



**Homeland
Security**

RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

To: Dr. Emilio T. Gonzalez, Director, USCIS
Cc: Michael P. Jackson, Deputy Secretary, Department of Homeland Security
From: Prakash Khatri, CIS Ombudsman
Date: March 20, 2006
Re: Recommendation to USCIS that it: 1) begin issuance of multi-year Employment Authorization Documents; 2) issue Employment Authorization Documents valid as of the date any previous issuance expires; and 3) amend the regulations such that K-1 nonimmigrants are not subject to breaks in employment authorization.

I. RECOMMENDATION

Recommendation to USCIS that it: 1) begin issuance of multi-year Employment Authorization Documents (EADs); 2) issue EADs valid as of the date any previous issuance expires; and 3) amend the regulations such that K-1 nonimmigrants are not subject to breaks in employment authorization.

II. BACKGROUND

A. Regulatory Framework

Several classes of aliens are authorized employment incident to their immigration status including asylees,¹ lawful permanent residents, certain nonimmigrants, lawful temporary residents, certain parolees, and aliens in Temporary Protected Status.

With limited exceptions, most classes of foreign nationals who are authorized employment under 8 C.F.R. §274a.12(a) or 274a.12(c) are required to apply for evidence of employment authorization using the Form I-765, Application for Employment Authorization.² If USCIS approves the Form I-765 application, it issues an EAD. Traditionally, regulations

¹ See generally THE MEANING OF 8 C.F.R. §274A.12(A) AS IT RELATES TO REFUGEE AND ASYLEE AUTHORIZATION FOR EMPLOYMENT, William Yates, INS, March 10, 2003 (Asylees and Refugees are authorized to work in the United States and need not apply for an EAD).

² 8 C.F.R. §274a.12(a) provides a list of 16 different classes of foreign nationals of aliens authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes. Any alien who is within a class of aliens described in paragraphs (a)(3), (a)(4), (a)(6)-(8), or (a)(10)-(16) of this section, and who seeks to be employed in the United States, must apply to USCIS for an EAD. Subsection b provides a list of 20 classes of foreign nationals who are not issued EADs including foreign government officials in A-1 or A-2 status and other nonimmigrant visa holders. Subsection c provides a list of foreign nationals who must apply for employment authorization including F-1 students.

specifically limited the EAD validity period to one-year increments; and in other instances, with limited exceptions, USCIS policy was to issue EADs valid for one year.

B. *Employment Authorization Documents and Up-Front Processing*

The CIS Ombudsman envisions an immigration benefits system that would feature “up-front processing” and obviate the need for the issuance of EADs in most, if not all, cases for applicants for permanent residence. Up-front processing would, among other things, allow applicants to be interviewed, if required, on the day of filing, and provide the immigration benefit within a few days of filing the application. Further, up-front processing would limit the number of “interim benefits” – EADs and advance parole travel documents – issued, which would decrease the number of ineligible individuals who receive immigration benefits.³

Nothing in this recommendation should be perceived as a move away from the CIS Ombudsman’s endorsement of up-front processing. Nevertheless, as USCIS moves to develop and roll-out up-front processing programs, certain changes to EAD issuance policy are both necessary and appropriate.

C. *Multi-Year Employment Authorization Document Authorization in USCIS Interim Rule:*

On July 30, 2004, the Bureau of Citizenship and Immigration Services, now the U.S. Citizenship and Immigration Services, published an interim rule, “Employment Authorization Documents.” 69 Fed. Reg. 45555. The July 2004 interim rule removed regulatory language limiting EAD validity periods to one-year increments and provides for USCIS issuance of multi-year EADs.

