

USCIS Publishes Filing Guidance for Certain H-4 Dependent Spouses

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USCIS on May 21, 2015, published information to help eligible H-4 dependent spouses who want to apply for employment authorization under the Employment Authorization for Certain H-4 Dependent Spouses final rule.

Beginning May 26, 2015, certain H-4 dependent spouses of H-1B nonimmigrants can file Form I-765, Application for Employment Authorization, as long as the H-1B nonimmigrant has already started the process of seeking employment-based lawful permanent resident (LPR) status. Specifically, H-4 dependent spouses may apply for employment authorization if the H-1B nonimmigrant:

- Is the principal beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker; *or*
- Has been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act (AC21). AC21 permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status.

Do NOT submit an application for employment authorization (Form I-765) before May 26, 2015. USCIS will not accept a Form I-765 requesting employment authorization based on H-4 status until the H-4 rule takes effect on May 26, 2015. If you submit a Form I-765 requesting employment authorization on this basis before May 26, 2015, USCIS will reject and return your application with the filing fee. You would then need to re-submit the application on or after May 26, 2015.

In response to the stakeholder teleconference, USCIS posted the following Frequently Asked Questions that can help in clarifying queries of many eligible applicants.

Frequently Asked Questions

Determining If You May Apply for Employment Authorization

1. **As an H-4 nonimmigrant, would my employment authorization be limited to just my H-1B spouse's time under AC21? For example, if my H-1B spouse's petition is approved for the remaining time left in the 6-year period of admission *plus* the one year under AC21 §§ 106(a) and (b), and my H-4 status is granted the same period of time, how long will my employment authorization be valid for?**

Your employment authorization expiration date generally will match your H-4 nonimmigrant status expiration date. USCIS may grant employment authorization for the maximum time allowed even if the AC21 §§ 106(a) and (b) portion of your H-1B spouse's extension is only for part of the full validity period. Under this scenario, your H-1B spouse's extension has been granted under AC21 §§ 106(a) and (b), so you would be eligible for employment authorization for as long as your H-4 status is valid.

2. Is this a one-time opportunity?

No, this is not a one-time opportunity. If you are a H-4 nonimmigrant who obtains employment authorization under 8 CFR 274a.12(c)(26), you may file to renew your employment authorization and receive a new EAD as long as you remain eligible for employment authorization as described in 8 CFR 214.2(h)(9)(iv).

3. Do I need to be in the United States to apply for employment authorization based on my H-4 status?

Yes, you *must* be in the United States to apply for employment authorization. You must be in H-4 status to be eligible for employment authorization, and an individual outside of the United States cannot be in H-4 status.

4. Am I eligible for employment authorization if USCIS revoked my H-1B spouse's approved Form I-140 petition?

In order to qualify for employment authorization as an H-4 nonimmigrant, your H-1B spouse must have been granted H-1B status under sections 106(a) and (b) of AC21 or be the beneficiary of an approved Form I-140. If USCIS revokes the Form I-140 petition, your H-1B spouse is no longer the beneficiary of an approved Form I-140. Therefore, you would not qualify for employment authorization based on that eligibility criterion. You may still qualify for employment authorization if your H-1B spouse has received an extension of stay under sections 106(a) or (b) of AC21.

5. My H-1B spouse's approved Form I-140 was filed by a previous employer. Am I eligible for employment authorization?

For you to qualify for employment authorization based on your H-4 status, your H-1B spouse must have been granted H-1B status under sections 106(a) and (b) of AC21 or be the beneficiary of an approved Form I-140. USCIS does not require that the approved Form I-140 be filed by your spouse's current employer or by the same employer who filed your H-1B spouse's Form I-129, Petition for a Nonimmigrant Worker.

6. What happens to my employment authorization if USCIS revokes my H-1B spouse's Form I-140?

We have the discretion to revoke your employment authorization if your H-1B spouse no longer has an approved Form I-140 or is no longer eligible for H-1B status under sections 106(a) and

(b) of AC21. Both you and your H-1B spouse must be maintaining your nonimmigrant status for you to be eligible for employment authorization under 8 CFR 274a.12(c)(26).

7. If I am granted H-4 employment authorization, can I work anywhere (including starting my own business)?

Yes. If you are granted employment authorization based on your H-4 status, your employment authorization is *unrestricted*. This means that your employment authorization is not limited to a specific employer. It also does not prohibit self-employment or starting a business.

8. Can I employ other people?

As noted above, employment authorization based on H-4 status under 8 CFR 274a.12(c)(26) is *unrestricted*. Such employment authorization does not prohibit self-employment, including situations where the H-4 nonimmigrant hires individuals as employees of their business.

