

# Mobility: immigration alert

November 2021

## United States

Significant changes to rules relating to employment authorization for certain H-4, E, and L non-immigrant dependent spouses

### Executive summary

Pursuant to a legal settlement and corresponding changes to the U.S. Citizenship and Immigration Services (USCIS) Policy Manual, which are effective immediately, E and L dependent spouses are considered employment authorized incident to their non-immigrant status. This means that a separate Employment Authorization Document (EAD) will (eventually) no longer be required in order for these foreign nationals to accept employment in the U.S. Furthermore, H-4 dependent spouses are now eligible for automatic extensions of their EADs for up to 180 days, provided that certain conditions are satisfied.

Ultimately, these changes will expedite the entry of E and L dependent spouses into the U.S. labor market in addition to reducing and, in some cases, eliminating gaps in employment authorization for H-4 dependent spouses.

### Background

On 10 November 2021, USCIS entered into a settlement relating to a class action lawsuit, *Shergill v. Mayorkas*, which was filed to obtain relief from long delayed processing times of I-765 Applications for Employment Authorization for qualifying spouses. Subsequently, on 12 November 2021, USCIS issued a Policy Alert outlining revisions made to its Policy Manual to implement the settlement agreement. This policy guidance is effective immediately and supersedes any related prior guidance as it relates to Employment Authorization for H-4, E, and L dependent spouses.

### Analysis

E and L spousal dependents are now authorized to work incident to their non-immigrant status. Foreign nationals who are authorized to work incident to their non-immigrant status are not required to first apply for and obtain an EAD before working in the U.S.

However, in order to properly complete Employment Eligibility Verification (Form I-9), U.S. employers are restricted to accepting specific documents as proof that a new hire is authorized to work in the United States, and additional steps will need to be taken before E and L spousal dependents are able to demonstrate their eligibility to work without an EAD.

To that end:

- ▶ The Department of Homeland Security will take immediate steps to modify Forms I-94 issued to E and L dependents so that dependent spouses can be distinguished from E and L dependent children, who are not employment authorized incident to their status, on the face of the document. The revised I-94 will contain a notation indicating that the bearer is an E or L dependent spouse, which will be acceptable as evidence of authorization to accept employment in the United States.
- ▶ In the interim, USCIS will continue to issue E and L dependent spouses EADs upon request via Form I-765; such EADs will also be acceptable for Employment Eligibility Verification (Form I-9).



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- ▶ H-4, E, or L dependent spouses will also qualify for an automatic extension of their existing employment authorization and accompanying EAD:
  - if they have 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.
- ▶ The extension of the EAD will continue until the earlier of:
  - the end date on Form I-94 showing valid E or L status,
  - the approval or denial of the I-765 renewal application, or
  - 180 days from the date of expiration of the previous EAD.
- ▶ USCIS has determined presenting a valid 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 valid employment authorization for Form I-9 purposes.
- ▶ In order to take advantage of the automatic extension, H-4, E, and L spousal dependents must be seeking renewal in the same category. An EAD will not be automatically extended if employment authorization in a new category is being sought (e.g. L-2 to H-4).

#### **What this means**

The announcement has several implications:

- ▶ H-4, L, and E dependent spouses now receive the benefit of an automatic EAD extension for a period of 180 days provided that their EAD renewal application has been timely filed, and they hold an I-94 that will be valid for the entire 180 automatic extension period.
- ▶ The filing of an EAD will ultimately no longer be required for E and L dependent spouses, as they have work authorization incident to their status. This will be most beneficial for spouses who do not have to wait for an EAD approval and can begin working immediately after relocating to the U.S., provided that their I-94 reflects their status as an E/L spouse subsequent to the implementation of the revised Form I-94.
- ▶ However, until such time as the Form I-94 is revised for E and L dependent spouses as outlined above, the only acceptable means of demonstrating employment authorization is presenting a valid EAD (or an expired EAD with the combination of documentation outlined above that demonstrate eligibility for an automatic extension).
- ▶ H-4 spouses whose applications for an extension of status are not adjudicated by USCIS prior to the expiration of their I-94 will continue to experience gaps in work authorization as the automatic extension of work authorization will terminate upon the expiration of the I-94.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

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