The interim rule amended relevant regulations to establish EAD validity periods based on certain criteria including: the applicant’s immigration status; general processing time for the underlying application or petition; and required background checks and response times for background checks by other agencies. In discussing the one-year limitation on EAD validity periods, the interim rule states:

These regulatory and policy limitations often require an alien whose underlying status is longer than one year, or whose underlying application will remain pending with [USCIS] for longer than one year, to apply for renewal of the EAD every year, ***creating a burden on the applicant and an additional workload for [USCIS].*** (emphasis added)

USCIS also states in the interim rule that the agency reserves the right to provide for the expiration of such documents to address security-related concerns. Nevertheless, the intent and plain meaning of the interim rule remain unmistakable – USCIS is to begin issuance of EADs with validity periods of more than one year. However, to date, the CIS Ombudsman is not aware of USCIS issuing any multi-year EADs.

³ For a full discussion of interim benefits and up-front processing, see CIS OMBUDSMAN ANN. REP. 2005 §II(B).

D. Employment Authorization Document Validity Dates

Currently, USCIS issues EADs with validity periods beginning on the dates of Form I-765 approval, and in so doing does not take into account any previously-issued EAD periods. As a result, applicants receive documents that effectively are valid for less than the one-year period referenced on the EAD. This practice is a source of many complaints from applicants and practitioners who find themselves filing (and paying) for more EADs than is truly necessary.

For example, an applicant who holds an EAD that is set to expire on March 31, 2006 may wish to apply for employment authorization in December 2005 to ensure continuous authority to work in the United States (current USCIS processing times exceed 90 days in some jurisdictions⁴). If the applicant applies for a new EAD, and if the application is approved on January 5, 2006, the EAD will be valid for a specific period (see section C above) beginning January 5, 2006. However, this approval does not take into account that the previous EAD was valid until March 31, 2006. In effect, the applicant loses almost three months of authorized employment, and the individual will have to apply for the next EAD, if necessary, three months early. If instead, USCIS were to approve new EADs *in seriatim* – to be valid for periods to begin on the date of expiration of any previous EAD issuances – the applicant would receive the full period previously paid for, plus the full new period based on the new issuance.

K-1 Employment Authorization

USCIS issues EADs to K-1 nonimmigrants to be valid only for the period of the authorized nonimmigrant stay – 90 days following admission. INA §214(d); 8 C.F.R. §274a.12(a)(6). K-1s must apply for an EAD, under the nonimmigrant classification, because Customs and Border and Protection (CBP) does not have authority to issue “employment authorized” stamps at ports-of-entry.⁵ Individuals who seek adjustment of status to lawful permanent residence as a K-1 spouse of a U.S. Citizen must then file a second application for an employment authorization document with the adjustment application.

Unless the applicant marries and applies for adjustment of status almost immediately after entry as a K-1, which is not required under relevant statute or regulations, employment authorization based on the adjustment application will not begin until days or weeks after the K-1 employment authorization period expires due to current processing times. In addition, there may be a several week delay before the newly married couple receives the marriage license from the state, which is required for the adjustment application filing.

There is no evidence of employment authorization for a K-1 prior to adjudication of the EAD based on the K-1 nonimmigrant visa. Additionally, there is no continuous evidence of

⁴ USCIS processing times are available on the USCIS website; *see* <https://egov.immigration.gov/cris/jsps/ptimes.jsp;jsessionid=d2Ro1oG7IK5a> (last visited December 16, 2005).

⁵ *See* DHS Delegation of Authority to USCIS for Employment Authorization 0150.1, March 1, 2003; *compare with* DHS Delegation of Authority to CBP (no such delegation of authority to provide for employment authorization is granted to CBP).

employment authorization where the individual's EAD expires at the end of his/her K-1 stay and before a new adjustment-based EAD is adjudicated and issued.

