



November 12, 2021

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## Policy Alert

SUBJECT: Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses

### Purpose

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the [USCIS Policy Manual](#) to address automatic extension of employment authorization for certain H-4, E, and L nonimmigrant dependent spouses. USCIS is also rescinding the 2002 Legacy Immigration and Naturalization Service memorandum entitled, “Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petition” (2002 INS memorandum).<sup>1</sup>

### Background

The regulations at [8 CFR 274a.13\(d\)](#) provide that employment authorization, Employment Authorization Documents (Form I-766 or EAD), or both, may be automatically extended in certain circumstances. After considering public comments received in response to the Identifying Barriers Across USCIS Benefits and Services; Request for Public Input,<sup>2</sup> USCIS is updating its interpretation and implementation of 8 CFR 274a.13(d) to provide that certain H-4, E, or L dependent spouses will qualify for the automatic extension provided under this regulatory provision if certain conditions are met. Accordingly, a document combination to include an unexpired Form I-94, Form I-797C (Notice of Action) showing a timely-filed EAD renewal application, and facially expired EAD may be acceptable to evidence unexpired employment authorization for Employment Eligibility Verification (Form I-9) purposes.

In addition, USCIS is also clarifying that it will consider E and L dependent spouses to be employment authorized incident to their valid E or L nonimmigrant status.<sup>3</sup> Since the 2002 INS

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<sup>1</sup> See Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petition, HQ 70/6.2.5,6.2.12, issued February 22, 2002.

<sup>2</sup> See [86 FR 20398](#) (Apr. 19, 2021).

<sup>3</sup> This policy does not apply to dependents (including spouses) of Employees of the Taipei Economic and Cultural Representative Office (TECRO) and Taipei Economic and Cultural Offices (TECO), who continue to be required to apply for employment authorization per 8 CFR 274a.12(c)(2). Further, this policy does not apply to spouses of Long-Term Investors in the Commonwealth of the Northern Mariana Islands (E-2 CNMI Investors) who are also required to apply for employment authorization per 8 CFR 274a.12(c)(12). Additionally, as noted in 8 CFR 214.2(e)(23)(x)(B), spouses of E-2 CNMI investors who obtained such status based upon a Foreign Retiree Investment Certificate are not eligible for work authorization.

memorandum, which was issued to implement new legislation, E and L spouses have been required to request employment authorization by filing an Application for Employment Authorization ([Form I-765](#)) and receive an EAD before beginning employment. Therefore, the 2002 INS memorandum is superseded by this updated policy guidance. USCIS will continue to issue E and L dependent spouses EADs upon request via Form I-765; such EADs are acceptable for Employment Eligibility Verification (Form I-9) as List A documents (documents evidencing both employment authorization and identity). DHS will immediately take steps to modify Forms I-94 evidencing nonimmigrant status issued to E and L dependents so that E and L dependent spouses can be distinguished from E and L dependent children on the face of the document. Once these changes are made, the revised Form I-94 containing a notation indicating that the bearer is an E or L dependent spouse will be acceptable as evidence of employment authorization under List C of Form I-9.

This guidance, contained in Volume 10 of the Policy Manual, is effective immediately. The guidance contained in the Policy Manual is controlling and supersedes any related prior guidance.

### Policy Highlights

- Provides that certain H-4, E, or L dependent spouses qualify for automatic extension of their existing employment authorization and accompanying EAD if they properly filed an application to renew their H-4, E, or L-based EAD before it expires, and they have an unexpired Form I-94 showing their status as an H-4, E, or L nonimmigrant, as applicable.
- Provides that the automatic extension of the EAD will continue until the earlier of: the end date on Form I-94 showing valid status, the approval or denial of the EAD renewal application, or 180 days from the date of expiration of the previous EAD.
- Provides that the following combination of documents evidence the automatic extension of the previous EAD, and are acceptable to present to employers for Form I-9 purposes: Form I-94 indicating the unexpired nonimmigrant status (H-4, E, or L), Form I-797C for a timely-filed EAD renewal application (Form I-765) stating “Class requested” as “(a)(17),” “(a)(18),” or “(c)(26),” and the facially expired EAD issued under the same category (that is, indicating Category A17, A18, or C26).
- Provides that E and L dependent spouses are employment authorized incident to their status and therefore they are no longer required to request employment authorization by filing Form I-765 but may continue to file Form I-765 if they choose to receive an EAD.<sup>4</sup>

