

A Guide To DHS' Work-On-Arrival Policy For Visa Dependents

By **Andrew Greenfield** (March 1, 2022, 6:06 PM EST)

The U.S. Department of Homeland Security has implemented a new policy of annotating the arrival records of spouses of temporary foreign workers in the L and E visa categories, allowing these dependent spouses to work in the U.S. immediately upon entry.[1]

To avoid unlawful discrimination, U.S. employers should adjust their I-9 employment eligibility verification procedures, so that foreign-born spouses can demonstrate their U.S. work authorization by presenting a valid photo ID and an I-94 arrival record annotated to reflect their U.S. visa status as an E or L spouse.[2]



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Background

Congress amended the immigration laws in 2002 so that spouses of L-1 and E temporary workers could accept employment in the U.S.[3] While the revised statute gave the Immigration and Naturalization Service — now U.S. Citizenship and Immigration Services — discretion to grant immediate employment authorization to these spouses, the agency chose instead to require that they apply for and receive an employment authorization document before seeking employment.[4]

Over the past several years, it has taken USCIS increasingly longer to process employment authorization requests, in some cases over a year. In addition to facing delays in securing initial authorization, spouses of temporary workers often face gaps in employment authorization due to these protracted government adjudications when they are renewing their documents.

In November 2021, USCIS settled a lawsuit, *Shergill v. Mayorkas* in the U.S. District Court for the Western District of Washington, over these lengthy processing delays.[5]

As a result, the agency changed its policy and agreed to develop a procedure whereby L and E spouses would receive annotated arrival documents — known as I-94 records — to serve as evidence of their employment authorization, thus obviating the need for an employment authorization document.

In addition, USCIS agreed to automatically extend the validity of E and L employment authorization cards by 180 days, so dependents already in the U.S. are less likely to face gaps in employment authorization while USCIS processes requests for new cards.[6]

The new policy extending the validity of E and L employment authorization documents by 180 days went

into effect immediately. While helpful, the change has not been curative. Even with the extra six-month runway, USCIS processing delays are so lengthy that many E and L spouses still lose employment authorization — and employment — while waiting for agency renewals.

As for the government's promise to create a mechanism for spouses to become employment authorized upon arrival, U.S. Customs and Border Protection began implementing a new procedure on Jan. 31, whereby E and L spouses arriving in the U.S. receive an annotated I-94 arrival record, specifying their status as E and L spouses and thereby serving as evidence of U.S. employment authorization.[7]

Options for E and L Spouses Awaiting New or Renewed Documents

At the moment, CBP has not invited those already in the U.S. to request revised I-94 records unless they arrived after Jan. 31 and were mistakenly refused an annotated arrival record.

USCIS is also in the final stages of promulgating a final regulation that would allow foreign nationals to pay a fee to expedite the processing of their employment authorization document applications. In 2020, Congress mandated an expansion of USCIS' premium processing program that would allow the agency to charge a fee of up to \$1,500 in exchange for processing applications within 30 days.[8]

Once effective, this might provide relief to some E and L spouses in the U.S. whose need for a new or renewed document is not time sensitive.

Other E and L spouses who entered the U.S. without annotated I-94 arrival records before Jan. 31 and are waiting for new or renewed cards in order to commence or resume employment may also consider departing the U.S. in order to receive an annotated I-94 record upon reentry.

Those who choose this approach must bear in mind that it may take some time for officers across all U.S. ports of entry to be trained on the new guidance and annotation. Annotated I-94 records have however already been reported from several key international airports as well as some pre-flight inspection facilities overseas.

To mitigate risk, travelers should carry documentation confirming they are the spouse of an E or L principal, especially if they are traveling into the U.S. without their spouses.

This documentation includes a copy of the principal spouse's visa and I-94 record, as well as a copy of the couple's marriage certificate. In case border officers are unfamiliar with the new policy and annotations, E and L spouses may also wish to carry a copy of the policy alert issued by USCIS in November 2021 announcing its intention to treat E and L spouses as employment authorized upon arrival,[9] along with a copy of USCIS' confirmation, provided to the American Immigration Lawyers Association, that it began implementing the new policy and issuing annotated I-94 records on Jan. 31.[10]

Travelers should be polite and respectful, but proactive in identifying themselves to the inspecting officer as the spouse of an E or L visa holder. If a CBP officer is unfamiliar with the new guidance and does not issue the annotation, the traveler should ask to speak to a supervisor and present a copy of the guidance and announcements. After inspection, E and L spouses should check the CBP online I-94 site before leaving the secure immigration area to make sure that they have received the annotation, and return to CBP inspection for a correction if needed.[11]

Like all travelers to the U.S., E and L spouses should make sure they meet U.S. COVID-19 vaccination and testing requirements, as well as possess all necessary travel documents, including unexpired foreign passports containing valid L and E visa stamps.

