

Employment Authorization Extensions and Reverifications for DACA Beneficiaries

Question: Are DACA beneficiaries eligible for automatic employment authorization extensions pending the adjudication of their Employment Authorization Document, Form I-766 (EAD)?

Response & Analysis: No. Some DACA beneficiaries are eligible for an extension of their DACA status (and the employment authorization that comes along with it). This is different from the automatic employment authorization extensions that apply to other EADs and Forms I-94 pending adjudication of a renewal application.

BACKGROUND

DACA, short for “Deferred Action for Childhood Arrivals,” is an Obama-era program that allows certain individuals who are illegally present in the United States to avoid removal and work for a period of time. If approved, such individuals will receive an EAD which can be renewed.

There has been much litigation surrounding DACA, and in response the Biden Administration promulgated a rule formalizing the DACA program. On August 30, 2022, the rule became final and was scheduled to go into effect on **October 31, 2022**.¹ As of this writing, the DHS has been barred

¹ Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53737 (September 28, 2021) (available [here](#))



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from accepting new applications under the new DACA rule pending further litigation. This prohibition, however, does not impact extension eligibility below.

EFFECT ON EMPLOYERS

Importantly, the rule does not represent any departure from current Form I-9 practices for employers.

An EAD issued to a DACA beneficiary will bear category code C33.² Certain EADs, depending on the category code, may be extended while a renewal application is pending.³ Under previous iterations of the program, DACA beneficiaries were not eligible for such extensions, and the new regulation does not change that.⁴ In fact, the new regulation implies that, due to faster processing times for DACA EADs, no extension (either formal or informal) will be available. Further, the commentary to the new regulation states that, because work authorization is predicated on a favorable adjudication of the underlying DACA renewal application, an automatic extension while the DACA renewal is pending is impermissible under the current regulations.

TO EXTEND, OR NOT EXTEND?

As described above, DACA beneficiaries are *not* eligible for the 540 day automatic extension, but they *could* be currently eligible for an employment authorization extension of up to one year, provided:

- Their EAD showing category code C33 was issued on or after July 28, 2020, and
- They have a 797 Extension Notice (Sample Below) showing a one year extension of their deferred action and work authorization.⁵

² *Id.*

³ See 8 C.F.R. § 274a.13(d).

⁴ *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53152, 53242 (August 30, 2022) (available [here](#))

⁵ See [Completing Form I-9 for Employees with Extended Work Authorization under DACA | USCIS.](#)



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Sample: Form I-797 Extension Notice

As noted above, this extension may disappear at some point after the effective date of the new regulation. It is presumed that either USCIS will make an announcement that it is retiring the extension flow or it will simply stop issuing the 797 Extension Notices described above.

CONCLUSION

As always, employers should make a habit to familiarize themselves with all Form I-9 standards put in place by USCIS. For support in your Form I-9 completion process – including DACA-related nuances now that the program is formalized – please get in touch with your **BIG** Account Manager or Sales Executive. ■

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