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<sup>4</sup> Note, however, that until such time as USCIS can implement changes to the I-94 to distinguish E and L spouses from E and L children, E and L spouses would still need to rely upon an EAD as evidence of employment authorization to present to employers for completion of Form I-9. Until the notation on Form I-94 issued to E and L dependent nonimmigrants is revised, Form I-94 solely indicating E or L nonimmigrant status is insufficient evidence of employment authorization under List C of Form I-9.

## Citation

Volume 10: Employment Authorization, Part B, Specific Categories, Chapter 1, Purpose and Background [[10 USCIS-PM B.1](#)] and Chapter 2, Employment-Based Nonimmigrants [[10 USCIS-PM B.2](#)].

### *Additional Considerations*

#### **Administrative Procedure Act (APA)**

##### *Expanding the Categories Who Receive Automatic Extensions of Employment Authorization*

DHS regulations generally provide for automatic extension of EADs and employment authorization for EAD renewal applicants if their EAD renewal application is timely filed and based on the same employment authorization category as shown on the face of the expiring EAD.<sup>5</sup> The automatic extension, however, may also apply in limited situations where the EAD renewal application is “[b]ased on a class of aliens whose eligibility to apply for employment authorization continues notwithstanding expiration of the Employment Authorization Document and is based on an employment authorization category that does not require adjudication of an underlying application or petition before adjudication of the renewal application, . . . as may be announced on the USCIS Web site.”<sup>6</sup>

On its Website, USCIS lists 15 categories eligible for automatic extensions of their employment authorization and/or EADs.<sup>7</sup> Missing from the list are E and L dependent spouses and H-4 spouses. These broad categories were not included because at the time the automatic extension authority was established in 2016,<sup>8</sup> USCIS determined that these applicants are in a category that first requires adjudication of an underlying application before their EAD renewal application can be adjudicated.<sup>9</sup> While that is a permissible interpretation of the regulation, upon further review and consideration, USCIS recognizes that this interpretation does not contemplate the situation where the E, L, and H-4 dependent spouse has already been granted a new period of authorized stay and such individual is eligible for employment authorization past the expiration of his or her EAD while the renewal Form I-765 application is pending. Under this scenario, the possible risk the provision at 8 CFR 274a.13(d)(1)(iii) sought to avoid—the risk that a Form I-765 renewal applicant’s eligibility for

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<sup>5</sup> See [8 CFR 274a.13\(d\)\(1\)\(i\) and \(ii\)](#).

<sup>6</sup> See [8 CFR 274a.13\(d\)\(1\)\(iii\)](#).

<sup>7</sup> See the [Automatic Employment Authorization Document \(EAD\) Extension](#) webpage.

<sup>8</sup> See *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, [81 FR 82398](#) (Nov. 18, 2016) (Final Rule); see also [80 FR 81899, 81928](#) (Dec. 31, 2015) (NPRM listing the 15 categories).

<sup>9</sup> DHS previously considered providing an automatic extension of employment authorization for H-4 nonimmigrants but consistently decided not to amend the regulation to allow for such automatic extension. See 2015 Rule, 80 FR at 10,299; *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, [81 FR 82398, 82460-61](#) (Nov. 18, 2016) (“2016 Rule”). Therefore, under existing DHS regulations, H-4 nonimmigrants may experience gaps in employment authorization and employment authorization documentation, as well as E and L dependent spouses who, to date, have been in a similar position.

employment authorization will lapse during the automatic extension period—is not present. As such, it is reasonable for USCIS to expand the list of categories eligible to receive automatic EAD extensions to include this narrowly defined category of E, L, and H-4 dependent spouses to mitigate the risk of experiencing gaps in employment authorization and documentation while their renewal Form I-765 is pending, in light of their continued employment eligibility past the expiration date of their EAD.

