



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

July 11, 2014

Ms. Laura Dawkins
Chief Regulatory Coordinator
Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Submitted via: <http://www.regulations.gov>

**Re: Comments on Proposed Rule: Employment Authorization for Certain H-4
Dependent Spouses
79 Fed. Reg. 26886 (May 12, 2014)
Docket ID: USCIS-2012-0017**

Dear Chief Dawkins:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the USCIS Proposed Rule, “Employment Authorization for Certain H-4 Dependent Spouses,” published in the Federal Register on May 12, 2014.

AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our 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, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

Summary of Proposed 8 CFR §214.2(h)(9)(iv)

DHS is proposing to amend 8 CFR §§214.2(h)(9)(iv) and 274a.12(c) to extend employment authorization to H-4 nonimmigrant spouses if: (1) the principal H-1B spouse is the beneficiary of an approved immigrant visa petition (Form I-140); or (2) the H-1B nonimmigrant’s period of stay is authorized under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21). AC21 §§106(a) and (b) provide for a one-year extension of H-1B status beyond the six-year limitation established by INA §214(g)(4) if the H-1B nonimmigrant is the beneficiary of a labor certification application or an I-140 petition that has been pending for at least 365 days prior to reaching the end of the sixth year of H-1B status. H-4

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spouses who meet these eligibility requirements would still need to apply for and be granted an employment authorization document (EAD) on Form I-765 and pay the appropriate fee.

While USCIS is to be commended for providing employment authorization to certain H-4 spouses of H-1B nonimmigrants, the proposed rule does not go far enough. USCIS states that the purpose of the proposed rule is “to encourage H-1B skilled workers to remain in the United States, continue contributing to the U.S. economy, and not abandon their efforts to become lawful permanent residents, to the detriment of their U.S. employer, because their H-4 nonimmigrant spouses are unable to obtain work authorization.”¹ As a result, USCIS states that the proposed rule will “foster the goals of attracting and retaining high skilled foreign workers and minimizing disruption to U.S. businesses . . .”² To fully achieve these goals, the proposed rule should be revised to provide work authorization to all H-4 dependents from the time of admission, or at a minimum, to those who have expressed an intention to make the United States their permanent home by taking affirmative steps to apply for permanent residence, but are at an earlier point in the process. The dependents (both spouses and children) of employment-based nonimmigrants should be able to work in the U.S., as spouses of U.S. citizens abroad are able to work in so many countries. Failing that, certainly those who intend to make the United States their permanent home, should not have to wait years, or even decades, to accept employment and become more integrated and assimilated into our society. Our comments are offered with the intention of further serving the interests of American businesses and the economy, as well as the individuals who will ultimately become permanent residents of the United States.

Expand EAD Eligibility to All H-4 Nonimmigrants

Though USCIS has stated in the Supplementary Information to the proposed rule that it has elected to not extend EAD eligibility to all in H-4 status in an effort to “enhance the United States’ ability to attract and more permanently retain high-skilled foreign workers,”³ there is no legitimate policy reason to treat H-4 nonimmigrant spouses differently from spouses of L-1, E-1, E-2, and E-3 nonimmigrants who may seek employment authorization immediately upon admission to the U.S. in such status.⁴ Moreover, the goal of retaining highly educated and skilled workers is actually best served by expanding EAD eligibility to as large a pool of H-4 nonimmigrants as possible. While the rule as currently proposed may “bring U.S. immigration laws *more in line* with other countries,”⁵ the U.S. would still be operating at a great disadvantage as compared to its economic competitors, many of whom, such as Canada and the U.K., offer benefits to spouses of high-skilled workers that are much more generous. Accordingly, we

¹ 79 Fed. Reg. 26886, 26887 (May 12, 2014).

² 79 Fed. Reg. at 26887.

³ 79 Fed. Reg. at 26891.

⁴ Ultimately, AILA believes that extending employment authorization to the dependents of nonimmigrants in all employment-authorized nonimmigrant categories will further even more the objective of making the U.S. attractive to the highly skilled world-wide.

⁵ 79 Fed. Reg. at 26888 (emphasis added).

strongly encourage USCIS to reconsider and remove the limitations placed upon the ability of spouses of H-1B nonimmigrants to enter the U.S. workforce.

