

Immigration Alert: USCIS TO BEGIN ISSUING EAD CARDS TO CERTAIN H4 DEPENDENT SPOUSES

2/25/2015

USCIS TO BEGIN ISSUING EMPLOYMENT AUTHORIZATION CARDS TO CERTAIN H-4 DEPENDENT SPOUSES

Background

The Department of Homeland Security (DHS) has finalized the rule allowing certain H-4 dependent spouses to obtain employment authorization. This rule was initially announced in May 2014. The goal of this new program is to lessen the burden on H-1B families that are subject to lengthy employment-based immigrant visa (a.k.a. green card) processes by allowing the H-4 dependent spouse to work. This rule does not apply to minor children of qualifying H-4 dependent spouses or to the dependent spouses of nonimmigrants in the following classes: H-1B1 (Chilean and Singaporean), H-2A/H-2B (Temporary Agricultural/Non-Agricultural Workers) and H-3 (Trainees). Although DHS estimates that approximately 180,000 H-4 nonimmigrants will qualify for this provision in the first year and approximately 55,000 for each subsequent year, our firm anticipates that these number may understate the number of H-4 spouses who may be eligible for this new program.

Eligibility & Filing Requirements

The new program applies to H-4 dependent spouses when the principal H-1B nonimmigrant:

- 1) Has an approved Form I-140, Immigration Petition for Alien Worker; or
- 2) Has been granted H-1B status beyond the sixth year maximum period of stay in H-1B status on the basis of the Section 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

A qualifying H-4 dependent spouse will not automatically receive employment authorization incident to their status, but will have to apply for an Employment Authorization Document (EAD) card by submitting the Form I-765, Application for Employment Authorization, to the U.S. Citizenship and Immigration Services (USCIS). The Form I-765 must be submitted with fee (currently \$380) and supporting documents. The H-4 dependent spouse will only be eligible to work upon receipt of the EAD. When the EAD expires, the H-4 dependent spouse will lose employment authorization unless he/she has received a new EAD card prior to the expiration. The USCIS will modify the existing Form I-765 to include a box specifically for this new program.

The supporting documents that must be filed with the Form I-765 include documentation demonstrating that:

- 1) The H-4 spouse is in valid H-4 status;

- 2) The H-1B spouse holds valid H-B status;
- 3) Proof of marriage; and
- 4) Proof that the H-1B spouse has an approved Form I-140 or has been granted H-1B status beyond the sixth year maximum period of stay under Section 106(a) or (b) of AC21.

If primary documentation is unavailable, the USCIS will accept secondary documentation in the form of two or more sworn affidavits by individuals not including the H-4 spouse or H-1B principal beneficiary.

The Form I-765 can be filed concurrently with the Form I-539, Application to Extend/Change Nonimmigrant Status requesting a change or extension of H-4 status. Additionally, the Form I-765 can be filed with the Form I-539 (and if applicable the principal H-1B spouse's Form I-129, Petition for a Nonimmigrant Worker) up to six months prior to the EAD/I-94 expiration date.

Validity

An EAD for a qualifying H-4 dependent spouse will be issued until the earlier of the H-4 dependent spouse's authorized period of stay as indicated by his/her Form I-94 or the H-1B principal's authorized period of stay as indicated by his/her Form I-94. The maximum period that the EAD will be issued for is 3 years. A qualifying H-4 dependent spouse must file an extension of the EAD on a timely basis as there will not be an automatic extension of employment authorization while a new Form I-765 application is pending. When the EAD expires, the H-4 dependent spouse will lose employment authorization unless he/she has received a new EAD card prior to the expiration.

Effect of New Program on Processing Timeline for F-1 OPT EADs and Other USCIS Benefits

The DHS has made it clear that the timing of when the USCIS will begin accepting Forms I-765 for qualifying H-4 dependent spouse in May 2015 is designed to prevent an overlap with the H-1B cap season and the EAD applications filed by F-1 students through the Optional Practical Training (OPT) program. However, because many F-1 students who are graduating from school this spring/summer will file their post-completion OPT EAD applications in May, it is highly recommended that the F-1 students file their OPT EAD applications prior to the effective date of this program because it is uncertain whether the USCIS will have the resources to timely process EAD applications filed through this program and the other EAD programs.

Premium processing is not available for this program. Although the Form I-765 may be submitted with the Form I-539 and Form I-129, the USCIS will not process the Form I-765 until the Form I-539 and/or the Form I-129 have been approved. Therefore, the 90-day period by which the USCIS must adjudicate a Form I-765 will begin on the last day that the Form I-539/Form I-129 is approved.

Earliest Date to File

The earliest date that a qualifying H-4 dependent spouse may submit the Form I-765 as part of this program is May 26, 2015. Any applications submitted prior to this date will be rejected. Although the earliest filing date is May 26, 2015, our office is recommending that H-4 dependent spouses contact our office in April 2015 to prepare the necessary documents so that they are ready to be filed when the program commences on May 26, 2015.