While USCIS’s original application of the requirements in 8 CFR 274a.13(d)(1)(iii) in 2016 appears to have relied on an interpretation of “class” and “category” to mean the broad classes/categories described in 8 CFR 274a.12(a) and (c), the regulatory text does not define these terms in this manner, let alone with such a restriction. As the terms “class” and “category” are undefined in the regulatory text and subject to interpretation because they are ambiguous, USCIS has the discretion and flexibility to further interpret these terms and tailor designated categories to emerging circumstances and to fulfill the primary purpose of the EAD auto-extension provision.

This interpretation is reasonable because, as DHS explained in the preamble to the final rule amending 8 CFR 274a.13(d), the auto-extension provision is intended to “help prevent gaps in employment authorization” and “will provide additional stability and certainty to employment-authorized individuals and their U.S. employers.”<sup>10</sup> DHS sought to balance that primary purpose with another important principle, which is to ensure “that the renewal applicant is eligible for employment authorization, thereby minimizing the risk that ineligible individuals will receive immigration benefits.”<sup>11</sup> While that generally precludes most H-4s, for example, from being eligible for the auto-extension because “[r]enewal of employment authorization for such nonimmigrants is dependent on the prior adjudication of underlying benefit requests,” and “DHS cannot be reasonably assured these classes of individuals will remain eligible for employment authorization,” those concerns are inapplicable to the category of H-4, L and E dependent spouses with I-94s that will continue to remain valid. USCIS, therefore, believes that expanding the list of categories eligible for the auto-extension provision to include H-4, L and E dependent spouses with EAD renewal applications that do not require adjudication of an underlying application is consistent with both principles described above and is a reasonable interpretation and application of 8 CFR 274a.13(d).

Additionally, this interpretation is also reasonable because the risk that a Form I-765 renewal applicant’s eligibility for employment authorization will lapse during the automatic extension period is not present where the E, L, and H-4 dependent spouse has already been granted a new period of authorized stay and such individual is eligible for employment authorization past the expiration of his or her EAD while the renewal Form I-765 application is pending. At the same time, a failure to automatically extend employment authorization could result in loss of employment for such E, L, and H-4 dependent spouses, which is a potentially significant harm for the applicant and their U.S. employer. Given the absence of risk that eligibility for employment authorization will lapse, and the significant potential for harm caused by a disruption in employment authorization, USCIS has concluded that the EAD should be automatically extended in these circumstances.

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<sup>10</sup> See [81 FR 82398, 82455-56](#) (Nov. 18, 2016).

<sup>11</sup> See [81 FR 82398, 82461](#) (Nov. 18, 2016).

At 8 CFR 274a.13(d)(4), the regulations describe the documentation that evidences an EAD automatic extension as a combination of the expired EAD and Notice of Action (Form I-797C) demonstrating the regulatory requirements of 8 CFR 274a.13(d)(1). Acceptable Forms I-797C are those indicating that the Form I-765 renewal application was timely filed, based on the same employment authorization category as shown on the face of the expiring EAD, and identifying the employment authorization category that meets 8 CFR 274a.13(d)(1)(iii) as announced by USCIS on its website. For eligible E, L, and H-4 dependent spouses, their Form I-797C indicating timely filing of the I-765 application under employment categories (a)(17), (a)(18), or (c)(26) is sufficient to meet the regulatory requirements when supplemented with an unexpired Form I-94 demonstrating their continued nonimmigrant status and, therefore, continued eligibility for employment authorization. This is a reasonable construction of 8 CFR 274a.13(d)(4) as it accommodates for operational limitations, which is in keeping with longstanding agency practice of using supplemental documents to overcome such limitations, particularly in the area of automatic extensions.<sup>12</sup>

USCIS considered to what extent, if any, this change could have on interested parties. Given that this change pertains to a temporary auto-extension of existing employment authorization, USCIS has not been able to identify any adverse impacts that would outweigh the benefits provided by this updated policy. USCIS believes that these changes will help to avoid gaps in employment authorization and documentation for those H-4, E, and L dependent spouses with an EAD renewal application that does not first require adjudication of an underlying application. This change will help not only such H-4, E, and L dependent spouses, but also their U.S. employers and other workers employed with those U.S. employers who might also feel the adverse impact of disruption in the H-4, E, and L dependent spouses' lapse in employment authorization.

