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THE LEGAL BASIS UNDERPINNING THE NEW AUTOMATIC EXTENSION OF WORK AUTHORIZATION FOR H-4, L-2 AND E-2 SPOUSES, AND WHY IT MUST STILL BE CHALLENGED

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The USCIS has been processing employment authorization requests for H-4 and L-2 spouses so slowly that they have been rendered virtually useless. By the time the applicant receives the employment authorization document (EAD) after 10 months, the job offer no longer exists. The experience is even more harrowing when the spouse begins working under the first EAD and has to apply for a renewal. By the time the renewal EAD comes through, the spouse would have been forced to stop working after the prior EAD expired and often loses her job. Most H-4 spouses who have availed of the EAD are mainly women and spouses of Indian born H-1B visa holders who are caught in the crushing India employment-based backlogs under the second and third preferences.

Following a recent settlement in *Shergill v. Mayorkas*, USCIS announced on November 12, 2021, that certain H-4, E, or L dependent spouses will qualify for an automatic extension provided under 8 CFR § 274a.13(d) if certain conditions are met.

The new policy provides that certain H-4, E or L dependent spouses qualify for automatic extension of their existing employment authorization and accompanying EAD if they properly file application to renew their H-4, E or L-based EAD expires, and they have an unexpired I-94 showing their status as an H-4, E or L nonimmigrant. The policy further provides that E and L dependent spouses are employment authorized incident to their status and therefore they

are no longer required to file Form I-765 for an EAD but may still do so if they choose to request an EAD. Still, the E and L dependent spouse may only qualify for an automatic extension if they have an unexpired valid E-2 or L-2 status.

Accordingly, a document combination to include an unexpired Form I-94, Form I-797C (Notice of Action) showing a timely filed employment authorization document (EAD) renewal application, and facially expired EAD may be acceptable to evidence unexpired work authorization for employment eligibility verification (Form I-9) purposes.

Although this new policy is a positive step, as a practical matter, many H-4 spouses may not be able to avail of the automatic extension if they are unable to demonstrate an H-4 status beyond the expiration of their existing EAD. Most H-4 statuses and EAD end on the same date.

Even if an H-1B extension is filed on behalf of the principal spouse under premium processing six months before the existing H-1B status expires, the USCIS no longer processes the extension of the H-4 status in an expeditious manner. Thus, even if the H-1B status is renewed under premium processing within 15 days for an additional 3 years, the H-4 status continues to remain pending and may or may not get approved before the expiration of the current H-4 status. If the H-4 status is not renewed prior to the expiration of the current H-4 status, the spouse will not be able to avail of the auto extension under the new policy.

It would thus behoove the USCIS to courtesy premium process the H-4 status extension request along with the H-1B premium request. This used to be done prior to the imposition by the Trump administration of a mandatory biometrics appointment for an extension request filed by the spouse. As a result of the new biometric requirement, the H-4 spouse's extension request was no longer processed along with the H-1B premium request. Although the biometric requirement has been eliminated for H-4 spouse extension requests, the USCIS continues to process these cases at a snail's pace. It is difficult to understand why the USCIS is unable to process the H-4 request along with the H-1B premium request at the same time as was done before the imposition of the biometric requirement.

Another way to get around the limitation of having H-4 status beyond the EAD is for the H-4 spouse to travel overseas and return with an I-94 that would have the same validity as the principal spouse's H-1B status. However, if the H-4

spouse needs to obtain a new visa stamp, it is difficult to obtain consular appointments timely as a result of Covid-19.

Another work around would be for the H-4 spouse to go to Canada for less than 30 days and be readmitted under automatic visa revalidation provided for trips to Canada or Mexico that are less than 30 days. The difficulty with this strategy, though, is that the CBP often admits the H-4 spouse under the same period of the existing status instead of admitting the spouse for an extended period that would be coterminous with the H-1B spouse's new status.

L-2 and E-2 spouses are in a better situation that H-4 spouses. INA 214(c)(2)(E) provides statutory authority for dependent spouses of L nonimmigrants to be granted work authorization. INA 214(c)(2) provides similar work authorization for dependent spouses. Notwithstanding this statutory authorization that took effect on January 16, 2002 providing for work authorization incident to status, USCIS was still insisting that L-2 and EAD spouses obtain an EAD through a policy memo authored by William Yates dated February 22, 2002, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Authorization for E and L Nonimmigrant Souses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions." (Yates Memo). The November 12, 2021 guidance has now rescinded the Yates Memo.

As a result of being recognized to be work authorized incident to status, L-2 and E-2 spouses will be able to work when their L-2 or E-2 status is extended. CBP will notate the I-94 to distinguish the L-2 or E-2 spouse from E and L children. Unlike the H-4 spouse who will need to apply for an EAD based on status that already extends beyond the EAD extension request, the L-2 spouse will be able to work as soon as the E-2 or L-2 status is granted. Similarly, the spouse who is admitted after travelling to the US in L-2 or E-2 spouse will also be issued an I-94 with a similar notation from the CBP and be work authorized after admission in that status. However, like with the H-4 spouse, when the L-2 spouse applies for an extension of that status, there will be no basis for an automatic extension of work authorization until the L-2 status is approved.

On November 18, 2016, DHS promulgated the automatic extension of EAD regulation at 8 CFR 274a.13(d), which took effect on January 17, 2017. 8 CFR 274a.13(d) provides the legal underpinning for November 12, 2021 policy. An applicant is eligible for automatic extension if the EAD renewal is timely filed

and based on the same employment authorization category as shown on the face of the expiring EAD. See 8 CFR 274a.13(d)(1)(i) and (ii). Under 8 CFR 274a.13(d)(1)(iii) automatic extension may also apply where the EAD renewal application is "ased on a class of aliens whose eligibility to apply for employment authorization continues notwithstanding expiration of the Employment Authorization Document and is based on an employment authorization category that does not require adjudication of an underlying application or petition before adjudication of the renewal application, …. As may be announced on the USICS Web site."