Avoiding Citizenship Status Discrimination

Federal anti-discrimination laws generally prohibit employers from requiring employees to present specific documents during the I-9 employment verification process. Employees are free to choose from a list of documents, so long as the documents appear genuine on their face, relate to the employee, and are among the documents listed in Title 8 of the U.S. Code, Section 274B(a)(6) — i.e, a document from List A or a combination of documents from Lists B and C.[12]

Though DHS has not yet publicly announced specific I-9 instructions, employers should accept the new annotated I-94 records as List C documents for purposes of verifying employment authorization, assuming the documentation appears genuine and relates to the employee.[13]

Employers may need to revise their internal I-9 procedures to ensure that onboarding staff do not ask or require E or L spouses to present employment authorization cards if they instead choose to present an annotated I-94 record, along with a valid List B identity document such as a driver's license.

Employers should also note that in some cases the new annotation may appear on an I-797 approval notice issued by USCIS when it grants E or L visa status to a foreign national who is already in the U.S. and applying for a change of status. These annotated approval notices also serve as List C documents and should be accepted along with a valid photo ID as evidence of employment authorization.

Conclusion

The ability of E and L spouses to work immediately upon arrival is a positive development for these dependents and their families. It also solves a challenge many U.S. employers have faced in recruiting professional staff from overseas offices, as potential assignees are often reluctant to accept U.S.-based roles if their spouses will encounter long delays in securing work authorization.

Especially in the near term as the new policy is rolled out, E and L spouses should identify themselves as such at U.S. ports of entry, and carry documentation of the new policy and their relationship to the principal L-1 or E temporary worker to ensure border officers are familiar with and will affix the new annotation to their I-94 arrival records.

In addition, employers should update their I-9 employment verification procedures to reflect that E and L spouses may present an identity document and a properly annotated I-94 record in lieu of an employment authorization document as evidence their authorization to work in the U.S.

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[1] L-1 visas are issued to employees of multinational organizations who are being transferred from

foreign affiliates to work in the U.S. in executive, managerial, or specialized knowledge positions. See 8 USC § 1101(a)(15)(L) and 8 CFR § 214.2(l). Established by treaty, E visas include E-1 and E-2 visas, which are issued to managerial and key employees of certain foreign-owned U.S. businesses, and E-3 visas, which are issued to citizens of Australia sponsored to fill professional positions in the U.S. See 8 USC § 1101(a)(15)(E) and 8 CFR § 214.2(e).

[2] The new annotations will appear under the "Class of Admission" as "L-2S" "E-1S," "E-2S," or "E-3S."

[3] See Public Law 107-125, 115 Stat. 2403 (Jan. 16, 2002); 8 USC §§ 1184(c)(2)(E) and 1184(e)(2).

[4] William R. Yates, Deputy Executive Associate Commissioner, Immigration and Naturalization Service, "Guidance on Employment Authorization for E and L Nonimmigrant Spouses, and for Determinations on the Requisite Employment Abroad for L Blanket Petitions," available at American Immigration Lawyers Association (AILA) Doc. No. 02022832 (Feb. 22, 2002).

[5] Shergill, et al. v. Mayorkas, Case No. 21-cv-1296-RSM (W.D. Wash. Nov. 15, 2021).

[6] U.S. Citizenship and Immigration Services, "Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses," PA-2021-25 (Nov. 12, 2021), available at <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-EmploymentAuthorization.pdf>. The new policy also includes an automatic six-month employment-authorization-document extension for certain H-4 spouses, which is beyond the scope of this article.

[7] American Immigration Lawyers Association, "Practice Alert: Initial Updates on E and L Derivative Spouse Admission Codes," available at AILA Doc. No. 22020300 (Feb. 3, 2022). As stated above, the new annotations will appear under the "Class of Admission" as "L-2S," "E-1S," "E-2S," or "E-3S." E and L spouses may still apply for employment authorization documents, but it is no longer required.

[8] Section 4103 of the Emergency Stopgap USCIS Stabilization Act, Title I, Div. D of Public Law 116-159 (8 USC § 1103 note).

[9] See supra note 4.

[10] See supra note 5.

[11] Available at <https://i94.cbp.dhs.gov/i94/#/home>.

[12] See 8 USC § 274B(a)(6).

[13] See supra note 4 at 2.