



ASYLUM SEEKER ADVOCACY PROJECT

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Submitted via www.regulations.gov

Samantha Deshommnes, Chief
Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2140

Re: OMB Control No. 1615-0047; DHS Docket No. USCIS-2006-0068, Comments in Response to Notice of Revision of a Currently Approved Information Collection Activity: Employment Eligibility Verification

Dear Chief Deshommnes,

The Asylum Seeker Advocacy Project (ASAP) respectfully submits the following comments in connection with U.S. Citizenship and Immigration Services' (USCIS) above-referenced notice entitled *Agency Information Collection Activities; Revision of a Currently Approved Collection: Employment Eligibility Verification*, 87 Fed. Reg. 18377 (Mar. 30, 2022). Based on the experiences of its members, ASAP requests that USCIS amend the I-9 and its instructions to adequately explain to employers that certain receipts automatically extend the expiration date of USCIS-issued Employment Authorization Documents (EADs).

The Asylum Seeker Advocacy Project (ASAP) believes that asylum seekers can make great change by standing together. We provide our membership of asylum seekers with legal and community support. And we work with our members — over 320,000 asylum seekers — to build a more welcoming United States. ASAP members come from more than 175 countries and live in every U.S. state and territory. Since the fall of 2020, ASAP staff have responded to over 5,000 inquiries from members concerning related employment authorization issues.

Many ASAP members have raised issues related to a prospective or current employer intending to take adverse employment action because the employer does not

believe that a receipt notice can extend the expiration date on the face of an EAD card. ASAP believes that a clear, succinct explanation of USCIS’s automatic extension rules will alleviate employer confusion and prevent work-authorized asylum seekers from losing employment opportunities. As USCIS recently recognized, gaps in employment authorization “have a highly detrimental impact on noncitizen workers and their U.S. employers,” especially “at a time when such employers already are facing unprecedented workforce disruptions due to the COVID crisis.”¹ USCIS should revise Form I-9 so as to remove unnecessary obstacles to the hiring and retention of authorized workers.

I. Background

Federal law requires that every employer who recruits, refers for a fee, or hires an individual for employment in the U.S. must complete Form I-9, Employment Eligibility Verification.² Form I-9 requires employees to present specified documentation of their authorization to work in the United States.³ Noncitizens who are not authorized to work incident to status must present an unexpired Form I-766, Employment Authorization Document (EAD) during the employment eligibility verification process.⁴

Applicants for asylum are eligible to obtain EADs.⁵ However, in recent years, the processing times to renew EADs in the asylum applicant category have ballooned. Even though USCIS will generally only accept an EAD renewal application six months prior to the expiration of the current EAD, the agency’s estimated processing time for such a renewal is 13 months.⁶ Anticipating that undesirable gaps in employment authorization are possible when processing times are lengthy, the Department of Homeland Security (DHS) amended its regulations in 2016 to provide that certain applications to renew an EAD would automatically extend the expiration date of the EAD by 180 days.⁷ Earlier

¹ *Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants*, 87 Fed. Reg. 26614, 26629 (May 4, 2022).

² See 8 U.S.C. §§ 1324a(a)(1)(B), (b); 8 C.F.R. § 274a.2.

³ See *id.*

⁴ See 8 C.F.R. § 274a.2(b)(1)(v) (requiring unexpired documents); 8 C.F.R. § 247a.12(c) (listing categories of noncitizens who must apply for EADs to prove work authorization).

⁵ 8 C.F.R. §§ 208.7; 274a.12(c)(8).

⁶ See U.S. Citizenship & Immigration Serv., *Processing Time for Application for Employment Authorization (I-765) at Potomac Service Center*, <https://egov.uscis.gov/processing-times/> (accessed May 11, 2022). The Potomac Service Center only processes renewals in the C8 category whereas other USCIS Service Centers process both initial and renewal applications. The 13-month estimate for renewal processing is also consistent with the experience of ASAP’s members.

⁷ See *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398, 82454–55, 82492–93 (Nov. 18, 2016) (codified at 8 C.F.R. § 274a.13(d)).

this month, DHS published a temporary final rule extending the length of such automatic extensions to 540 days.⁸

Under the regulations, “[a]n Employment Authorization Document (Form I-766) that has expired on its face is considered unexpired when combined with a Notice of Action (Form I-797C), which demonstrates that the requirements [for automatic extension of an EAD] have been met.”⁹ However, in practice, a typical employer is unfamiliar with the Code of Federal Regulations, and the proposition that a receipt can “automatically extend” a facially expired identification document seems implausible.

ASAP members regularly encounter employers who are unwilling to accept a facially expired, but actually extended, EAD as evidence of employment authorization—often with serious consequences for the worker.

II. The Proposed Form I-9 Continues to Employ Confusing Language Regarding the Acceptability of EAD Renewal Receipts.

The proposed Form I-9 instructions will continue to generate confusion among prospective employers of work-authorized asylum applicants. This confusion principally arises from three aspects of the proposed form and instructions.¹⁰

First, the proposed Form I-9 will continue to confuse employers if a Notice of Action (Form I-797C), commonly known as a receipt notice, is not listed under “Acceptable Receipts.” As reflected in the figure on the next page, USCIS’s proposed form amends the List of Acceptable Documents to reflect certain categories of “Acceptable Receipts” without discussing the acceptability of a “receipt notice.”