Applying for Employment Authorization

1. Can I file the following applications/petitions concurrently?

a. An H-1B extension of stay petition, an H-4 extension of stay application, and an application for employment authorization?

Yes. You may file your Form I-765, Application for Employment Authorization *together* with your Form I-539, Application to Extend/Change Nonimmigrant Status and the Form I-129, Petition for Nonimmigrant Worker filed on behalf of your H-1B spouse. For extensions of nonimmigrant status, the Form I-129 for your H-1B spouse can be filed no more than six months before the date that the employer needs your spouse to work.

b. A new H-1B petition, a new H-4 change of status application, and an application for employment authorization?

Yes, but this scenario is possible only if your H-1B spouse has an approved Form I-140 or is requesting an extension of stay under sections 106(a) and (b) of AC21. Your spouse's employer can file Form I-129 for your H-1B spouse no more than six months before the date the employer needs your spouse to work.

Please note that under this scenario, we cannot adjudicate your Form I-765 until we make a determination about both your H-1B spouse's eligibility for H-1B status under sections 106(a) and (b) of AC21 and your eligibility for H-4 nonimmigrant status.

In either of the above scenarios, USCIS will not begin the 90-day interim EAD clock until we make a decision on your spouse's H-1B status and your H-4 status.

2. Will the Form I-765 be a paper-based application, or will it be an electronic application?

If you are applying for employment authorization based on your H-4 nonimmigrant status, you must file a paper Form I-765 application. We will not accept electronic Form I-765 applications.

3. What evidence should I, as an H-4 nonimmigrant, submit to demonstrate my eligibility for employment authorization?

When applying for employment authorization based on your H-4 nonimmigrant status, submit the following with your application to demonstrate eligibility:

- Evidence of your H-4 nonimmigrant status;
- Evidence of your qualifying spousal relationship with the H-1B principal nonimmigrant (such as a copy of your marriage certificate);
- Evidence of your spouse's H-1B nonimmigrant status, such as:
 - A copy of Form I-797, Notice of Approval, for Form I-129 filed on your H-1B spouse's behalf (if already approved and not being filed with your application for employment authorization);
 - A copy of your H-1B spouse's Form I-94, Arrival-Departure Record;
 - The receipt number of the approved Form I-129 filed on behalf of your H-1B spouse (if already approved and not being filed with your application for employment authorization); and/or
 - A legible copy of the personal data pages of your H-1B spouse's passport, the visas on which he or she last entered the United States, and the latest U.S. admission stamps in his or her passport.
 - If you are applying for employment authorization based on your spouse's grant of H-1B status under AC21 §§ 106(a) and (b), include the following evidence:
- Evidence that your H-1B spouse is the beneficiary of a Permanent Labor Certification Application filed at least 365 days before the expiration of his or her six-year limitation of stay as an H-1B nonimmigrant. Such evidence may include, but is not limited to:
 - A copy of a print out from the Department of Labor's (DOL's) website or other correspondence from DOL showing the status of the Permanent Labor Certification Application filed on your H-1B spouse's behalf; or
 - If DOL certified the Permanent Labor Certification, a copy of Form I-797, Notice of Receipt, for Form I-140 establishing that Form I-140 was filed within 180 days of DOL certifying the Permanent Labor Certification Application; **OR**
- Evidence that your H-1B spouse's Form I-140 was filed at least 365 days before the expiration of his or her six-year limitation of stay as an H-1B, **and** the Form I-140 remains pending. Such evidence may include, but is not limited to:
 - A copy of your H-1B spouse's Form I-797 Receipt Notice for Form I-140; or
 - The receipt number of your H-1B spouse's the pending Form I-140 filed on behalf of the H-1B spouse.

- If you are applying for employment authorization based on your spouse being a beneficiary of an **approved Form I-140**, include evidence that the Form I-140 filed on your H-1B spouse's behalf has been approved. Such evidence may include, but is not limited to:
 - A copy of the Form I-797 Approval Notice for Form I-140; or
 - A copy of the Form I-797 Receipt Notice for Form I-140 along with an explanation about why the Form I-797 Approval Notice is unavailable.

If you cannot submit the evidence listed on the Basis for Work Authorization section, you **must** demonstrate your inability to submit such evidence and instead submit secondary evidence, such as an attestation that lists information about the underlying Form I-129 or Form I-140 petition.

Such attestation can include the receipt number of the most current Form I-129 extension of stay filed on your H-1B spouse's behalf or the receipt number of the approved Form I-140 petition filed on your H-1B spouse's behalf, and the petitioner's/beneficiary's names in the underlying Form I-129 or I-140. If you cannot obtain such secondary evidence, explain your inability to do so and submit two or more sworn affidavits by non-parties who have direct knowledge of the relevant events and circumstances.

