

## Advising Clients in Light of EAD Processing Delays

May 31, 2022<sup>1</sup>

Recent increases in U.S. Citizenship and Immigration Services (USCIS) processing times for adjudicating Forms I-765, Applications for Employment Authorization, have created hardships for many noncitizens who have been unable to seek employment, have had to temporarily stop working, or have lost their jobs altogether.<sup>2</sup> This advisory provides tips for immigration practitioners to minimize the risk that clients' employment authorization will lapse and to advocate for faster adjudication once a Form I-765 has been filed. This resource also offers advice for navigating Employment Authorization Document (EAD) issues with employers and government agencies.

### Best Practices for Preempting I-765 Processing Delays

- **Include all required evidence with the I-765 application.**

To avoid a Request for Evidence (RFE) which will slow down processing, practitioners should carefully review the I-765 instructions<sup>3</sup> and include all required supporting documentation with the I-765 application. This includes the appropriate filing fee, if any, two passport-style photographs of the

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<sup>1</sup> Copyright 2022, Ready To Stay. The author of this practice advisory is Jennifer Riddle, Staff Attorney with the Catholic Legal Immigration Network, Inc. The author would like to thank the following individuals for their contributions to this advisory: Claudia Lainez, Assistant General Counsel, Service Employees International Union; Rebecca Scholtz, Senior Staff Attorney, NIPNLG; and Joshua Stehlik, Deputy Legal Director, National Immigration Law Center. This advisory is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner's jurisdiction.

<sup>2</sup> See AILA Policy Brief — *Righting the Ship: The Current Status of USCIS Processing Delays and How the Agency Can Get Back on Course* (Mar. 1, 2022), AILA Doc. No. 22022851, [https://www.aila.org/advo-media/aila-policy-briefs/uscis-processing-delays-2022?utm\\_source=Recent%20Postings%20Alert&utm\\_medium=Email&utm\\_campaign=RP%20Daily](https://www.aila.org/advo-media/aila-policy-briefs/uscis-processing-delays-2022?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily)

<sup>3</sup> I-765 instructions are available at: <https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf>

applicant, and a copy of the applicant's last EAD, if applicable. Those applying for an initial EAD must also submit a copy of a government-issued identity document, such as a passport. The I-765 instructions also list additional required evidence for specific eligibility categories. Any foreign language documents must be accompanied by a full English translation and the required translator's certification.

If an applicant cannot obtain a required document, the I-765 instructions allow them instead to provide secondary evidence. If secondary evidence does not exist or is unavailable, applicants must demonstrate both the unavailability of the required document and the relevant secondary evidence and submit two or more sworn affidavits by individuals with direct knowledge of the event and circumstances.<sup>4</sup> For example, an initial EAD applicant who is unable to provide a government-issued identity document such as a passport, birth certificate or national identity document might provide as secondary evidence church or school records pertaining to their identity.<sup>5</sup>

Practitioners should be sure to file standalone I-765 applications (EAD applications not being submitted with another application) at the appropriate location to avoid processing delays.<sup>6</sup>

- **File EAD renewal applications in a timely manner.**

Given long I-765 processing times, clients should file renewal applications well in advance of the expiration date of their current EAD. Practitioners may consider using a calendar system to generate reminders seven months before the expiration of a client's current EAD, since USCIS guidance states that renewal applications should be filed when an EAD is within 180 days of its expiration date.<sup>7</sup> Practitioners should also advise clients to contact them seven months before the EAD's expiration to start the renewal process. Practitioners can then prepare the renewal application and have it ready to file 180 days before the current EAD will expire.

- **Educate clients and employers about the 540-day auto-extension for certain EAD renewals.**

In the past, USCIS automatically extended certain categories of EADs for up to 180 days beyond their expiration date when the noncitizen timely filed a renewal application. Effective May 4, 2022, the Department of Homeland Security (DHS) temporarily amended existing regulations to increase the

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

<sup>5</sup> See USCIS Policy Manual, Vol. 7, Pt. A, Ch. 4, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-4>.

