



Practice Pointer

Practice Pointer: Important Considerations and FAQs regarding the Compelling Circumstances EAD

By AILA's USCIS HQ (Benefits Policy) Committee¹

In November 2016, as part of the issuance of a [final rule](#) entitled “Retention of EB–1, EB–2, and EB–3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers” [commonly known as the “High-Skilled” Final Rule], USCIS amended its regulations to allow certain nonimmigrants with approved Form I-140 petitions to apply for an independent employment authorization document (EAD) provided the individual demonstrates “compelling circumstances.” This USCIS final rule became effective on January 17, 2017.

The following practice pointer addresses some frequently asked questions and important considerations regarding the compelling circumstances EAD. AILA members are encouraged to read 8 CFR §204.5(p) and the supplementary information accompanying the USCIS final rule, which discuss the compelling circumstances EAD in great detail.

How does a nonimmigrant qualify for a compelling circumstances EAD?

To qualify for a compelling circumstances EAD, the nonimmigrant must satisfy the following criteria, as set forth at 8 CFR §204.5(p):

1. be the principal beneficiary of an approved Form I-140 petition for classification under the EB-1, EB-2 or EB-3 visa categories;
2. be in the United States in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status, including in any applicable grace period, on the date the application for employment authorization (Form I-765) is filed;
3. establish that an immigrant visa is not authorized for issuance to the principal beneficiary based on his or her priority date, preference category, and country of chargeability according to the Final Action Date in effect according to the Department of State's Visa Bulletin on the date the application for employment authorization is filed; and
4. the principal beneficiary demonstrates compelling circumstances that, in the discretion of USCIS, justify an independent grant of employment authorization.

Note further that an individual will not be eligible for a compelling circumstances EAD, including renewal, if the individual has been convicted of any felony or two or more misdemeanors.

What constitutes compelling circumstances for purposes of qualifying for a compelling circumstances EAD?

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Compelling circumstances are generally situations outside a worker's control that warrant the DHS Secretary's exercise of discretion in granting employment authorization, on a case-by-case basis, given the totality of the circumstances. While USCIS did not define "compelling circumstances" in its final rule, it did provide some examples in the preamble to the final rule of situations that, depending on the totality of the circumstances, may be considered compelling and justify the need for employment authorization. The situations highlighted below are meant to be illustrative, as compelling circumstances will be decided on a case-by-case basis and may involve facts that vary from those provided below.

1. Serious illnesses or disability faced by the nonimmigrant worker or his or her dependent

In the final rule, USCIS states that,

"[t]he nonimmigrant worker can demonstrate that he or she, or his or her dependent, is facing a serious illness or disability that entails the worker moving to a different geographic area for treatment or otherwise substantially changing his or her employment circumstances. A move to another part of the country to ensure proper medical care is just one example of compelling circumstances resulting from a serious illness or disability of the principal beneficiary or his or her family member."

2. Employer retaliation against the nonimmigrant worker

Providing more detail about this illustrative example, USCIS states in the final rule that,

"The nonimmigrant worker can demonstrate that he or she is involved in a dispute regarding the employer's alleged illegal or dishonest conduct as evidenced by, for example, a complaint filed with a relevant government agency or court, and that the employer has taken retaliatory action that justifies granting separate employment authorization to the worker on a discretionary basis or that the dispute otherwise is shown to have created compelling circumstances."

3. Other substantial harm to the applicant; and

Describing this example in more detail, USCIS states in the final rule that,

"The nonimmigrant worker can demonstrate that due to compelling circumstances, he or she will be unable to timely extend or otherwise maintain status, or obtain another nonimmigrant status, and absent continued employment authorization under this proposal the applicant and his or her family would suffer substantial harm. In some situations, this showing might be tied to financial hardship facing the principal and his or her spouse and children. An example of such substantial harm may involve an H-1B nonimmigrant worker who has been applying an industry-specific skillset in a high-technology sector for years with a U.S. entity that is unexpectedly terminating its business, where the worker is able to establish that the same or a similar industry (e.g., nuclear energy, aeronautics, or artificial intelligence) does not materially exist in the home country.