⁸ See *Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants*, 87 Fed. Reg. at 26651–52.

⁹ 8 C.F.R. § 274a.13(d)(4).

¹⁰ The screenshots used throughout this comment are taken from the draft documents posted on Regulations.gov, which use red type to indicate revisions from previous editions of the form. See Form I-9 Instructions for Form I-9, Employment Eligibility Verification (Mar. 30, 2022), <https://www.regulations.gov/document/USCIS-2006-0068-0424>; Form I-9 Employment Eligibility Verification (Mar. 30, 2022), <https://www.regulations.gov/document/USCIS-2006-0068-0428>.

Acceptable Receipts		
May be presented in lieu of a document listed above for a temporary period. For receipt validity dates, see the M-274.		
<ul style="list-style-type: none"> • Receipt for a replacement of a lost, stolen, or damaged List A document. • Form I-94 with "RE" notation or refugee stamp issued to a refugee. • Form I-94 that contains an I-551 stamp issued to a lawful permanent resident and that contains a Form I-551 stamp. 	OR	<ul style="list-style-type: none"> • Receipt for a replacement of a lost, stolen, or damaged List B document. • Receipt for a replacement of a lost, stolen, or damaged List C document.

Second, the proposed Form I-9 will continue to confuse employers if the List of Acceptable Documents continues to state in bold and capitalized type that “[a]ll documents must be **UNEXPIRED.**”

LISTS OF ACCEPTABLE DOCUMENTS

All documents must be **UNEXPIRED**

Employees may present one selection from List A or a combination of one selection from List B and one selection from List C.

Examples of many of these documents appear in the Handbook for Employers (M-274).

Finally, the proposed Form I-9 instructions will continue to confuse employers if there is not a clearer explanation of automatic extensions in the context of work authorization. While the proposed instructions do mention automatic extensions of work authorization for the first time, such automatic extensions are mentioned only in passing, and critically, the instructions do not explain what documentation is acceptable to demonstrate that a facially expired EAD has been automatically extended.

- 4. A noncitizen (other than Item Numbers 2. and 3. above) authorized to work:** An individual who has authorization to work but is not a U.S. citizen, noncitizen national, or lawful permanent resident.

If you select this box, enter the date that your employment authorization expires, if any, in the space provided. In most cases, your employment authorization expiration date is found on the documentation evidencing your employment authorization. **If your employment authorization documentation has been automatically extended, enter the expiration date of the automatic extension in this space.**

Taken together, these aspects of the proposed form and instructions can leave a reasonable reader or employer with the impression that a prospective employee must present a facially unexpired EAD card, and that a receipt notice demonstrating that they

have timely filed for renewal of their EAD is not an acceptable receipt in the employment eligibility verification process. This confusion is not in the best interest of asylum seekers, other immigrant workers with EAD cards, or employers. It is also most definitely not in the best interest of USCIS, which has gone to great lengths to extend the period of work authorization for individuals who have applied to renew their work permits through issuing a Temporary Final Rule.¹¹

III. USCIS should add language to the I-9 and its instructions that clearly describes the acceptability of documents extending the validity of an EAD.

Given DHS's reliance on automatic extensions of certain categories of EADs as a tool to manage its own backlogs,¹² it is critically important that employers are properly instructed on how to complete Form I-9 for an employee with an automatically extended EAD. The potential for confusion described above can be significantly reduced by including explanations of the automatic extension process in the form instructions and in the List of Acceptable Documents.

First, USCIS should add the Notice of Action (Form I-797C) or "receipt notice" to the list of "Acceptable Receipts." This is an important signal to employers that the receipt notice is a valid document and can prove instructive in determining whether an individual is authorized to work.

Second, USCIS should add a paragraph to the form instructions that informs employers about the circumstances under which it considers an EAD to be unexpired. ASAP proposes adding the following paragraph to the definitions section on Page 1 of the Form I-9 Instructions:

Unexpired: A document is unexpired if it is before the expiration date stated on the face of the document or if the document does not contain an expiration date. Additionally, an Employment Authorization Document (Form I-766) that has expired on its face is automatically extended for 540 days, and therefore considered unexpired, when it is combined with a Notice of Action (Form I-797C), which demonstrates that the applicant properly filed a qualifying application to renew their Employment Authorization Document. For more information about the circumstances under which an Employment Authorization Document is automatically extended, see <https://www.uscis.gov/eadautoextend>.

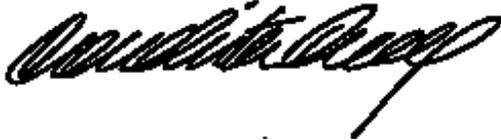
¹¹ See *Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants*, 87 Fed. Reg. at 26651–52.

¹² See n.1, *supra*.

Finally, given the possibility of employer confusion, the List of Acceptable Documents should state "See Instructions for definition of 'unexpired'" immediately underneath the statement that "All documents must be UNEXPIRED."

Thank you for your careful attention to these matters.

Respectfully submitted,



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