<sup>6</sup> Filing locations are provided at: <https://www.uscis.gov/i-765-addresses>.

<sup>7</sup> See USCIS, *Employment Authorization Document: Renew an EAD*, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document> (last updated Feb. 11, 2022).

automatic extension period from up to 180 days to up to 540 days from the expiration date of the expiring EAD.<sup>8</sup> The following renewal applicants are eligible for an automatic extension:

- Asylees and refugees: (a)(3) and (a)(5)
- Asylum applicants: (c)(8)
- TPS recipients: (a)(12)
- Applicants for initial TPS who have established a prima facie case and are eligible for an EAD as a “temporary treatment benefit”: (c)(19)
- Adjustment of status applicants: (c)(9)
- Registry applicants: (c)(16)
- Legalization, LIFE Legalization and SAW applicants: (c)(20), (c)(22), and (c)(24)
- VAWA self-petitioners: (c)(31)
- Individuals granted withholding of deportation or removal: (a)(10)
- Applicants for suspension of deportation and cancellation of removal, including NACARA cancellation: (c)(10)
- Citizens of Micronesia, Marshall Islands, or Palau: (a)(8)
- N-8 and N-9 nonimmigrants: (a)(7)
- Certain spouses of H-1B, E, and L-1 nonimmigrants: (c)(26), (a)(17), and (a)(18)

For the applicant’s existing EAD to be automatically extended, they must request a renewal EAD in the same category as the expiring EAD.<sup>9</sup> For TPS beneficiaries, the current EAD and the renewal request may be in either the (a)(12) or (c)(19) categories, but they do not have to match.<sup>10</sup> The temporary increase is available to eligible EAD renewal applicants with I-765s filed:

- before May 4, 2022, and whose 180-day automatic extension has since expired;
- before May 4, 2022, and whose 180-day automatic extension has not yet expired; or
- between May 4, 2022, and Oct. 26, 2023, inclusive of these dates.

The 540-day extension is only a temporary measure. Automatic extensions of EAD validity will revert to the normal 180-day period for any eligible applicant who timely files an I-765 renewal application after Oct. 26, 2023.

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<sup>8</sup> See Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants, 87 FR 26614 (May 4, 2022), <https://www.federalregister.gov/documents/2022/05/04/2022-09539/temporary-increase-of-the-automatic-extension-period-of-employment-authorization-and-documentation>.

<sup>9</sup> Additional details are available at USCIS, *Automatic Employment Authorization Document (EAD) Extension* <https://www.uscis.gov/eadautoextend> (last updated May 17, 2022).

<sup>10</sup> See 8 CFR § 274a.13(d)(1)(ii). Note that TPS recipients from certain countries have been provided with an automatic extension of their expired EAD by virtue of DHS announcement or publication in the *Federal Register*. See, e.g. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 86 FR 50725 (Sept. 10, 2021), <https://www.federalregister.gov/documents/2021/09/10/2021-19617/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-el>.

Those who qualify for an automatic extension may prove their continued work authorization to employers by showing their expired EAD, along with the Form I-797C, Notice of Action, showing the EAD renewal was filed before the EAD expired and in the same qualifying eligibility category as the expired EAD. USCIS provides more information in its [Handbook for Employers](#) (M-274).

## Strategies for Minimizing I-765 Adjudication Times

- **Qualifying healthcare and childcare workers may request expedited EAD renewals.**

Certain healthcare and childcare workers who have an EAD that has expired or will expire within 30 days may request expedited processing of their I-765 renewal application. USCIS initially provided this flexibility only to qualifying healthcare workers assisting public health efforts in response to the COVID-19 pandemic.<sup>11</sup> However, in March 2022, USCIS extended the benefit to also include certain childcare workers, defined as those who “attend to children at schools, businesses, private households, and childcare institutions” and “perform a variety of tasks, such as dressing, feeding, bathing, and overseeing play” (but not preschool teachers or teaching assistants).<sup>12</sup> Eligible applicants can request the expedite by calling the USCIS Contact Center<sup>13</sup> and must be prepared to provide evidence of their profession or current employment as a healthcare or childcare worker.

