

PUBLICATION

Some Happy News for H, L, and E Spouses Needing Work Authorization

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[Update: On November 12, 2021 USCIS issued a policy memorandum implementing all aspects of the discussion below, including E spouses with L spouses in (1) the plans for a new I-94 record that will indicate who is a spouse who will enjoy unrestricted work authorization "incident to status" without needing a USCIS EAD and (2) automatic extension of EAD when a timely renewal is filed at least for the remaining duration of E or L status.]

Spouses of H-1B, L-1, and maybe E-1/E-2/E-3 workers or investors will have an easier time maintaining work authorization under a litigation settlement entered by United States Citizenship and Immigration Services (USCIS). The news is better for L and maybe E spouses than for H spouses.

- Beginning a few months from now, L-2 spouses will officially be able to work without restriction as soon as they enter the United States.
- Both L-2 spouses and work-authorized H-4 spouses will benefit from a 180-day automatic extension of their work authorization when they file a timely extension, up to the date of their I-94 expiration.
- Dependent spouses of workers on E visas, while not explicitly mentioned in the settlement, could potentially receive the same benefits granted to L-2 spouses under the settlement.

L-2 Spouses: No EAD Required (Soon)

The biggest development, benefiting L-2 spouses, is that USCIS has acknowledged what the Social Security Administration (SSA) routinely has recognized for years and that at least one panel of the Board of Immigration Appeals ruled many years ago: spouses of L-1 workers automatically have unrestricted work authorization "incident to status" without needing to apply to USCIS for any employment authorization document (EAD). Despite the strong legal basis for this policy, the settlement doesn't offer immediate relief to L-2 spouses seeking to work in the United States. Instead, USCIS maintains that L-2 spouses cannot actually enjoy the work authorization they are entitled to until about four months from now when U.S. Customs and Border Protection (CBP) and USCIS start issuing a new kind of I-94 record specifically identifying the person as an L-2 spouse (instead of an L-2 child) and the person receives such a document through a new port admission or a change or extension of stay within the United States. Once they receive these new I-94s, L-2 spouses will not need to apply for an EAD at all, and an employer completing Form I-9 in hiring the L-2 spouse can rely on the person's passport and I-94 as collectively a "List A" document.

Some employers and L-2 spouses have been taking an aggressive position even before the recent litigation settlement, completing I-9 based on the passport, I-94 showing L-2, certificate showing marriage to the L-1, and the L-1 worker's passport and I-94, which is what the SSA has instructed its officers to accept in issuing a social security card ever since Congress enacted the law at 8 U.S.C. § 1184(c)(2)(E). That law states: "In the case of an alien spouse admitted under section 1101(a)(15)(L) of this title, who is accompanying or following to join a principal alien admitted under such section, [Secretary of Homeland Security] 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." Such a position no longer seems so aggressive in light of

USCIS recognition in the settlement, but parties should be aware of some lingering risks of "jumping the gun" before Department of Homeland Security (DHS) starts issuing the new I-94s.

E Spouses: Maybe No EAD Required (Soon)

The litigation inexplicably did not champion spouses of E-1, E-2, and E-3 workers in the same way, even though the law at 8 U.S.C. § 1184(e)(2) contains exactly the same words as the one for L spouses. It seems meaningfully possible that USCIS will go ahead and start issuing spouse-designated I-94 cards for them in order finally to implement that statute enacted in the same bill. If not, there is already another lawsuit against USCIS seeking to get E spouses and adjustment of status applicants the employment authorization they deserve.

H-4 and L-2 Spouses: Auto-Extension Now

The other development from the settlement is more subtle, but very important when the situation applies. For years, USCIS has automatically extended employment authorization for certain nonimmigrant categories, as long as they filed an application to renew their EAD before it expired. USCIS left L spouses (and E spouses) out of that regulation, while taking increasingly outrageous amounts of time to adjudicate the EAD applications filed by those same spouses. With processing times so long that H and L spouses legally could not file their EAD renewals early enough to avoid a gap in work authorization, many have lost jobs or gone without work during the worst of the COVID-19 pandemic. The recent litigation settlement offers limited relief from this problem, by extending to H and L spouses the regulation's automatic extension for up to 180 days pending a timely filed renewal application, but only for as long as the spouse's I-94 is valid. The employer can use the unexpired I-94, expired EAD, and I-765 receipt to complete or update Form I-9. That is helpful for the H-4 or L-2 spouse whose work authorization expires before their I-94 validity period ends. But often the EAD and the I-94 expire on the same day. The USCIS litigation settlement does not help the H or L spouse who filed the I-539 to extend their status and the I-765 to renew the EAD at the same time and neither has been adjudicated before expiration – which is quite common.

Conclusion

Again, the problem for L (and maybe E) spouses will begin to go away as soon as USCIS and CBP begin issuing the new, work-authorizing I-94. But H spouses will continue to face many situations where despite timely filings, the ridiculously slow processing times of USCIS cause them to lose their work authorization and their job during a time when U.S. employers are already struggling with worker shortages. If you have any questions, please reach out to [Robert Divine](#) or any member of Baker Donelson's [Immigration Team](#).