*E and L Dependent Spouses: Employment Authorization Incident to Status*

In January 2002, Congress established statutory authority for granting employment authorization to L-2 dependent spouses of L-1 principal nonimmigrants with Public Law 107-125.<sup>13</sup> The provision states that “[the Secretary] shall authorize the alien spouse to engage in employment in the United States and provide the spouse with an ‘employment authorized’ endorsement or other appropriate work permit.”<sup>14</sup> Congress also established statutory authority for granting employment authorization to E spouses with Public Law 107-124.<sup>15</sup>

Following these statutory changes, former Immigration and Naturalization Service (INS) issued an implementation memorandum titled, “Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions” (2002 Yates Memo). As described in the 2002 Yates Memo, INS chose to implement INA 214(c)(2)(E) and (e)(2) by providing that “[t]o obtain employment authorization and a document evidencing this authorization, the E or L nonimmigrant spouse must file Form I-

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<sup>12</sup> See, for example, [Handbook for Employers \(M-274\), Section 6.7, Extensions of Stay for Other Nonimmigrant Categories](#) (guidance on completion of Form I-9 in for those nonimmigrant categories (for example, H-1B) that can get an automatic extension of employment authorization of up to 240 days based on a pending extensions of stay).

<sup>13</sup> See [Pub. L. 107-125](#), 115 Stat. 2403 (January 16, 2002). See [INA 214\(c\)\(2\)\(E\)](#).

<sup>14</sup> See [Pub. L. 107-125](#), 115 Stat. 2403 (January 16, 2002). See [INA 214\(c\)\(2\)\(E\)](#).

<sup>15</sup> See [Pub. L 107-124](#), 115 Stat. 2402 (January 16, 2002). See [INA 214\(e\)\(2\)](#).

765, Application for Employment Authorization, and submit the required fee.” The Yates Memo reasoned that “[w]hile both [L-2 and E spousal] provisions state that the Attorney General “shall authorize” employment authorization for a spouse, the Service must still make a determination that the individual in question is in fact an accompanying or following to join spouse who has been admitted under INA 101(a)(15)(E) or (L) or, subsequent to his or her last admission, changed status to an E or L nonimmigrant.

The Yates Memo further provided that the Form I-765 application process would provide a mechanism for USCIS to determine eligibility for L-2-based employment authorization, stating that: “The regulations at 8 CFR § 274a.12(a)<sup>16</sup> are being amended to add the dependent spouse of a principal E and L nonimmigrant to the list of categories of aliens who are authorized to be employed in the United States without restriction,” and instructed applicants to fill in the basis for their employment authorization on the Form I-765. At the time the memo was issued, applicants were required to write in the words “spouse of E nonimmigrant” or “spouse of L nonimmigrant” as appropriate on Form I-765.<sup>17</sup> Implementation in this manner is based on a reading of the statutory text that, prior to granting such employment authorization, the Secretary first must address the question of how and when he must provide such authorization, and only after the Secretary determines that the person is in fact an L-2 spouse, must it consider the person to be employment authorized. After INA 214(c)(2)(E) and (e)(2) were enacted, former INS chose implementation through adjudication of case-by-case requests for employment authorization because it could be immediately implemented, versus delaying implementation for an amendment of the employment authorization regulations which list all noncitizen categories with incident to status employment authorization at 8 CFR 274a.12(a) to be completed through the rulemaking process of 5 U.S.C. 553.

To date, USCIS has not amended the regulations to add the E and L dependent spouse category to 8 CFR 274a.12(a), which lists the categories of noncitizens that USCIS has deemed to be employment authorized incident to status, as described above. However, in a 2007 interim rule governing the new U nonimmigrant program, the amendments to 8 CFR 274a.12(a) included reserving paragraph (a)(18).<sup>18</sup> The preamble to the rule explained that it was reserving this paragraph “for future use.”<sup>19</sup>

More recently, E and L dependent spouses have been experiencing gaps in employment authorization because of USCIS backlogs and resultant delays in the adjudication of Forms I-765. Such gaps have a detrimental impact on the E and L dependent spouses, as well as their current U.S. employers. In light of the current circumstances, USCIS reexamined its original policy choice requiring employment authorization to be granted through the Form I-765 adjudication process. USCIS believes that the statute granted USCIS the discretion to determine how and when to provide documentation evidencing employment authorization for E and L dependent spouses. While the longstanding case-by-case approach is a permissible exercise of the authority provided by

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<sup>16</sup> 8 CFR 274a.12(a) also notes that the categories of noncitizens listed under this paragraph are “authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes.”