- **Applicants who meet the general USCIS expedite criteria can request expedited processing of an initial or renewal I-765.**

USCIS may grant expedite requests<sup>14</sup> on a case-by-case basis if the applicant meets one or more of the following five criteria:

1. *Severe financial loss to a company or person, provided that the urgency is not the result of the applicant's failure to timely file the I-765 or respond to an RFE*

Practitioners should look into whether the client’s employer/company might fail, be forced to lay off other staff, or lose a critical contract if USCIS does not expedite the I-765 application. Will the employer’s losing the client as a worker result in a loss of critical public benefits or services? Practitioners should obtain a letter from the client’s employer explaining the invaluable role the client plays in the organization and the financial impact of losing the client as a worker.

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<sup>11</sup> For information on who qualifies as a “healthcare worker,” see Memorandum from Jen Easterly, Dir., DHS Cybersecurity & Infrastructure Security Agency, “Advisory Memorandum on Ensuring Essential Critical Infrastructure Workers’ Ability to Work During the COVID-19 Response,” at 7-9 (Aug. 10, 2021),

[https://www.cisa.gov/sites/default/files/publications/essential\\_critical\\_infrastructure\\_workforce-guidance\\_v4.1\\_508.pdf](https://www.cisa.gov/sites/default/files/publications/essential_critical_infrastructure_workforce-guidance_v4.1_508.pdf).

<sup>12</sup> See Department of Labor, Standard Occupational Classification System, Code 39-9011 (last modified Apr. 17, 2020), [https://www.bls.gov/soc/2018/major\\_groups.htm](https://www.bls.gov/soc/2018/major_groups.htm).

<sup>13</sup> See USCIS, Contact Center, <https://www.uscis.gov/about-us/contact-us> (last updated Mar. 17, 2022).

<sup>14</sup> See USCIS, How to Make an Expedite Request, <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request> (last updated Mar. 21, 2022).

While USCIS states that job loss may be sufficient to establish severe financial loss for an individual, its position is that the need for employment authorization by itself, without evidence of other compelling factors, does not warrant expedited adjudication. A worker arguing financial hardship should document their income and expenses and show the impact of job loss on their ability to support themselves and/or family members.

## 2. *Emergencies or urgent humanitarian reasons*

Practitioners should consider whether the need to expedite the I-765 is connected to the client's or a family member's safety, illness, disability, death, critical need for medical treatment, or extreme living conditions. Or is the worker's employment authorization critical in light of the COVID-19 pandemic or another emergency?

## 3. *Nonprofit organization whose request is in furtherance of the cultural or social interests of the United States*

If the I-765 applicant works for a nonprofit organization, practitioners should determine whether the employer can show that the applicant plays a specific role in furthering the cultural or social interests of the United States, for example, a doctor conducting urgent medical research or a religious worker spearheading a socially impactful project.

## 4. *U.S. government interests*

To meet this criterion, the I-765 applicant must work for a government agency, including labor and employment agencies, in which a senior official can demonstrate that the need for an EAD "is mission-critical and goes beyond a general need to retain a particular worker or person." Practitioners may be able to show that a victim or witness who is cooperating with a federal, state, or local agency needs employment authorization because the agency is seeking back pay or reinstatement in court proceedings.

## 5. *Clear USCIS error*

USCIS does not provide an explanation of the clear agency error criterion. One example could be if USCIS erroneously issued a notice of intent to deny or denied an I-765 on the basis that the applicant had applied under the wrong eligibility category when, in fact, he or she had provided the required documentation to establish eligibility for an EAD in that category.

To request expedited processing, EAD applicants or their representative of record should call the USCIS Contact Center at 800-375-5283 or use the "Ask Emma" feature on [uscis.gov](https://uscis.gov) and provide their I-765 receipt number. The "Ask Emma" feature functions as a chat, and the customer service representative will ask the same information via the "Ask Emma" function as over the phone. The Contact Center will forward a service request to the office with jurisdiction over the application. USCIS may request additional documentation before making a decision on whether or not to expedite the EAD application. Since these requests are entirely discretionary, applicants are encouraged to

articulate the specific expedite criterion(a) they fall into during the course of the call or the chat. They must also be prepared to provide compelling supporting documentation if USCIS requests it.

