did Not Thoroughly Plan for CBP One TM Risks, and Opportunities to Implement Improvements Exist," U.S. DHS Office of Inspector General OIG-24-28 (Aug. 19, 2024).
[12] See Parness, Ayelet, "For Asylum Seekers, CBP One App Poses Major Challenges," (Nov. 8, 2023) https://hias.org/news/asylum-seekers-cbp-one-app-poses-major-challenges/ .
[13] See https://www.dhs.gov/real-id/real-id-mobile-drivers-licenses-mdls .
[14] See 89 *Fed. Reg.*85340 (Oct. 25, 2024).

employment and identity verification, as compared to physical cards. EADs often take several weeks to be issued even after approval, resulting in work authorized individuals potentially losing jobs or experiencing interruptions in employment due solely to delays in receiving their EADs, despite having an approval of work authorization from USCIS. Currently, if an EAD is lost, stolen, or destroyed, government processing times indicate that it could take up to a year to obtain a replacement card, depending on the form category and service center adjudicating the application. A digital EAD would obviate the need to apply for a lost, missing, or damaged EAD.

Form I-765: Reducing Application Volume Created by the Adjustment of Status Process

Form I-765 applications for work authorization based on a Form I-485 adjustment application (C9 category) have been subject to processing and fee changes related to increased demands and processing backlogs. In 2019, USCIS opined that a single fee for Form I-485 would reduce the burden of administering separate fees and better reflect the cost of adjudication.[15] At the time, DHS regulations allowed I-485 adjustment applicants to file for ancillary benefits [e.g. work authorization (Form I-765) and travel/advance parole (I-131)] without paying additional fees.[16] In the 2024 Final Rule, USCIS unbundled the Form I-485, Form I-765, and Form I-131 to "make USCIS processing times more efficient by eliminating Forms I– 765 filed for individuals who are not in need of employment authorization or Forms I–131 for individuals who have no intention of traveling outside the U.S.

Another potentially more efficient option that would reduce the volume of employment authorization documentation would involve allowing a Form I-485 adjustment receipt to provide evidence of work authorization or amending USCIS regulations to extend employment authorization to the beneficiaries of approved employment-based Form I-140 petitions and Form I-130 immediate relative petitions.[17]

Form I-765: Enhancing Efficiency of Employment and Travel Authorization through Issuance of Provisional Ancillary Benefits

Similar to the process of applying for employment authorization as an ancillary benefit of applying for adjustment of status, adjustment applicants are required to apply for and obtain advance parole to be able to reenter the U.S. after international travel in order to avoid abandoning their pending adjustment of status applications.[18] Currently, USCIS reports that advance parole applications

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[15] See 84 Fed. Reg. 62280, (Nov. 14. 2019).

[16] *See id.* at 62303, 8 CFR 103.7(b)(1)(i)(M)(4) & (II). Before the Fiscal Year 2008/2009 fee rule, adjustment applicants paid separate fees to apply for an EAD or travel document while waiting for the Form I-485 to be adjudicated. Since the Fiscal Year 2008/2009 fee rule, USCIS allowed Form I-485 adjustment applications to be filed concurrently with the Form I-765 (work) and Form I-131 (travel). "By providing that the fees for interim benefits would be included in the fee for Form I–485, USCIS addressed the perception that it benefits from increased revenue by processing Forms I–485 more slowly. See 72 FR 4894 and 29861–2. The FY 2010/2011 fee rule continued the practice of 'bundling' the fees for interim benefits and Form I– 485. See 75 FR 58968."

[17] The DHS Secretary has broad statutory authority to determine categories of foreign nationals authorized for employment. See Immigration and Nationality Act, as amended (INA), §274A(h)(3), 8 U.S.C. §1324a(h)(3).