The page on the USCIS Website listed 15 categories for automatic extension of their employment authorization or EAD. However, the November 12, 2021 USCIS Policy Memo acknowledges that E and L as well as H-4 spouses were missing from this list, as follows:

> *These broad categories were not included because at the time the automatic extension authority was established in 2016, USCIS determined that these applicants are in a category that first requires adjudication of an underlying application before their EAD renewal application can be adjudicated.. While that is a permissible interpretation of the regulation, upon further review and consideration, USCIS recognizes that this interpretation does not contemplate the situation where the E, L, and H4 dependent spouse has already been granted a new period of authorized stay and such individual is eligible for employment authorization past the expiration of his or her EAD while the renewal Form I-765 application is pending. Under this scenario, the possible risk the provision at 8 CFR 274a.13(d)(1)(iii) sought to avoid—the risk that a Form I-765 renewal applicant's eligibility for employment authorization will lapse during the automatic extension period—is not present. As such, it is reasonable for USCIS to expand the list of categories eligible to receive automatic EAD extensions to include this narrowly defined category of E, L, and H-4 dependent spouses to mitigate the risk of experiencing gaps in employment authorization and documentation while their renewal Form I-765 is pending, in light of their continued employment eligibility past the expiration date of their EAD.*

The USCIS believes that this change in interpretation is permissible under 8 CFR

274a.13(d)(1)(iii) that speaks broadly of "class" and "category." As these terms are undefined and thus ambiguous, under the broad deference courts have granted to a government agency to interpret its own ambiguous regulation, see *Auer v. Robbins*, 519 US 452 (1997) as modified by *Kisor v. Wilke*, 588 US ___ (2019), USCIS believes it has the discretion to interpret these terms and tailor designated categories to emerging circumstances and to fulfill the primary purpose of the EAD auto-extension.

While one agrees that USCIS does have discretion to reinterpret 8 CFR 274a.13(d)(1(iii) to include auto extensions for H-4, L-2 and E-2 spouses, this is not the most satisfactory outcome and should be challenging the USCIS to do more.

For starters, if the USCIS processes extension requests of H-4, L-2 and E-2 statuses more rapidly, this problem will be resolved. It should not be taking upwards of 6 months to process such status extension requests when the biometric requirement has been done away with. The *Edakunni v. Mayorkas* lawsuit seeks to force USCIS to speed up processing times. USCIS can include courtesy premium processing of H-4, L-2 and E-2 status request applications that are part of a request for premium processing of the principal spouse's H-1B, L-1 or E petition. Also do not forget that Congress in HR 8837 has authorized premium processing of many more petitions and applications, including applications to change or extend status as well as applications for employment authorization.

More important, the USCIS need not be cabined by the restrictive language in 8 CFR 274a.13(d)(1)(iii) which provides for automatic extension where the EAD renewal application is "ased on a class of aliens whose eligibility to apply for employment authorization continues notwithstanding expiration of the Employment Authorization Document and is based on an employment authorization category that does not require adjudication of an underlying application or petition before adjudication of the renewal application." While the USCIS has threaded the difficult needle in its November 12, 2021 policy by justifying that 8 CFR 274a.13(d)(1)(iii) is nevertheless applicable if there is already an underlying status, the USCIS has authority under the INA to craft a whole new regulation that does not depend on automatic extension only if there is an underlying L-2, H-4 or E-2 status.

Furthermore, 8 CFR 274a.13(d)(1)(iii) can potentially be challenged as being

inconsistent with INA 214(c)(2)(E) and INA 214(e)(2) that provide work authorization incident to status to L-2 and E-2 spouses. Nowhere does it state in these INA provisions that a spouse who has been admitted in L-2 or E-2 status must remain in status in order to avail of an automatic extension of work authorization when applying for an extension of that status. Although there is not direct INA reference for H-4 authorization incident to status, the H-4 EAD rule is based on the general authority given to the DHS under INA 103(1) and 274A(h)(3) that allows it to grant work authorization to any noncitizen. Even under these general provisions there is no requirement that there must be an underlying nonimmigrant status in order to avail of automatic work authorization extension. Even if INA 214(c)(2)(E) and INA 214(e)(2) can be read to mean that a spouse is precluded from availing of an auto extension once the status has expired, 8 CFR 274a.13(d)(1)(iii) might still be inconsistent with the general authority to provide work authorization under INA 274A(h)(3).

Under its authority under INA 274A(h)(3), DHS may wish to promulgate a regulation similar to 8 CFR 274a.12(b)(20) that provides for an automatic extension of work authorization for 240 days when a petition to extend nonimmigrant status has been timely filed on behalf of a nonimmigrant through the same employer prior to the status expiring. The 240 day automatic extension will be denied if the petition requesting the extension is denied prior to the 240 days. The spouse should also be able to avail of a similar period of 240 days of automatic work authorization even if the underlying H-4, L-2 or E-2 status has expired so long as the request was made before the status had expired. If the underlying request for extension of status is denied prior to the 240 days, the automatic work authorization will be denied.

While the new H-4, L-2 and E-2 work authorization policy of November 12, 2021 is a step in the right direction, it should not become the permanent policy of the USCIS as it is far from perfect. As long as the USCIS delays in the processing of routine requests for extension of status and work authorization continue to persist, the regulations need to be changed in order to allow spouses to continue working regardless of whether there is an underlying nonimmigrant status or not.