There are additional details about expedite requests on the USCIS website<sup>15</sup> as well as in the USCIS Policy Manual.<sup>16</sup>

- **First time EAD applicants may save time by requesting a Social Security number in the I-765.**

In the past, noncitizens had to wait to receive their EAD before they could apply for a Social Security number (SSN) and Social Security card at the Social Security Administration (SSA) office. The I-765 now permits applicants to request that they be assigned an SSN and issued a Social Security card automatically by the SSA if their EAD application is approved. Applicants can make this request on Part 2, Questions 14-17 of the I-765. The SSA will mail the Social Security card to the address listed on the I-765, and EAD recipients should receive the Social Security card within seven business days of receiving the EAD from USCIS.<sup>17</sup> This can save applicants valuable time and avoid the need for an in-person appointment at the SSA office.

Practitioners should explain to clients that they may still use a validly-issued SSN to file tax returns, even if they lose employment authorization and can no longer use it to work.

- **Submit a case inquiry as soon as the I-765 has been pending beyond posted processing times.**

If the I-765 application remains pending longer than the processing time published on the USCIS website for the relevant service center, applicants can submit a case inquiry.<sup>18</sup> Practitioners should check [USCIS processing times](#) regularly in order to be able to submit an inquiry as soon as the I-765 receipt date permits. Note that some I-765 applications cannot be adjudicated until the benefit application with which it was concurrently filed is approved, including EADs based on I-821D DACA renewal applications, I-914 applications for T nonimmigrant status, and I-360 VAWA self-petitions.

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<sup>15</sup> See USCIS, How to Make an Expedite Request, <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request>.

<sup>16</sup> See USCIS Policy Manual, Vol. 1, Pt. A, Ch. 5, <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5>.

<sup>17</sup> See [ssa.gov/ssnvisa/ebe.html](https://ssa.gov/ssnvisa/ebe.html).

<sup>18</sup> See <https://egov.uscis.gov/e-request/displayONPTForm.do>.

Regulations require USCIS to process initial EAD applications filed by asylum applicants in the (c)(8) category within 30 days of filing.<sup>19</sup> These individuals can submit a case inquiry if the I-765 remains pending at 25 days and should follow USCIS guidance.<sup>20</sup>

- **Consider USCIS Ombudsman requests, Congressional inquiries, and/or litigation.**

If 30 days have passed since a USCIS case inquiry was submitted to USCIS (regardless of response) and the I-765 remains pending, or there are no published processing times for an application type and the application has been pending for more than six months, practitioners may consider making a request for case assistance with the USCIS Ombudsman.<sup>21</sup> However, due to the systemic nature of USCIS processing delays, the Ombudsman's office has stopped assisting with many individual inquiries. These include cases that are within published processing times or those with an expedite request already denied by USCIS. Thus, the Ombudsman's office has become less useful as a way to resolve individual inquiries related to delays.

Another advocacy avenue is to contact the client's member of Congress. Practitioners can make inquiries either through a House representative or one of the two U.S. senators for the applicant's state. Each congressional office has its own protocols and process for making these requests, which are usually spelled out on the congressional representative's website.

A final option is to challenge the delay in court by filing a mandamus action or claim under the Administrative Procedure Act. Note that the American Immigration Lawyers Association has a pending class action, *Kang v. DHS*, challenging USCIS delays in the processing of EADs filed by pending adjustment applicants in category (c)(9).<sup>22</sup>

## **Advising Clients About Navigating EAD Issues with Employers and Public Agencies**

- **Educate clients about workers' rights.**

Practitioners should remind clients that an employer can only reverify employment eligibility in certain circumstances, such as at the time the worker's EAD is set to expire. Once a worker loses work authorization, the employer can terminate their employment. However, it may be unlawful

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<sup>19</sup> These requirements come from litigation around EAD rules for asylum applicants. Two federal court decisions require USCIS to again process initial EAD applications for all asylum applicants within 30 days of submission of the application, as required by 8 CFR § 208.7(a)(1). *Rosario v. USCIS*, 365 F. Supp. 3d 1156 (W.D. Wash. 2018); *AsylumWorks v. Mayorkas*, 20-cv-3815 (D.D.C. Feb. 7, 2022).

