

# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 274a

[BCIS No. 2152-01]

RIN 1615-AA63

### Employment Authorization Documents

**AGENCY:** Bureau of Citizenship and Immigration Services, DHS.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule amends Bureau of Citizenship and Immigration Services (BCIS) regulations governing issuance of Employment Authorization Documents (EADs). Through this rule, BCIS will now establish EAD validity periods based on certain criteria, including: The applicant's immigration status; general processing time for the underlying application or petition; required background checks and response times for background checks by other agencies, as necessary; other security considerations and factors as deemed appropriate by BCIS. BCIS will have discretion to modify EAD validity periods both for initial, renewal, and replacement cards. BCIS also will be able to establish EAD validity periods for classes of aliens and for individuals within those classes whose cases warrant a lesser validity period. The rule also removes current regulatory language limiting EAD validity periods to one-year increments for certain classes of aliens who are required to apply for employment authorization. Finally, the rule amends BCIS regulations to reflect that BCIS will issue EADs to aliens granted asylum by the Department of Justice, Executive Office of Immigration Review (EOIR), with validity periods of up to five years, unless otherwise appropriate.

**DATES:** *Effective date:* This rule is effective July 30, 2004.

*Comment date:* Written comments must be submitted on or before September 28, 2004.

**ADDRESSES:** Please submit written comments to the Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference BCIS No. 2152-01 in your correspondence. You may also submit comments electronically at: [rfs.regs@dhs.gov](mailto:rfs.regs@dhs.gov). When submitting comments electronically, you *must* include CIS No. 2152-01 in the subject box. Comments are available for public inspection at the above address by calling (202) 514-3291 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Mills, Residence and Status Services, Office of Program and Regulations Development, Bureau of Citizenship and Immigration Services, Department of Homeland Security, 425 "I" Street, NW., ULLICO Building, Third Floor, Washington, DC 20536, telephone (202) 514-4754.

#### SUPPLEMENTARY INFORMATION:

#### Who Is Affected by This Rule?

This interim rule affects aliens who are required to apply for employment authorization or, if employment authorized incident to immigration status, to apply for evidence of employment authorization. This interim rule also affects aliens who have been granted asylum by EOIR and wish to obtain evidence of employment authorization.

#### What Are the Current Requirements for EAD Issuance?

Under 8 CFR 274a.12(a), certain aliens are authorized employment incident to their immigration status (*e.g.*, lawful permanent residents, lawful temporary residents, parolees, aliens in Temporary Protected Status, etc.). Such aliens are eligible to work in the United States regardless of whether they receive an EAD. However, these aliens must apply to BCIS to receive an EAD evidencing their employment authorization. Under 8 CFR 274a.12(c), certain aliens are required to apply for employment authorization before they may begin to work in the U.S. (*e.g.*, students seeking to perform optical practical training, aliens with pending applications for adjustment of status, etc.). Such aliens

must apply to BCIS to receive an EAD authorizing them to work in the United States, as well as evidencing the fact that they are employment authorized.

With limited exceptions, most classes of aliens who are employment authorized under 8 CFR 274a.12(a) or 274a.12(c) are required to apply for employment authorization using the Form I-765, Application for Employment Authorization. If BCIS approves the Form I-765, it will issue an EAD. For certain categories, the current regulations specifically limit the EAD validity period to one-year increments. In all other instances, and with limited exceptions, BCIS through policy has set EAD validity periods at one year.

#### Why Is BCIS Removing the Current Regulatory and Policy Limitations on EAD Validity Periods?

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 BCIS 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 BCIS. This rule gives BCIS the discretion and flexibility to modify EAD validity periods for initial, renewal, and replacement cards. BCIS also will establish EAD validity periods for classes of aliens and will preserve the discretion to establish validity periods of varying lengths for individuals within those classes whose cases warrant a lesser validity period. BCIS will issue field guidance to ensure that adjudicators use standard criteria when exercising their discretion in establishing EAD validity periods.

For aliens who are employment authorized incident to status, BCIS does not contemplate issuing employment authorization documents that would expire only upon expiration of the alien's status. BCIS must reserve the right to periodically expire such documents and, where appropriate, issue new cards. This will allow BCIS to address any security concerns and to ensure the integrity of the EADs process by preventing fraud or misuse of such documents. BCIS intends to review all classes of aliens who are employment authorized to determine a general validity period for each class. For example, currently BCIS issues

permanent resident cards (Form I-551) with ten-year validity periods. Similarly, BCIS intends to issue EADs to asylees with a validity period of five years, unless otherwise appropriate. An expiration date on the card reflects only that the card must be renewed, not that the bearer's work authorization has expired.

