

## Immigration Law Update

02/26/2015

### FAQs on H-4 Employment Authorization Final Rule From DHS

On February 25, 2015, the U.S. Department of Homeland Security (DHS) published a final rule confirming that certain H-4 spouses will be eligible to apply for U.S. work authorization. The following is an outline of the new final rule and how new H-4 work regulations will be implemented in the near future.

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#### **Are *All* Individuals in H-4 Status Now Authorized to Work in the United States?**

No. Only certain individuals in H-4 status are eligible to apply for U.S. work authorization, based on their spousal relationship to an H-1B worker who has reached certain thresholds in his or her permanent, employment-based sponsorship by a U.S. employer. The criteria for H-4 work authorization eligibility are narrow and specific. Considerably *less* than 50 percent of H-4 spouses will be eligible to apply for work authorization.

Also, eligibility is limited to H-4 spouses only. Dependent H-4 children are not eligible to apply for work authorization under the new rule.

#### **Which H-4 Spouses Are Now Eligible for Work Authorization?**

According to the final rule and new DHS regulations, all of the following criteria must be met to qualify for H-4 work authorization:

- The H-4 applicant must be married to an H-1B specialty occupation worker;
- The H-1B worker must be *either*:
  - a) the beneficiary of an approved I-140 petition; *or*
  - b) the beneficiary of an approved H-1B extension petition beyond the H-1B six-year limit based on AC21 s. 106(a) or (b) (due to having a PERM application or I-140 petition filed and pending for over 365 days, being the beneficiary of an approved I-140 petition, or having an I-485 application filed and pending);
- The H-1B worker must currently hold valid H-1B status; *and*
- The H-4 spouse must currently hold valid H-4 status.

## **I Meet the Criteria for H-4 Work Authorization. Can I Apply for U.S. Jobs Immediately?**

While you could apply for a job, a U.S. employer cannot hire you without your having an employment authorization document. Even H-4 spouses who meet all the eligibility criteria are not automatically authorized to work in the United States. To officially obtain work authorization, you must file an application to U.S. Citizenship and Immigration Services for an Employment Authorization Document (aka “EAD” or “work permit”). All U.S. employers are required to examine documents that prove your U.S. work authorization shortly after you are hired. If your only work authorization eligibility comes from your H-4 status and you do not have an EAD, no U.S. employer will be able to legally offer you work.

## **Okay, I Understand I Need an H-4 EAD to Begin Work. Can I Apply for My EAD Immediately?**

No. Changes to U.S. immigration rules and procedures typically require time to be implemented by U.S. government agencies, and this will hold true for the new final rule on H-4 spousal work authorization. U.S. Citizenship and Immigration Services (USCIS) has announced it will begin accepting H-4 EAD applications on May 26, 2015. Applications filed prior to this date may be rejected or denied.

## **When the Application Window Opens, What Form Should I File, and What Documents/Evidence Will I Need to Submit Along With My Application?**

USCIS Form I-765, Application for Employment Authorization, is the application form that will be used for H-4 EAD applications. Applications must be accompanied by a filing fee of \$380.

Although USCIS has not yet modified its filing instructions for Form I-765 to include specific guidance for H-4 EAD applicants, it would be prudent to prepare evidence addressing all eligibility criteria, i.e.:

- **Marriage Certificate:** The H-4 applicant must be married to an H-1B specialty occupation worker;
- The H-1B worker must be *either*:
  - **I-140 Approval Notice:** a) the beneficiary of an approved I-140 petition; *or* **H-1B Extension (I-129) Approval Notice, along with Receipt Notice/Proof of Filing dated more than 365 days ago for ETA Form 9089 or Form I-140; or I-140 Approval Notice; or I-485 Receipt Notice:** b) the beneficiary of an approved H-1B extension petition beyond the H-1B six-year limit based on AC21 s. 106(a) or (b) (due to having a PERM application or I-140 petition filed and pending for over 365 days, being the beneficiary of an approved I-140 petition, or having an I-485 application filed and pending);
- **Current I-94 Record evidencing valid H-1B status, along with recent paystubs from H-1B employer:** The H-1B worker must currently hold valid H-1B status; *and*
- **Current I-94 Record evidencing valid H-4 status:** The H-4 spouse must currently hold valid H-4 status.

Before the application filing window opens on May 26, USCIS may issue further guidance as to the required supporting documentation, including but not limited to these items. Be sure to check USCIS's website at: <http://www.uscis.gov/i-765> for full instructions prior to filing.

### **What Can I Expect From the USCIS Application Process and How Should I Plan Ahead for Filing?**

Average processing times for EADs, as of the time of this Legal Update, are 2 to 3 months. The H-4 Final Rule corroborates that USCIS should adjudicate the application within 90 days of receipt.

There are a few collateral considerations you should also keep in mind when preparing to file your H-4 EAD application, including:

- When does my H-4 status and my spouse's H-1B status expire?
- Will the period of validity on my H-4 EAD be limited or foreshortened due to my upcoming H-4 status expiration?
- Am I eligible to apply to extend my H-4 status right now? (If so, consider filing your EAD application concurrently with your I-539 extension of status application.)
- Is my spouse eligible to apply to extend his or her H-1B status right now? (If so, consider filing your EAD application and your I-539 extension of status application concurrently with your spouse's I-129 petition. If the I-129 petition is filed under USCIS's Premium Processing Program, this might be a strategy that would yield faster processing of your applications.)

**Note:** As of the date of publishing this Legal Update, USCIS has not yet released details regarding the prospective validity period of H-4 EADs, or the prospective processing of concurrently filed applications.

### **I Don't Plan on Working in The United States. Is There Any Reason to Apply for an H-4 EAD Anyway?**

Even if you do not plan to work in the United States, receiving U.S. work authorization allows you to apply for and be issued a U.S. Social Security Number. Some individuals find having a U.S. Social Security Number desirable or useful.

### **Is There Any Reason I Might *Not* Apply for an H-4 EAD if I Am Eligible to Do So?**

A person who has more than one employment authorization option available should assess which is the most favorable. Practically speaking, H-4 EADs will be most useful for individuals that are subject to backlogs in employment-based immigrant visa categories. These include spouses of H-1B workers from all countries whose employment-based sponsorship is in the EB-3 (third-preference) category, or spouses of H-1B workers from China or India whose employment-based sponsorship is in the EB-2 or EB-3 category.

Other prospective H-4 EAD applicants (i.e., spouses of EB-1 beneficiaries or non-China/India spouses of EB-2 beneficiaries) may be eligible to immediately apply to USCIS for adjustment of status, and may be eligible for EADs on this basis, without needing to maintain H-4 status.

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The full text of DHS's final rule, including public comments and specific amendments to 8 CFR 214.2(h) and 274a, can be found in the Federal Register at: <https://www.federalregister.gov/articles/2015/02/25/2015-04042/employment-authorization-for-certain-h-4-dependent-spouses>. An official press release from DHS/USCIS regarding the EAD application process can be found at: <http://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence>.

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