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Relaxing of Employment Authorization Extension Policies for E, H-4, and L Visa Dependent Spouses

The U.S. Department of Homeland Security (DHS) reached a settlement agreement on November 10, 2021, to allow automatic extensions of employment authorization for certain H-4 and L dependent spouses. Additionally, on November 12, 2021, U.S. Citizenship & Immigration Services (USCIS) issued a policy alert announcing that E visa dependent spouses will receive the same benefits of the settlement as L dependent spouses. The recent settlement in *Shergill et al. v. Mayorkas* is the latest in a string of class action lawsuits filed by H-4 and L-2 plaintiffs who have experienced gaps in employment authorization and resulting job loss. Although the relief is limited, the settlement has a potentially far-reaching impact, with an estimated working population of approximately 90,000 H-4 workers alone.

This comes as welcome news for E, H-4, and L dependent spouses who experience increasingly long wait times for renewal of Employment Authorization Documents (EADs). Recent immigration policies have resulted in employment eligibility gaps for many individuals relying on E, H-4, and L EADs. Previously, E, H-4, L, and corresponding EAD applications were adjudicated at the same time as the underlying E, H-1B, or L-1 petition. This provided a response in as little as 15 calendar days when premium processing was requested. Longstanding DHS regulations also instructed USCIS to adjudicate EAD applications within 90 days of receipt, resulting in timely adjudication of most applications. Beginning in 2017, EAD processing timelines began to increase significantly with the elimination of the 90-day processing guideline. Processing times further increased in 2019 when USCIS began collecting biometrics for E, H-4, and L dependent extension applicants. These changes resulted in ballooning processing times that have reached up to approximately one year for an EAD renewal. As EAD renewal applications can only be filed a maximum of six months prior to the EAD expiration date, this significant increase in processing time all but guaranteed a gap in employment authorization.

Effective immediately, the *Shergill* settlement and subsequent policy alert provide the following changes to the processing of E, H-4, and L dependent EAD renewals:

- H-4 spouses will receive an automatic EAD extension if they (1) filed an EAD renewal application before the expiration of their prior EAD, (2) are in valid H-4 status, and (3) will continue to have valid H-4 status beyond the EAD expiration date. The extension will continue until the end of the applicant's H-4 status, the approval or denial of the EAD renewal application, or 180 days from the expiration of the prior EAD—whichever is earlier.
- E and L spouses are employment authorized incident to status, meaning that a separate EAD will not be required. In cooperation with U.S. Customs and Border Protection (CBP), USCIS will reissue I-94s within 120 days noting that the I-94 holder is an E or L dependent spouse. The newly issued I-94 will then serve as a List C document for I-9 purposes.
- Until an E or L spouse receives a reissued I-94, automatic EAD extensions will be available where certain requirements are satisfied. These automatic extension policies mirror the duration and policies for H-4 automatic extensions, requiring that the applicant have a valid I-94 and that the EAD renewal application was timely filed.
- For I-9 purposes, employers of E, H-4, and L spouses may accept the following combination of documents: an unexpired or facially expired EAD, an I-765 receipt notice indicating that the renewal was filed before EAD expiration, and an unexpired I-94 showing valid E, H-4, or L status.

Although the *Shergill* settlement is good news for E, H-4, and L spouses and their employers, the policy changes are limited in scope and do not address the large number of E, H-4, and L spouses currently awaiting approval of their underlying E, H-4, or L status extensions. In order to benefit from the automatic extension of employment

authorization, the E, H-4, or L applicant would need to (1) have an approved application to extend E, H-4, or L status; (2) be in valid E, H-4, or L dependent status after recent travel abroad; or (3) depart the United States, apply for a visa stamp at a U.S. consulate or embassy abroad (if needed), and return in E, H-4, or L status. With processing times for E, H-4, and L dependent extension applications currently estimated at up to a year and a half, many individuals will still experience a significant employment gap before they are eligible to utilize the automatic extension of employment authorization. This will continue to result in many E, H-4, and L spouses facing a choice of either losing their jobs or traveling abroad during an ongoing pandemic in which visa appointment availability is severely backlogged. Other ongoing litigation may affect the E, H-4, and L visa dependent spouses who do not benefit from the recent *Shergill* settlement and subsequent policy alert.

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