#### **What Does This Rule Implement?**

This interim rule amends 8 CFR 274a.12(a) and (c) to eliminate provisions in the regulations that provide a maximum validity period for certain EADs. This rule also amends 8 CFR 274a.12(a)(5) to reflect that BCIS will issue initial EADs to aliens granted asylum by the EOIR with validity periods of up to five years, unless otherwise appropriate.

#### **Good Cause Exception**

The Department of Homeland Security (DHS) has determined that good cause exists under 5 U.S.C. 553(b)(B) and (d)(3) to make this rule effective July 30, 2004, for the following reasons: BCIS is modifying the regulations at 8 CFR 274a.12(a)(5) and 274a.13(a) to facilitate BCIS' immediate compliance with its statutory obligation under the Enhanced Border Security and Visa Entry Reform Act ("Border Security Act"), Pub. L. 107-173, 116 Stat. 543, 556-57; 8 U.S.C. 1158(c)(1)(B), which became effective in May 2002. The Border Security Act requires BCIS to provide asylees with initial evidence of employment authorization. BCIS also is removing the regulatory limitations on certain classes of one-year maximum validity periods to allow BCIS to set more flexible EAD periods. In certain instances, BCIS will be able to set validity periods for longer than one year, thereby benefiting the aliens and reducing BCIS workload associated with yearly EAD issuance. The delay in the implementation of this interim rule for consideration of public comments prior to the effective date of the rule will serve only to increase the current backlog of EAD applications. Accordingly, DHS finds that it would be impracticable and contrary to the public interest to delay the implementation of this rule to allow the prior notice and comment period normally required under 5 U.S.C. 553(b)(B) and (d)(3). DHS nevertheless invites written comments on this interim rule and will consider any timely comments in preparing a final rule.

#### **Regulatory Flexibility Act**

This rule will have a positive significant economic impact on a substantial number of small businesses

described in the Regulatory Flexibility Act at 5 U.S.C. 605.

With this rule, DHS addresses security concerns and improves BCIS efficiency by giving BCIS more flexibility in determining the appropriate validity period for EADs. Due to security concerns, DHS does not wish to have EADs issued with a validity period that is significantly longer than the immigration status or processing time of the application that the EAD is based upon. However, the validity period needs to be long enough to significantly lessen the burden created by the filing, adjudication, and issuance of EAD renewals. Removing this burden will allow BCIS to better focus its policy and resources upon improving the security and integrity of EADs and the security, integrity, and efficiency of BCIS application processes.

In accordance with the President's long-term goal of a standard BCIS application processing time of six months, this rule is forward-looking, giving BCIS the flexibility to lessen the validity period of affected EADs as BCIS processing times make progress toward and then reach the President's goal.

Considering all of these factors, DHS believes that a flexible validity period established by policy and taking into account security considerations, application processing times, and other factors is more appropriate than the inflexible validity periods contained in the regulatory provisions in place prior to this interim rule.

This change will decrease costs for affected applicants in so far as they will be required to pay the \$175 filing fee for the I-765, Application for Employment Authorization, in order to renew their EAD less frequently or, in some situations, not at all.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse

effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This rule is considered by DHS to be an economically significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review.

Obtaining and then presenting an EAD to an employer is how many aliens verify their identity and employment authorization as required by Form I-9, Employment Eligibility Verification. To obtain an EAD, an applicant must submit a Form I-765, Application for Employment Authorization Document, to the appropriate BCIS service center or district office, along with a \$175 fee or request for a fee waiver. The fee is necessary to comply with Public Law 100-459, which requires BCIS to prescribe and collect fees to recover the full cost of processing immigration and naturalization applications, petitions, and associated support benefits. An applicant who cannot afford to pay the fee may submit a fee waiver request by following the instructions in 8 CFR 103.7(c). Therefore, the cost of filing each EAD renewal application is approximately \$175.

This regulation removes regulatory provisions limiting the validity period for some EADs. At present, BCIS receives more than 950,000 Form I-765 applications for EAD renewal per year. The removal of the regulatory provisions limiting EADs to no more than one year of validity will have no effect by itself. However, there would be an economically significant benefit stemming from the projected BCIS policy change to a process where the validity period of these and certain other EAD categories are established based on based upon security concerns, the underlying application or status, and other appropriate factors.