"Another example might include a nonimmigrant worker whose return to his or her home country would cause significant hardship to the worker and his or her

family by resulting in a series of circumstances regarding the family being uprooted that in their totality, rise to the level of compelling circumstances.”

4. Significant disruption to the employer

Finally, when providing more details regarding the example, USCIS notes that

“The nonimmigrant worker can show that due to compelling circumstances, he or she is unexpectedly unable to timely extend or change status, there are no other possible avenues for the immediate employment of such worker with that employer, and the worker’s departure would cause the petitioning employer substantial disruption.”

Adjudicators will look at various factors, including all factors identified by the applicant, and may consider whether the evidence supports providing compelling circumstances employment authorization. DHS will not, however, consider a long wait for an immigrant visa to constitute a compelling circumstance *on its own*. Similarly, home ownership, notable academic qualifications, or dissatisfaction with a position or salary, *standing alone*, do not rise to the level of a compelling circumstance. Furthermore, an interest in entrepreneurship *standing alone* cannot support an employment authorization request based on compelling circumstances. However, any one of these situations could rise to the level of compelling circumstances in combination with other circumstances.

Beneficiaries of approved EB–2 National Interest Waiver petitions, which include national interest waiver beneficiaries as well as physicians working in medically underserved areas, are eligible to apply for employment authorization based on compelling circumstances, as long as they meet all other applicable eligibility requirements.

USCIS discusses the compelling circumstances criteria in more detail in the final rule [at pages 82428–82430](#). Members are encouraged to carefully review the final rule and the illustrative examples discussed when evaluating whether compelling circumstances exist for clients who are considering this immigration benefit.

What is the validity of a compelling circumstances EAD?

USCIS is authorized to issue a compelling circumstances EAD for up to one (1) year from the date of issuance, with the option to renew the EAD in 1-year increments.

What is the EAD category for individuals who are granted a compelling circumstances EAD?

Principal beneficiaries who receive an initial grant of employment authorization based on “compelling circumstances” (or a renewal of such employment authorization) will receive an EAD based on category (c)(35). Qualifying dependent spouses and children of a principal beneficiary granted employment authorization under category (c)(35) who apply for work authorization will receive EAD cards based on category (c)(36).

How does one renew a compelling circumstances EAD?

The applicant must file the application to renew his or her compelling circumstances EAD application prior to the expiration of his or her current employment authorization. Applicants must be in the United States when applying for the benefit.

In order to be eligible to renew the compelling circumstances EAD pursuant to 8 CFR §204.5(p)(3), the principal beneficiary must demonstrate that,

1. he or she continues to face compelling circumstances and establish that an immigrant visa is not authorized for issuance based on his or her priority date, preference category, and country of chargeability according to the Final Action Date in effect on the date the renewal application is submitted to USCIS; or
2. the difference between his or her priority date and the relevant Final Action Date is 1 year or less (eligibility does not require demonstrating compelling circumstances).

What is the immigration status of the principal worker who obtains a compelling circumstances EAD?

While individuals eligible for compelling circumstances EAD must have lawful nonimmigrant status at the time they apply, such individuals will generally lose that status once they engage in employment pursuant to the EAD. While such a foreign national will no longer be maintaining nonimmigrant status, he or she will generally not accrue unlawful presence during the validity period of the EAD or during the pendency of a timely filed and non-frivolous application.

USCIS indicates in its final rule that “USCIS intends to adjust its policy guidance to confirm that holders of compelling circumstances EADs will be considered to be in a period of authorized stay,” As the principal applicant’s authorized stay does not automatically extend to any dependent family members, dependents who require this authorized stay should apply for a compelling circumstances EAD under the dependent classification (i.e. (c)(36) applicant), as discussed below.

Is a compelling circumstances EAD applicant eligible to apply for adjustment of status?

