

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](#))

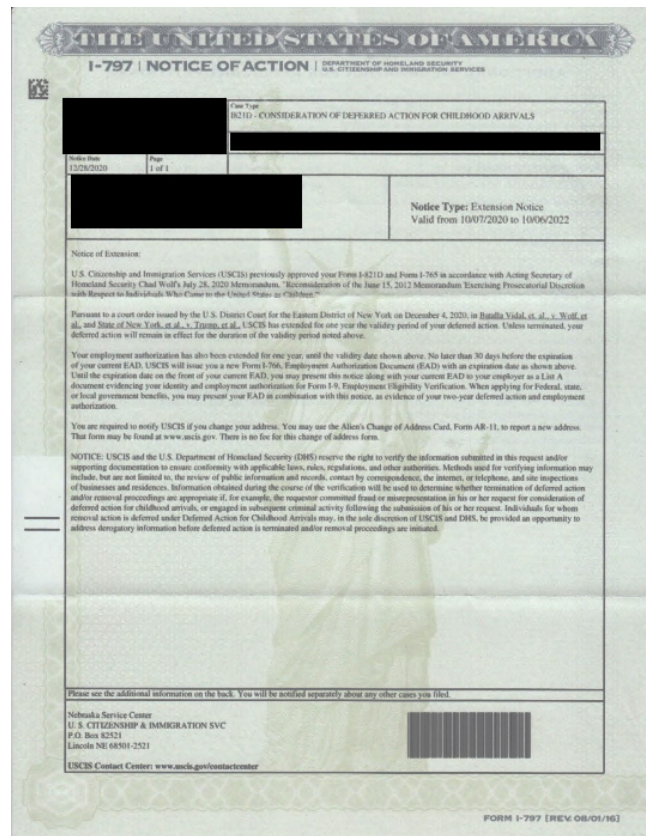
⁵ See [Completing Form I-9 for Employees with Extended Work Authorization under DACA | USCIS](#).

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THE UNITED STATES OF AMERICA
I-797 | NOTICE OF ACTION DEPARTMENT OF HOMELAND SECURITY
 U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Case Type: B21D - CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Notice Date: 12/29/2021 Page: 1 of 1

Notice Type: Extension Notice
 Valid from 10/07/2020 to 10/06/2022

Notice of Extension

U.S. Citizenship and Immigration Services (USCIS) previously approved your Form I-821D and Form I-765 in accordance with Acting Secretary of Homeland Security Chad Wolf's July 28, 2020 Memorandum, "Recommendation of the June 15, 2012 Memorandum Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."

Pursuant to a court order issued by the U.S. District Court for the Eastern District of New York on December 4, 2020, in *Butalla Yildiz, et al., v. Wolf, et al.*, and *State of New York, et al., v. Trump, et al.*, USCIS has extended for one year the validity period of your deferred action. Unless terminated, your deferred action will remain in effect for the duration of the validity period noted above.

Your employment authorization has also been extended for one year, until the validity date shown above. No later than 30 days before the expiration of your current EAD, USCIS will issue you a new Form I-766, Employment Authorization Document (EAD) with an expiration date as shown above. Until the expiration date on the front of your current EAD, you may present this notice along with your current EAD to your employer as a List A document evidencing your identity and employment authorization for Form I-9, Employment Eligibility Verification. When applying for Federal, state, or local government benefits, you may present your EAD in combination with this notice, as evidence of your two-year deferred action and employment authorization.

You are required to notify USCIS if you change your address. You may use the Alien's Change of Address Card, Form AR-11, to report a new address. That form may be found at www.uscis.gov. There is no fee for this change of address form.

NOTICE: USCIS and the U.S. Department of Homeland Security (DHS) reserve the right to verify the information submitted in this request and/or supporting documentation to ensure conformity with applicable laws, rules, regulations, and other authorities. Methods used for verifying information may include, but are not limited to, the review of public information and records, contact by correspondence, the internet, or telephone, and site inspections of businesses and residences. Information obtained during the course of the verification will be used to determine whether termination of deferred action and/or removal proceedings are appropriate. If, for example, the requestor committed fraud or misrepresentation in his or her request for consideration of deferred action for childhood arrivals, or engaged in subsequent criminal activity following the submission of his or her request, individuals for whom removal action is deferred under Deferred Action for Childhood Arrivals may, in the sole discretion of USCIS and DHS, be provided an opportunity to address derogatory information before deferred action is terminated and/or removal proceedings are initiated.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

Nebraska Service Center
 U. S. CITIZENSHIP & IMMIGRATION SVC
 P.O. Box 82521
 Lincoln NE 68501-2521

USCIS Contact Center: www.uscis.gov/contactcenter

FORM I-797 (REV. 08/01/16)

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 **Certiphi Screening** Account Manager or Sales Executive. ■

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