

## Practice Alert: USCIS Increases Auto-Extension Period for Certain Employment Authorization Documents from 180 to 540 days; Guidelines for Completing Form I-9<sup>1</sup>

On April 8, 2024, USCIS published a [Temporary Final Rule](#) (TFR) in the Federal Register that would again increase the auto-extension period for certain employment authorization documents from 180 days to 540 days, despite its significant efforts to reduce processing times for Employment Authorization Documents (Form I-765, Application for Employment Authorization; hereinafter “EAD”) over the past year.<sup>2</sup> The TFR increases the EAD auto-extension duration period for the following populations:

- Any eligible applicant who filed their Form I-765 to renew their EAD on or after October 27, 2023 and whose application remains pending as of April 8, 2024;<sup>3</sup> and
- Any eligible applicant who files a Form I-765 on or after April 8, 2024 but before September 30, 2025.<sup>4</sup>

Members continue to report delays in EAD processing as well as inconsistent processing times across the eligibility categories. The apparent struggle to timely adjudicate EAD applications likely stems from multitude of factors ranging from staffing shortages dating back to the pre-2021 hiring freeze and COVID precautions<sup>5</sup> to a record number of EAD renewals requests.<sup>6</sup> The 180-day auto-extension period granted under the regulations is often not enough to address EAD adjudication delays which can lead to disruption in work authorization for hundreds of thousands of workers (many part of vulnerable populations, such as refugees and Temporary Protected Status beneficiaries) causing them to lose employment. Terminating key employees due to a disruption in work authorization can likewise lead to significant disruption to operational continuity for U.S. businesses.

USCIS recognized this problem in late 2021, and in 2022 sought to remedy it by implementing a [TFR](#) that increased the duration of the EAD auto-extension from 180 to 540 days. This increase was meant to allow foreign nationals who no longer could evince work authorization to return to work while USCIS implemented regulatory changes and procedural enhancements that would allow for faster and more efficient adjudication of these renewal applications. While USCIS has, in fact, made strides on both of these fronts, these efforts have not been able to keep pace with the significant increase in the number of Forms I-765 filed.<sup>7</sup>

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<sup>1</sup> Special thanks to Verification and Documentation Committee Members John Mazzeo and Rosanna Fox for their contributions to this Practice Alert.

<sup>2</sup> Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants, 89 FR 24628 (April 8, 2024) (to be codified at 8 C.F.R. § 274a.13(d)(6)).

<sup>3</sup> *Id.* at 24629.

<sup>4</sup> *Id.*

<sup>5</sup> *See* 89 FR at 24633.

<sup>6</sup> *Id.* at 24635.

<sup>7</sup> *See* 89 at 24635 (noting that USCIS received 50 percent more initial and renewal Forms I-765 in fiscal year 2023 than they did in fiscal year 2022).

### **Calculating the New EAD Expiration Date**

While there are many ways the validity period of an EAD can be extended,<sup>8</sup> the TFR only applies to those foreign nationals who are eligible for an extension of the EAD validity period because of a timely renewal filing. Determining eligibility and calculating the new validity period of the EAD can be a painstaking process and can depend on the category code of the EAD itself.<sup>9</sup> The following examples demonstrate how to apply this increased extension period in certain circumstances.

#### ***Extension of EADs in Most Circumstances***

If the category code on the face of the EAD is listed [here](#), then apply the following test:

1. Did the foreign national apply to renew their EAD prior to the expiration date listed on the face of the EAD, as evidenced by the “Received Date” on the Form I-797C?
2. Does the Form I-797C show that the foreign national has applied for a new EAD bearing the same category code as their expiring or expired EAD?

If the foreign national is able to satisfy both of these conditions, their EAD, when presented with the Form I-797C, is valid for an additional 540 days from the expiration date listed on the front of the EAD.

#### ***Extension of EADs Issued to Temporary Protect Status Beneficiaries<sup>10</sup>***

If the category code on the face of the EAD is A12 or C19, then apply the following test:

1. Did the foreign national apply to renew their EAD prior to the conclusion of the current TPS re-registration period (as opposed to the expiration date listed on their EAD)?<sup>11</sup>
2. Do both the EAD and the Form I-797C list either category code A12 or C19 (as opposed to the category codes having to match, codes A12 and C19 are interchangeable for these purposes).

If the foreign national is able to satisfy both of these conditions (for one of the types of extensions noted above), their EAD, when presented with the Form I-797C, is valid for an additional 540 days from the expiration date listed on the front of the EAD.

#### ***Extension of EADs Issued to E, L, and H Dependent Spouses<sup>12</sup>***

If the category code on the face of the EAD is A17, A18, or C26, then apply the following test:

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<sup>8</sup> Such as through publication in the Federal Register, timely renewal application, CAP-GAP, STEM OPT filing, or individual notice.

<sup>9</sup> USCIS has created an EAD extension calculator available [here](#), but it is merely a date calculator and does not apply any of the nuanced rules listed in this Practice Pointer.

<sup>10</sup> Because the rules surrounding extensions of the validity period for these EADs are nuanced, AILA has published an entire Practice Pointer, available [here](#).

<sup>11</sup> As described in the Practice Pointer referenced in the footnote immediately above, USCIS has never included a specific filing deadline for renewal applications in the Federal Register, and the Department of Justice Immigrant and Employee Rights Section (IER) has taken the position that, in the absence of such a deadline, the timely filing auto-extension is available to TPS beneficiaries who file to renew their EAD at any time during the applicable re-registration period.

<sup>12</sup> As indicated in the USCIS [Policy Manual](#), E and L derivative spouses no longer require an EAD as their work authorization is incident to status. However, they may choose to apply for an EAD and it can be used as acceptable evidence of work authorization.

1. Did the foreign national apply to renew their EAD prior to the expiration date listed on the face of the EAD, as evidenced by the “Received Date” on the Form I-797C?
2. Does the Form I-797C show that the foreign national has applied for a new EAD bearing the same category code as their expiring or expired EAD?

If the foreign national is able to satisfy both of these conditions, they are entitled to an EAD auto-extension. However, the EAD extension period may not exceed the period of stay listed on the Form I-94, so the foreign national will receive an extension of either (a) 540 days from the expiration date listed on the EAD; or (b) until the VALID UNTIL date on the Form I-94, whichever is *shorter*.

### **Completing Form I-9 using an Auto-Extended EAD**

USCIS has updated the Handbook for Employers (M-274) at [Section 5.2](#) to provide guidance for updating Forms I-9 to include the increased 540-day extension duration period. To complete a Form I-9 using auto-extended EAD cards under this rule, the following protocol has been provided by USCIS:

For new hires or rehires completing new Forms I-9:

- The new hire should list the extended date of work authorization using the “Noncitizen eligible to work until” field;
- The employer should use the EAD to complete Section 2 of Form I-9; the receipt number should be taken from the Form I-797C and used to complete the “document number” field in Section 2. The extended expiration date should be listed and match that used in Section 1.
- The employer should list “EAD EXT” in the Additional Information field of Section 2.

For existing employees with valid employment authorization as of April 8, 2024, who are now eligible for the 540-day extension, USCIS guidance indicates that Section 2 may be amended to update the expiration date as follows:

- Employers should enter “EAD EXT” and the auto-extended date (EAD EXT mm/dd/yyyy) based on the “Card Expires” date on the EAD.