<sup>20</sup> See <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/rosario-class-action>.

<sup>21</sup> See <https://www.dhs.gov/case-assistance>.

<sup>22</sup> See <https://www.immactlitigation.com/ead-delays-kang-v-dhs/>.

discrimination for an employer to selectively reverify an employee's employment eligibility on the basis of their country of origin, citizenship, or type of immigration status.<sup>23</sup> When verifying a worker's employment authorization, employers of any size are not allowed to demand more or different documents than necessary or request specific documentation.<sup>24</sup> Individuals can report violations or unlawful conduct to the Immigrant and Employee Rights Section of the U.S. Department of Justice. See additional discussion below. Some workers belonging to a union may also be protected through Collective Bargaining Agreements and should contact their union representative or counsel to discuss their rights in these situations.

- **Offer to connect with a client's employer or relevant government agency.**

Employers, in addition to departments of motor vehicles and other public agencies, may benefit from an advocate's willingness to explain when a client may remain employment authorized under the law, even with an EAD that is expired on its face. For example, employers may not understand that certain TPS recipients have received automatic extensions of their TPS and related employment authorization and can continue to work legally despite an expired EAD.

In some situations, a worker whose employment authorization has lapsed may be able to negotiate with their employer for a temporary leave of absence until they regain work authorization.

- **Encourage both clients and employers to contact the Immigrant and Employee Rights Section of the U.S. Department of Justice.**

The Immigrant and Employee Rights (IER) Section of the U.S. Department of Justice operates a free hotline for employers and another one for workers and can help solve issues regarding the I-9 requirements, E-Verify/SAVE, EAD auto-extensions, background checks, and SSN requirements.

For example, a U nonimmigrant may have filed a timely application for adjustment of status under INA § 245(m) but has not yet received her (c)(9) EAD. Her employer has refused to accept her I-94 and I-485 receipt notice as proof of her continued work authorization and threatened to fire her. A call from the IER may convince this employer that the employee's U status is automatically extended until adjudication of the pending adjustment and she remains work-authorized incident to status.

Employers or employees can call IER anonymously, and the agency will reach out to employers over email or phone. The hotlines are open Monday through Friday from 9 a.m. to 5 p.m. ET, are accessible in English and Spanish, and have a language line for interpretation to other languages. The employer hotline is 1-800-255-8155 and the worker hotline is 1-800-255-7688. More details are available at: <https://www.justice.gov/crt/immigrant-and-employee-rights-section>.

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<sup>23</sup> See 8 U.S.C. § 1324b(a).

<sup>24</sup> See 8 U.S.C. § 1324b(a)(6).

## Additional Considerations

USCIS is aware of the harmful impacts of processing delays for EAD applications, as well as other application types. On March 29, 2022, it [announced](#) its intention to “improve timely access to [EADs].” First, USCIS announced that its new internal “cycle time” goal for processing I-765 applications is 3 months.<sup>25</sup> Second, USCIS indicated plans to publish a temporary final rule that would increase the automatic extension of EADs for certain renewal applicants. This rule was published on May 4, 2022, and the details are described above.

Finally, USCIS published a [final rule](#) that will expand premium processing to additional form types, including certain I-765s. The first expansion in 2022 will only include I-765s for J exchange visitors and F-1 Optional Practical Training. USCIS will include some additional EAD application types in 2025. While premium processing would ensure a 30-day processing timeframe, it would require a \$1,500 premium processing fee which will make it inaccessible to most workers. However, in theory these fees will be used to hire more staff to address the backlog of EAD applications.

The hope is that as these measures are fully implemented, workers will see I-765 applications adjudicated more quickly and will be in a better position to obtain and maintain the ability to work legally in the United States.

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<sup>25</sup> See <https://www.uscis.gov/forms/filing-guidance>.