<sup>17</sup> Subsequent to the issuance of this memo, the Form I-765 Instructions were revised, as noted below, to instruct such persons to enter the alpha-numeric “(a)(18)” in the corresponding section of the Form I-765.

<sup>18</sup> Note that a similar provision relating to E-2 dependent spouses is found at 8 CFR 274a.12(a)(17).

<sup>19</sup> See [72 FR 53013, 53030](#) (Sept. 17, 2007).

the statute, it is also a permissible interpretation to deem these individuals employment authorized incident to status and to rely upon other documentation, such as a clearly endorsed I-94 combined with a valid identity document, to fulfill the statutory requirement to “provide the spouse with an ‘employment authorized’ endorsement or other appropriate work permit.” After careful consideration, USCIS has concluded that to continue to adhere to the case-by-case policy despite the high risk of gaps in employment authorization will result in USCIS’ failure to meet the directive under the statute to grant employment authorization to this population. Therefore, in order to meet its statutory obligation, USCIS is changing its current policy requiring case-by-case adjudication of requests of employment authorization and instead will deem E and L dependent spouses employment authorized incident to their E and L nonimmigrant status.<sup>20</sup>

USCIS believes that this change would help reduce backlogs by eliminating the Form I-765 requirement for E and L dependent spouses prior to being eligible to engage in employment. If E and L dependent spouses are considered employment authorized incident to status, they can engage in authorized employment immediately after obtaining status, assuming they have sufficient documentation evidencing their employment authorized status. That is, they would still need to present their employer with evidence of employment authorization and identity for Form I-9 purposes pursuant to [INA 274A\(b\)](#) and implementing regulations at [8 CFR 274a.2](#).

At this time, the only document issued to this category that satisfies the Form I-9 document requirements is the Form I-766 EAD. USCIS, however, will develop acceptable alternative documentation for E and L dependent spouses to have immediate documentation of their employment authorization upon a grant of E or L status, as applicable. As the Form I-94 is issued upon a grant of nonimmigrant status, USCIS has determined that it is a reasonable and operationally feasible solution to take steps to modify the notations on the form, in cooperation with U.S. Customs and border Protection (CBP), so that Form I-94 distinguishes employment authorized E and L dependent spouses from E and L dependent children who are not eligible for employment. Therefore, until USCIS is able to issue alternative evidence of employment authorization for this group, they will likely continue to request an EAD through the Form I-765 process to meet Form I-9 requirements.<sup>21</sup> However, the change in policy such that this population is considered employment authorized incident to status coupled with their eligibility to receive automatic extensions of their EADs should help reduce the adverse effects from the EAD processing backlogs until the Form I-94 notations are changed.

USCIS considered to what extent, if any, this change would impact interested parties. Given that this change simply implements an existing statutory directive, and identifies additional documentation that, when available, may be used by E and L dependent spouses to evidence employment authorization, USCIS has not been able to identify any adverse impacts that would outweigh the benefits provided by this updated policy. USCIS believes that this change will lessen the burden on these applicants, which could free up adjudicative resources to improve processing of

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<sup>20</sup> This policy does not apply to dependents (including spouses) of Employees of the Taipei Economic and Cultural Representative Office (TECRO) and Taipei Economic and Cultural Offices (TECO), who continue to be required to apply for employment authorization per 8 CFR 274a.12(c)(2).

<sup>21</sup> Note that even after the notation on Form I-94 is modified, E and L dependent spouses choosing to present such Form I-94 to employers would still need to obtain a separate identity document in order to meet Form I-9 requirements.

other applications. This change, however, will not otherwise adversely impact other interested parties as this policy does not expand the population of E and L dependent spouses who are eligible to obtain employment authorization but simply changes the steps that must be taken to evidence their employment authorization.