An individual who is seeking lawful permanent residence based on classification as an employment-based immigrant is generally barred by INA §245(c)(2) and (c)(7) from applying for adjustment of status if he or she is not in lawful nonimmigrant status. Thus, a compelling circumstances EAD applicant who uses the EAD for work may be ineligible to apply for adjustment based on an employment-based immigrant classification unless an exception, such as INA §245(k), applies.²

May a compelling circumstances EAD applicant who needs to travel abroad for urgent humanitarian reasons or significant public benefit apply for advance parole?

While the preamble to the final rule suggests that DHS may consider granting advance parole for individuals with compelling circumstances EAD to travel for urgent humanitarian reasons or significant public benefit on a case-by-case basis, neither the regulation as set forth under the

² Specifically, INA 245(k) provides exemptions to INA 245(c)(2), (7), and (8) bars if the applicant has not failed to maintain a lawful status, engaged in unauthorized employment, or violated the terms and conditions of his or her admission for an aggregate period exceeding 180 days.

final rule, USCIS website on compelling circumstances EAD, nor Form I-131 instructions provide any guidance on this point. Accordingly, barring another basis for an advance parole, it is unclear whether a compelling circumstances EAD applicant may apply for an advance parole.

May the dependent spouse and children of the principal nonimmigrant worker apply for a compelling circumstances EAD?

Yes. The dependent spouse and children of the principal beneficiary may apply for a compelling circumstances EAD, provided they are in nonimmigrant status at the time the principal beneficiary applies for the employment authorization and provided that the principal beneficiary has been granted employment authorization and that work authorization has not been terminated or revoked. Such family members may apply for employment authorization concurrently with the principal beneficiary, but they cannot be granted employment authorization until the principal beneficiary has been granted work authorization. The validity period of employment authorization granted to the family members may not extend beyond the validity period of employment authorization granted to the principal beneficiary.

How does an individual submit a request for a compelling circumstances EAD?

To apply for a compelling circumstances EAD, an individual must file Form I-765, Application for Employment Authorization, with USCIS. Note that two identical two-by-two inch passport style color photographs of the applicant must be submitted with the application.

What documentation may a principal beneficiary submit to establish that the individual qualifies for a compelling circumstances EAD?

USCIS has provided a [list of evidence on its website](#) that can be submitted on behalf of a principal beneficiary to establish that the applicant qualifies for a compelling circumstances EAD under category (c)(35). The list of evidence on the USCIS website includes, but is not limited to, the following items listed below. Please note that this list is for reference only. AILA members are encouraged to review the final rule and the USCIS website prior to preparing and submitting a request for a compelling circumstances EAD.

To establish...	An applicant can submit....
E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status	A copy of the applicant's current Form I-797 approval notice for Form I-129, Petition for a Nonimmigrant Worker; or A copy of Form I-94, Arrival/Departure Record, showing admission as an E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant.

Identity	A government-issued identification document with photo, such as: • A copy of the biometric page of passport; • A birth certificate with photo ID; • A visa issued by a foreign consulate; or • A national identity document with photo.
That an immigrant visa is not authorized for issuance based on the individual's priority date, preference category, and country of chargeability according to the Final Action Date in effect on the date of filing the Form I-765	• A copy of an approval notice for Form I-140 filed for the principal beneficiary; or • Other evidence showing the priority date assigned to an approved Form I-140 filed for the principal beneficiary.
That compelling circumstances exist that justify USCIS using its discretion to issue you an independent grant of employment authorization	• Medical documentation to show the principal beneficiary or their dependents are facing a serious illness or disability; • Evidence that the employer has retaliated against the principal applicant; • Evidence of other substantial harm to the principal applicant; • Evidence of significant disruption to the employer; or • Other evidence that demonstrates the principal beneficiary is experiencing compelling circumstances.
That you have not been convicted of a felony or two misdemeanors	• Certified copies of all arrests reports, court dispositions, sentencing documents, and any other relevant documents.