Expand EAD Eligibility to H-4 Spouses Where the H-1B Nonimmigrant Is the Beneficiary of a Pending Labor Certification Application or I-140 Petition

Should USCIS decline to take an all-inclusive approach, it should at least expand H-4 EAD eligibility where the H-1B nonimmigrant is the beneficiary of a pending labor certification or I-140 petition. As stated in the Supplementary Information, the proposed rule is intended to increase the incentive of skilled workers to continue working for their U.S. employers while waiting for the often-lengthy immigrant visa process to be completed. This purpose would be enhanced by providing employment authorization at the earliest opportunity once the H-1B nonimmigrant has demonstrated his or her intent to remain permanently in the U.S.

An employer who invests the time and money into preparing and filing an application for labor certification or I-140 petition on behalf of a high-skilled H-1B employee has clearly expressed a serious intent to move forward with permanent residence sponsorship. Similarly, the employee's decision to commence the permanent residence process with a specific employer is not one that he or she takes lightly. An application for labor certification and an I-140 petition require extensive work and preparation on the part of both the employer and the employee. For the labor certification, the employer must first test the U.S. labor market, a process which can entail the expenditure of thousands of dollars in advertising and recruitment fees and expenses alone. Where a labor certification is not required, the preparation and filing of an I-140 in the employment-based first preference category ("priority workers"), or the employment-based second preference category, which requires a showing that the labor certification requirement should be waived in the "national interest," requires a great deal of time and the investment of resources to ensure a successful outcome. Employers would certainly not be willing to undertake this effort were they not intending to employ the individual on a permanent basis. The employee would also not embark on this long and arduous journey were they not intending to make the U.S. their permanent home. The process for attaining lawful permanent residence is certainly "well underway" by the time a labor certification and/or I-140 petition is filed. This sensible yet generous approach would remain true to the spirit and goal of enhancing the ability of the U.S. to attract and more permanently retain high-skilled foreign workers.

Clarify that an H-4 Spouse Is Eligible for Work Authorization Once 365 Days Have Passed Since the Filing of the H-1B's Labor Certification Application or I-140 Petition

As currently written, one of the proposed bases for H-4 EAD eligibility is if "the H-1B nonimmigrant's period of stay ... is authorized under sections 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act 2000 (AC21)." According to a strict reading of this provision, H-4 spouses would be eligible to apply for an EAD only when the H-1B nonimmigrant is in *the* specific one-year period of stay authorized by AC21.

At a minimum, the final rule should be amended to clearly state that H-4 spouses may apply for an EAD as soon as the principal H-1B nonimmigrant meets the threshold eligibility requirements under AC21 §106(a) and (b). In other words, H-4 spouses should be eligible for an EAD when 365 days have elapsed since the filing of a labor certification application or I-140 petition on behalf of the H-1B nonimmigrant, regardless of whether the H-1B nonimmigrant has actually applied for a 7th year extension. Proof that the labor certification application or I-140 petition was filed at least 365 days earlier and remains pending or has been approved will satisfy the evidentiary requirements.

Eligibility for Employment Authorization Should Extend to H-4 Children

Though a footnote to the Supplementary Information states that “extension of eligibility for employment authorization to H-4 dependent children is beyond the scope of this proposed rule,”⁶ we reiterate that the purpose of the proposed rule is to encourage highly skilled individuals to seek immigrant status in the United States and to promote continuity of employment for the U.S. employers who need their talent. While extending work authorization benefits to H-4 spouses is a welcome and important step toward accomplishing this goal, the same logic that compels authorization for spouses in many cases extends to H-4 children who are of an age (high school or college) where they can be lawfully employed. Employment authorization for the children of H-1B nonimmigrants would enhance their integration into their communities and American society which would enhance, not diminish, the incentives to remain in the U.S.