Thus, there is often a gap in evidence of employment authorization for K-1s both prior to issuance of the EAD based on the K-1 and when the K-1 and attendant EAD expires prior to issuance of the EAD based on the adjustment application. USCIS could address this gap by 1) amending 8 C.F.R. §274a.12 so that K-1 nonimmigrants, who are work authorized incident to status, would not need to apply for an EAD;⁶ and 2) providing for an automatic extension of the first EAD if the adjustment application is timely filed.⁷

III. JUSTIFICATION

For the foregoing reasons and as stated above, the CIS Ombudsman recommends immediate action to 1) begin issuance of multi-year EADs; 2) issue EADs valid as of the date any previous issuance expires; and 3) amend the regulations such that K-1 nonimmigrants are not subject to breaks in employment authorization.

These changes to the EAD issuance policy and practice will benefit employers and individuals, as well as USCIS. As discussed in the July 2004 interim rule, the current practice of issuing one-year EADs “[creates] a burden on the applicant” by requiring repeat applications. The validity date issue needlessly requires customers to apply for EADs even more frequently than otherwise would be necessary, and the current K-1 EAD policies needlessly leave this class of foreign nationals without evidence of employment authorization prior to issuance of the K-1 EAD and while the adjustment EAD application is adjudicated. Existing EAD issuance policies also create, as discussed in the July 2004 interim rule, an additional workload for USCIS.

To the extent that issuance of multi-year EADs will have a detrimental impact on the fee-based USCIS budget or presents technology hurdles (*i.e.* EAD production machines do not provide for multi-year cards), the CIS Ombudsman recommends proactive efforts by the agency and DHS management to address these obstacles including but not limited to a small fee increase for the multi-year EAD. Issues collateral to national security and the efficient delivery of immigration benefits like a potential short-term fee-based budget shortfall or antiquated technology should not drive USCIS policy and practice.

⁶ While in most instances where the nonimmigrant classification and attendant employment authorization are not specific to the petitioner, as opposed to open market employment authorization, the regulations require that the foreign national apply for an EAD. However, this is not the case with asylees, and there would appear to be no rationale for the EAD requirement for K-1s. *See generally* supra Note 1.

⁷ To address this K-1 employment authorization gap, USCIS could look to the so-called 240 day rule, under which foreign nationals in nonimmigrant visa status who timely file for an extension are automatically given authorization to work for 240 days after initial expiration. 8 C.F.R. §274.a12(b)(20). In the case of K-1s, upon the filing of the adjustment application and the EAD application, the existing employment authorization could continue for a period of 90 or 120 days.

IV. BENEFITS

A. Customer Service

Customers, both individual foreign nationals and employers, would be well-served by the issuance of multi-year EADs, EADs with full periods of validity, and amendments to the regulations such that K-1 nonimmigrants are not subject to breaks in employment authorization. While many USCIS customer service goals ultimately will be achieved through up-front processing, in the interim the steps outlined in this recommendation will make significant improvements in the efficient delivery of immigration benefits processing.

B. USCIS Efficiency

Issuance of multi-year EADs and EADs with full periods of validity will improve USCIS efficiency. Issuing EADs with one-year validity periods—in cases where it is likely that re-issuance of the EAD will be necessary—requires USCIS to perform redundant adjudications. To the extent that budgetary issues or information technology obstacles are preventing USCIS from issuing multi-year EADs, the CIS Ombudsman calls on USCIS and DHS management to address these issues to make the agency more efficient, not to continue inefficiencies that serve neither a customer service nor a national security purpose.

C. National Security

This recommendation has a neutral impact on national security. As discussed above, in July 2004, USCIS published a recommendation providing for the authority to issue multi-year EADs. Under the interim rule, the agency has the authority to provide for the expiration of such documents and, where appropriate, issue new cards to allow USCIS to address any security-related concerns and to ensure the integrity of the EAD process. Thus, the interim rule contemplated national security issues in the post-September 11, 2001 context and provides the means for USCIS to address such concerns accordingly, but does not preclude the issuance of multi-year EADs for national security reasons. The CIS Ombudsman supports this authority and looks forward to working with USCIS to address any national security issues within the framework of multi-year EAD issuance.