What documentation may a dependent spouse or child of a principal beneficiary submit to establish that they qualify for a compelling circumstances EAD?

USCIS has provided a [list of evidence on its website](#) that can be submitted on behalf of the dependent spouse or child to establish that the applicant qualifies for a compelling circumstances EAD under category (c)(36). The list of evidence on the USCIS website includes, but is not limited to, the following items listed below. Please note that this list is for reference

only. AILA members are encouraged to review the final rule and the USCIS website prior to preparing and submitting a request for a compelling circumstances EAD to USCIS.

To establish...	An applicant can submit....
The applicant's nonimmigrant status at the time the principal beneficiary applies for (c)(35) employment authorization	• A copy of the dependent spouse or child's current Form I-797 approval notice for Form I-129, Petition for a Nonimmigrant Worker, or a copy of their current Form I-797 approval notice for Form I-539, Application to Extend/Change Nonimmigrant Status; or • A copy of Form I-94, Arrival/Departure Record, showing admission as a nonimmigrant.
Identity	A government-issued identification document with photo, such as: • A copy of the biometric page of passport; • A birth certificate with photo ID; • A visa issued by a foreign consulate; or • A national identity document with photo.
That the principal beneficiary has an approved Form I-765 under (c)(35) ³	• A copy of an approval notice for Form I-765 filed by the principal beneficiary; or • Other evidence showing the approved Form I-765 filed by the principal beneficiary.
That the applicant has not been convicted of a felony or two misdemeanors	• Certified copies of all arrest reports, court dispositions, sentencing documents, and any other relevant documents.
The applicant's relationship to the principal beneficiary	• A copy of marriage certificate, if applying as the spouse of the principal beneficiary with compelling circumstances, and, if applicable, copies of documents showing the legal termination of all other marriages by applicant or spouse.

³ 8 CFR §204.5(p)(3) also allows derivative family members to file a compelling circumstances EAD application concurrently with the principal applicant.

	• A copy of birth certificate, if applying as the child of the principal beneficiary with compelling circumstances.
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How long does it take for USCIS to process a compelling circumstances EAD?

Processing times for compelling circumstances EADs can vary greatly. Some members report waiting several months for a compelling circumstances EAD. While expedited processing can be requested, expedite requests are granted at the discretion of USCIS. As such, nonimmigrants who are seeking to take advantage of this immigration benefit should be apprised of the possibility that the benefit could take several months for USCIS to process.

Must the principal beneficiary wait for the EAD application to be approved before commencing work pursuant to the EAD?

Yes. An individual must receive the compelling circumstances EAD from USCIS before they can begin working under this employment authorization.

Is the renewal of a compelling circumstances EAD eligible for auto extension?

No. The compelling circumstances EAD is not classified as an EAD eligible for automatic extension while a timely filed renewal application is pending.

What is the success rate of compelling circumstances EADs?

Based on information AILA has received from members regarding compelling circumstances EAD adjudications, it appears that the adjudication standard for this immigration benefit is very rigorous, with relatively few approvals being reported to AILA.

AILA's USCIS HQ Committee has requested USCIS to provide data demonstrating the volume of compelling circumstances EAD requests since 2017, the approval rate and the denial rate, to better understand the adjudication trends regarding this immigration benefit.

How can AILA members learn from other members about their experience obtaining compelling circumstances EADs?

In order to better understand USCIS adjudication trends regarding this immigration benefit, AILA's USCIS HQ (Benefits Policy) Committee would welcome hearing from members regarding their experience filing for a compelling circumstance EAD, in particular whether or not the request was successful and the compelling circumstance(s) at issue (e.g., medical emergency, layoff, humanitarian issue, etc.). AILA intends to compile the adjudication trends reported by AILA members and update this practice pointer accordingly with a summary of the reports provided.

To share your experience with AILA regarding filing for a compelling circumstances EAD, please submit your experience through the AILA USCIS HQ Committee's [webpage](#) under the "Report a Trend" feature.