This policy change would reduce the number of Form I-765 applications for EAD renewal in the future. BCIS cannot yet estimate the magnitude of this reduction because the policy change is still under development. However, BCIS does plan to compensate for the lack of a yearly EAD renewal application from affected aliens by ensuring that certain security and background checks are generally completed prior to issuance of EAD that is valid for more than one year.

**Executive Order 13132**

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**Executive Order 12988 Civil Justice Reform**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

**Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. However, as previously stated under Executive Order 12866, the DHS anticipates that as a result of this regulation there will be a reduction in the number of Form I-765 submissions. Accordingly, BCIS has submitted the Paperwork Reduction Change Worksheet (OMB-83C) to the OMB reflecting the reduction in burden hours for Form I-765 and the OMB has approved the changes.

**List of Subjects in 8 CFR Part 274a**

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

■ Accordingly, part 274a of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

**PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

■ 1. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

■ 2. Section 274a.12 is amended by:

- a. Revising the introductory text of paragraph (a);
- b. Revising paragraph (a)(5);
- c. Removing the last sentence in paragraph (a)(15);
- d. Revising paragraph (c);
- e. Removing the second sentence in paragraph (c)(9);

■ f. Removing the last sentence in paragraph (c)(10);

■ g. Removing the last sentence in paragraph (c)(16);

■ h. Removing the last sentence in paragraph (c)(20);

■ i. Removing the last sentence in paragraph (c)(24);

■ The revisions read as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(a) *Aliens authorized incident to status.* Pursuant to the statutory or regulatory reference cited, the following classes of aliens are 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 the Bureau of Citizenship and Immigration Services (BCIS) for a document evidencing such employment. BCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an alien's authorization to work in the United States.

\* \* \* \* \*

(5) An alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document, issued by BCIS to the alien. An expiration date on the employment authorization document issued by BCIS reflects only that the document must be renewed, and not that the bearer's work authorization has expired. Evidence of employment authorization shall be granted in increments not exceeding 5 years for the period of time the alien remains in that status.

\* \* \* \* \*

(c) *Aliens who must apply for employment authorization.* An alien within a class of aliens described in this section must apply for work authorization. If authorized, such an alien may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document. BCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.

Dated: July 20, 2004.

**Tom Ridge,**

*Secretary of Homeland Security.*

[FR Doc. 04-16938 Filed 7-29-04; 8:45 am]

BILLING CODE 4410-10-P

**SMALL BUSINESS ADMINISTRATION****13 CFR Part 121**

[Docket No. 04-10066]

RIN 3245-AE92

**Small Business Size Regulations; Correction**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule; correction of applicability date.

**SUMMARY:** The U.S. Small Business Administration (SBA) is correcting a final rule that appeared in the **Federal Register** of May 21, 2004 (69 FR 29192). The document amended the definitions of affiliation and employees and made procedural and technical amendments to cover several of SBA's programs.

**DATES:** *Effective Date:* The rule is effective on June 21, 2004.

*Applicability Date:* These amendments apply to all solicitations issued on or after June 21, 2004, as well as all applications for financial or other assistance pending as of or submitted to the SBA on or after June 21, 2004. The amendments will apply to all follow-on or contract renewals and size representations submitted as part of an order issued pursuant to a contract (if the Contracting Officer has reserved the order for small businesses and requested a size certification) on or after December 21, 2004. The amendments will apply to all novation and change-of-name agreements executed pursuant to FAR 42.12 on or after December 21, 2004. The SBA believes it is necessary to delay applicability of this rule for such situations because some novations may be in the progress of completion, but not yet completed at this time and this change in applicability date will not hinder the progress of such agreements.

**FOR FURTHER INFORMATION CONTACT:** Gary Jackson, Assistant Administrator, Office of Size Standards, (202) 205-6618, or [Gary.Jackson@sba.gov](mailto:Gary.Jackson@sba.gov).

**SUPPLEMENTARY INFORMATION:** In FR Doc 04-10066 appearing on page 29192 in the **Federal Register** of Friday, May 21, 2004, the SBA published a final rule amending its size regulations. In response to inquiries, SBA is issuing this notice to clarify application of the effective date, by modifying the