EADs Should be Issued with a Validity Period Equal to the Period of H-4 Status

At present, EADs are generally approved for either one- or two- year periods, depending on the basis of the EAD request. H-1B status, and therefore H-4 status for dependents, is granted in periods that vary, up to a maximum of three years. We urge USCIS to issue EADs to H-4 nonimmigrants with validity periods that match the period of authorized stay to facilitate the renewal process and assist H-4 nonimmigrants in avoiding unnecessary lapses in work authorization and/or status. To do otherwise will serve no useful purpose and will inject confusion and administrative inconvenience into the process for both the Service and the applicants. Under 8 CFR §274.a12(c), USCIS has the discretion to determine appropriate validity periods for EADs. This provision was published as an interim rule on July 30, 2004, with the following explanation:

[A]n alien whose underlying status is longer than one year, or whose underlying application will remain pending with BCIS for longer than one year, [is often required] to apply for renewal of the EAD every year, creating a burden on the applicant and an additional workload for BCIS. This rule gives BCIS the discretion and flexibility to modify EAD validity periods for initial, renewal, and replacement cards. BCIS also will establish EAD validity periods for classes of aliens and will preserve the discretion to

⁶ 79 Fed. Reg. 26891, FN 11.

establish validity periods of varying lengths for individuals within those classes whose cases warrant a lesser validity period.⁷

The explanatory comments with the 2004 interim rule support the policy reasons for matching EAD validity to the duration of the H-4 status.

Change the EAD Filing Window to Six Months Prior to the Expiration of the Current EAD

The Supplementary Information to the proposed rule notes two windows for filing an H-4 EAD renewal: 120 days prior to the expiration of the current EAD or simultaneously with the request for extension of status.⁸ However, a request to extend H-4 status is typically filed concurrently with the principal's H-1B extension petition, which can be filed up to six months prior to the expiration of H-1B status.⁹ Given the volatility of processing times, it is recommended that H-1B and other nonimmigrant extension petitions be filed as early as possible in an effort to avoid a disruption in the continuity of employment.¹⁰ At the same time, although the USCIS website states that renewal EADs may not be filed more than 120 days prior to the expiration of the current EAD, there appears to be no regulation or form instruction that mandates a 120-day filing window.

We urge USCIS to clarify in the final rule that the filing of EAD renewal applications up to six months prior to the expiration of the current EAD and H-1B/H-4 status is permitted, so that all applications and petitions can be filed concurrently with sufficient time for adjudication. We foresee no administrative benefit in filing a multitude of applications at divergent times.

Allow Concurrent EAD Filings with Applications to Change Status to H-4

Concurrent filing is only discussed in the Supplementary Information to the proposed rule in the context of EAD renewals.¹¹ There is no mention of the filing of an H-4 EAD application concurrently with an application to change status to H-4.

Many H-1B nonimmigrants have spouses in the United States in nonimmigrant categories other than H-4, such as F-1 or H-1B. If the principal H-1B is far enough along in the process of obtaining permanent residence such that his or her H-4 spouse would be eligible for an EAD, concurrent filing of the EAD application with an application to change status to H-4 would allow for parallel adjudication, which would benefit the applicant while utilizing Service resources

⁷ 69 Fed. Reg. 45555 (July 30, 2004).

⁸ 79 Fed. Reg. at 26893.

⁹ See 8 CFR §214.2(h)(9)(i)(B) ("The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training").

¹⁰ See also "Instructions for Form I-129, Petition for Nonimmigrant Worker," available at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>. ("Generally, a Form I-129 petition may not be filed more than 6 months prior to the date employment is scheduled to begin... File the petition as soon as possible before the proposed employment begins or before an extension of stay will be required.")

¹¹ 79 Fed. Reg. at 26893.

more efficiently. Concurrent filing of an H-4 EAD request with a change of status presents no procedural differences from concurrent filing of an H-4 EAD request with an extension of status. In both cases, the H-4 EAD will not be issued until the requested status is granted, and both cases present the same adjudication efficiencies for USCIS. We urge USCIS to clarify in the final rule that concurrent filing is allowed for both *extensions* and *changes* of nonimmigrant status.

Clarify that Economic Need Is Not a Requirement for H-4 Employment Authorization

In computing the public burden and information collection needs under the Paperwork Reduction Act, USCIS uses time calculations for completing both the I-765 and the I-765 Worksheet.¹² Form I-765WS is a supplemental form required for applicants for employment authorization based on deferred action and other limited benefits to demonstrate financial need. There is no other indication that financial need is an element to be considered in the adjudication of an application for H-4 employment authorization. We ask that USCIS remove reference to the I-765WS in the final rule.

Conclusion

AILA appreciates the opportunity to comment on this notice, and we look forward to a continued dialogue with USCIS on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

¹² See 79 Fed. Reg. at 26900. (“An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: ...*594,602 responses related to Form I-765WS at .50 hours per response ...”)