4. Will USCIS require me to submit original documents with my application for employment authorization?

As noted in the instructions for Form I-765, Application for Employment Authorization, you may submit a legible photocopy of an original document with your application, unless we later specifically request the original document in a request for evidence. If you submit original documents when not required, those documents may remain a part of the record and will not be automatically returned.

5. Will premium processing be available for Form I-765, Application for Employment Authorization?

No. Premium processing is not available for Form I-765 applications filed by H-4 dependent spouses under 8 CFR 274a.12(c)(26).

6. What if my Form I-539 for H-4 status is still pending on May 26, 2015? Can I file Form I-765 immediately? Will USCIS match my Form I-765, Application for Employment Authorization to my pending Form I-539?

If you have filed a Form I-539 and it is still pending on May 26, 2015, we encourage you to wait until your Form I-539 has been adjudicated before filing a Form I-765. This will prevent delays in the adjudication of your Form I-765. Additionally, because we anticipate a high volume of filings, we cannot guarantee that we will be able to match your Form I-765 with your Form I-539.

How We Will Adjudicate Your Application for Employment Authorization (Form I-765)

- 1. Will USCIS cut off Forms I-765 after receiving the anticipated number of applications stated in the rule?**

No. There is no cap on Forms I-765 filed based on H-4 dependent spouse eligibility under 8 CFR 274a.12(c)(26).

- 2. Does USCIS expect any changes to the Form I-140 immigrant petition process based on this regulation change?**

No. We do not anticipate any changes in the way officers adjudicate Form I-140 immigrant petitions.

- 3. I am an F-1 nonimmigrant who possesses Optional Practical Training (OPT) employment authorization. Would there be continuous employment if I file a petition requesting H-4 nonimmigrant status concurrently with an EAD?**

As an F-1 nonimmigrant who has employment authorization under OPT, you are allowed to work only as long as the OPT authorization remains valid. Filing an application to change status from F-1 to H-4 nonimmigrant status and/or an application for employment authorization based on H-4 status does not extend your employment authorization under OPT or any previously granted employment authorization. If you file a Form I-539 requesting to change your nonimmigrant status to H-4 and you include a Form I-765, we will adjudicate your Form I-765 only after we adjudicate your Form I-539 and grant you H-4 status.

- 4. Will USCIS backdate the beginning validity date on the EAD to the start of my H-4 status if the Form I-539 is adjudicated before Form I-765?**

No. We will not backdate the validity date of your EAD to the time your H-4 status was granted. Your EAD will be valid beginning on the date that USCIS adjudicates your Form I-765 or the date you acquire qualifying H-4 status, whichever is later. Additionally, your EAD will expire when your H-4 nonimmigrant status expires.

While Waiting for USCIS to Adjudicate Your Application for Employment Authorization (Form I-765)

- 1. Can I travel while my Form I-765 is pending?**

You may travel if you are in valid H-4 status and meet all the admission requirements, including having a valid H-4 nonimmigrant visa. *However, traveling outside of the United States could cause delays in your case.* While you are outside of the United States, we may need additional information to make a decision on your Form I-765 or we may issue a Notice of Intent to Deny (NOID) with an opportunity to respond. If you do not respond on time to a Request for Evidence (RFE) or to the NOID, we may deny your case as abandoned. Additionally, travel outside of the

United States may also cause possible delays if we need to reschedule your appointment at an Application Support Center.

Finally, please note that if you file Form I-765 concurrently with Form I-539 requesting a change to H-4 status from a different nonimmigrant classification, we will deny your Form I-539 as abandoned if you travel abroad while your Form I-539 is pending. In this case, we would also deny your Form I-765.

2. How long will it take USCIS to adjudicate my Form I-765?

The timeline will vary from case-to-case. Currently, the processing time for Form I-765 is 90 days (3 months). Please note that if you file a Form I-765 based on your H-4 nonimmigrant status under 8 CFR 274a.12(c)(26) concurrently with a Form I-129 and Form I-539, the processing timeline will not begin until we have made a decision on your spouse's eligibility for H-1B status and/or your eligibility for H-4 status. Processing may also be delayed if the evidence included with these benefit requests does not establish eligibility and we need to issue an RFE or NOID.

Once You Receive Employment Authorization

1. Can I use my EAD to enter and exit the country?

No. An EAD issued to an H-4 dependent spouse under 8 CFR 274a.12(c)(26) is not an entry document. If you have H-4 nonimmigrant status and depart the United States, you must use your valid passport and H-4 nonimmigrant visa (unless you are visa exempt) or other travel document to return to the United States.

For any additional H-4 Spouse information, please feel free to contact the Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. at info@visaserve.com or by calling our offices at 201-670-0006 (x107).