[18] The only exception is for holders of valid H-1B and L-1 visas who may travel abroad and reenter in H or L status without abandoning their adjustment of status applications, as authorized by memorandum by Michael Cronin, HQADJ 70/2.8.6, 2.8.12, 10.18, AD00-03 (May 25, 2000) ("Cronin Memo").

filed pursuant to adjustment applications have a processing time of 5.5 to 23.5 months (80% of cases). This requirement creates a substantial workload for USCIS and the lengthy processing times cause harm to adjustment of status applicants in the U.S. who need to travel internationally for personal and professional reasons. In some cases, adjustment of status applicants are forced to choose between critical personal and business events abroad – including important family events and caring for or attending to close relatives experiencing health emergencies – and their ability to complete their permanent residence processing in the U.S. The available options for adjustment applicants to expedite their advance parole applications or obtain advance parole at a local USCIS office through the InfoPass system – are cumbersome and inconsistently granted.

Congress and USCIS have long recognized that travel for a legitimate reason is a necessity, particularly in today's global economy, and have provided the advance parole as a means to facilitate such travel during the adjustment of status process. The history of Form I-131 adjudications supports the importance of this benefit to adjustment applicants.[19]

USCIS could deem, similar in concept to the "combo card" providing both employment and travel authorization, that Forms I-485/I-131/I-765 receipt notices in combination constitute a *provisional revocable grant* of both the interim benefits pending adjudication of these benefit requests. Deeming the receipt notices to constitute a "grant" of both benefit allows the adjustment of status applicant to work and travel abroad and reenter the U.S. without abandoning the adjustment of status as stated in the regulation. At the same time, deeming the receipt notice to be a *provisional revocable grant* of advance parole and employment authorization gives USCIS the ability to revisit the provisional grant and revoke the benefits at any time, if the agency determines that the applicant is not eligible. This option would also eliminate most requests for expedited/emergency issuance of travel and work authorization documentation.

USCIS has previously permitted applicants to make brief trips abroad during the adjustment of status process. Under past USCIS policy and practice, the agency has recognized that "brief, casual and innocent" departures during the adjustment of status process are permissible.[20] In line with

[19] The USCIS Adjudicator's Field Manual states at AFM 54.3(b):

(b) Explanation of "Emergent Personal" and "Bona Fide Business" Reasons. Most requests for advance parole submitted to District Directors will be considered under class (3) above. Class (3) is in two parts:
The first part of class (3) authorizes advance parole for aliens who filed an adjustment application while a visa number was available and whose case cannot be completed solely because a visa number became unavailable. Any bona fide business or personal reason for travel will serve to justify approval of the advance parole request and issuance of Form I-512.

The Associate Commissioner for Examinations, in CO 212.28-C (July 6, 1992), stated:
This instruction was clearly meant to accommodate the legitimate travel of persons inconvenienced by visa numbers becoming unavailable after they filed adjustment applications. Construction of the term 'bona fide business or personal reason' to require a showing of emergent or extreme need to travel is inappropriate. Accordingly, travel for a bona fide business or personal reason should be considered as travel for any reason which is not contrary to law or public policy." (Emphasis added).

[20] See *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

this prior policy and practice, departures under the provisional revocable grant of advance parole during the adjustment of status process could be considered as "brief, casual and innocent," not triggering abandonment of the adjustment of status application.

USCIS and other DHS agencies have previously permitted applicants for benefits to use receipt notices as a provisional grant of a benefit in numerous contexts under regulations and policy as a mechanism to address lengthy processing delays. For example, please consider the following:

- Receipt for filing of Form I-129, Petition for a Nonimmigrant Worker, under H-1B portability,
- Receipt for filing of Form I-751, Petition to Remove Conditions on Residence,
- Receipt for filing of Form I-829, Petition by Investor to Remove Conditions on Permanent Resident Status, and
- Receipt for filing of Form I-90, Application to Replace Permanent Resident Card.

Inasmuch as adjustment of status applicants are typically individuals who have been vetted multiple times before receiving numerous immigration benefits/admission through DOS, CBP, and USCIS prior to applying for adjustment, often over a period of several years, issuance of provisional ancillary benefits in the adjustment of status process as outlined above poses minimal security risks while creating significant process efficiencies for USCIS and applicants.

We appreciate the opportunity to comment on this information collection and we look forward to a continuing dialogue with USCIS on this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION