



# GMS Flash Alert

## Immigration Edition

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# United States – Issuing EADs Based on Compelling Circumstances

On June 14, 2023, the U.S. Citizenship and Immigration Services (USCIS) issued guidance in its “Policy Manual” regarding eligibility criteria for initial and renewal applications for Employment Authorization Documents (EADs) in compelling circumstances based on existing regulatory requirements at 8 CFR 204.5(p).<sup>1</sup>

## WHY THIS MATTERS

Foreign nationals in the United States must have employment authorization to lawfully engage in employment. While employers work closely with foreign nationals to secure non-immigrant visas on their behalf to secure employment authorization, there may be situations where additional protection is required. Compelling circumstances EADs are a temporary measure to address the difficult circumstances individuals face when their work authorization is interrupted.

USCIS’s announcement clarifies the eligibility requirements for compelling circumstance EADs. Applicants should remember that this provision is temporary and provides relief in emergency situations only. The compelling circumstances EAD provides an authorized stay and work authorization; however, it does not provide status. To move back to a valid immigration status or to file an I-485 *Application to Adjust Status*, additional steps like traveling outside the U.S. are necessary.

The guidance by the USCIS has an immediate effect and will be applied to petitions prospectively as long as they were filed on or after June 14, 2023.

## KPMG INSIGHTS

While compelling circumstances EADs are not a new remedy available to non-immigrants, the updated guidance serves as a reminder to work closely with immigration counsel to determine whether a compelling circumstance EAD may

## KPMG INSIGHTS continued

benefit an individual's specific situation especially when more traditional remedies are not available. The policy manual also highlights the importance of submitting supporting evidence to demonstrate compelling circumstances to receive a favorable decision in the adjudication of a compelling circumstance EAD.

The guidance does not fundamentally alter the compelling circumstance EAD, but perhaps the release of the guidance signals USCIS increased willingness to grant more of these applications. Previously USCIS used a strict measure in determining whether a situation was substantially compelling to take action. The Immigration team with KPMG Law LLP in Canada is hopeful that USCIS will be more willing to consider a variety of factors in reviewing these cases.

We will closely track whether these cases are more successful in the upcoming months.

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## Eligibility Requirements

An applicant (employment-based immigrant) for an EAD to be granted based on compelling circumstances must remember that it is within USCIS's discretion to determine if compelling circumstances are sufficient and for an exercise of its discretion to grant the EAD.

The eligibility requirements for the EAD issued under compelling circumstances are as follows:<sup>2</sup>

- The principal applicant is the principal beneficiary of an approved Form I-140, *Immigrant Petition for Alien Workers*, in either the 1st, 2nd, or 3rd employment-based preference category;
- The principal applicant is in valid E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status or authorized grace period when he or she files the Form I-765, *Application for Employment Authorization*;
- The principal applicant has not filed an adjustment-of-status application;
- An immigrant visa is not available to the principal applicant based on the applicant's priority date according to the relevant Final Action Date in the U.S. Department of State's Visa Bulletin in effect when he or she files Form I-765;
- The applicant and his or her dependents provide biometrics as required;
- The applicant and his or her dependents have not been convicted of a felony or two or more misdemeanors; and
- USCIS determines, as a matter of discretion, that the principal applicant demonstrates compelling circumstances that justify the issuance of the employment authorization.

The compelling circumstances that must exist for principal applicants and their dependents are not defined by USCIS and those provided in the Policy Manual are non-exhaustive, but may include some of the following:<sup>3</sup>

- **Serious illness and disability** facing a principal applicant or his/her dependent and preventing such person from continuing previously approved employment or requiring such person to move to a different part of the U.S., for example. Evidence (such as medical records) is beneficial for a successful application under this circumstance.
- **Employer dispute or retaliation:** Principal applicant faces a dispute as a result of an employer's illegal or abusive conduct. Retaliation is not limited to termination of employment but may involve harassment, etc. Evidence –

such as communication with the employer, legal filings – is beneficial for a successful application under this circumstance.

- **Substantial harm to the applicant:** Principal applicant is unable to extend his/her underlying status or change that status and would suffer substantial harm as a result. Such harm includes, but is not limited to, financial harm or inability to return to the home country due to conditions there. Demonstrating financial harm beyond job loss is often required to establish compelling circumstances. Evidence – such as financial records, bona fide cost estimates, and documentation pertaining to home-country conditions – is beneficial for a successful application under this circumstance.
- **Significant disruption to the employer:** Due to the principal applicant's specific knowledge and expertise, the employer's projects would be negatively affected and would suffer significant monetary loss or disruption should the employee not be permitted to continue his/her employment. Demonstrating disruption beyond unemployment or job loss is often required to establish compelling circumstances, indicating that the hardship is truly excessive. Evidence – such as lengthy time spent in the U.S., housing costs, and young children for example, coupled with the job loss – is often required for a successful application.

## Validity and Period of Stay

Initial employment authorization on an EAD issued under compelling circumstances will be for up to one (1) year, and subsequent extensions will be issued in up to one (1) year increments. When seeking an extension of an EAD issued under compelling circumstances, the applicant (and/or dependent(s)) need not be in valid nonimmigrant status. However, such EADs are not eligible for automatic extensions.

The period of stay in which the EAD is pending and subsequently approved is not considered to be a “nonimmigrant” status, but rather a period of authorized stay by the Secretary of Homeland Security. Thus, an applicant will not accrue unlawful presence during that time but may be ineligible for a change or adjustment of status because he or she does not maintain a lawful status. Nonetheless, the individual may still leave the U.S. to apply for an immigrant or nonimmigrant visa at a consular post abroad if needed without triggering the unlawful presence grounds for inadmissibility.

## Dependents

Spouses and children of the principal EAD applicant may also receive EADs provided that each meets the compelling circumstances and filing requirements, and that the relationship with the principal be in existence both at the time of filing and adjudication. The dependents' applications may be filed concurrently with the principal's application. However, the principal's application must be adjudicated first and be approved, and the EAD validity period of the dependents may not exceed that of the principal.

Dependent applicants must provide biometrics and not be convicted of a felony or two or more misdemeanors, just as the principal applicant.

## FOOTNOTES:

1 USCIS, [“Policy Alert: Employment Authorization Documents Based on Compelling Circumstances”](#) (June 14, 2023).

2 Ibid.

3 Ibid.

## Contact us

For additional information or assistance, please contact your local GMS or People Services professional\* or one of the following professionals with the KPMG International member firm in Canada:



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*\* Please note the KPMG International member firm in the United States does not provide immigration or labor law services. However, KPMG Law LLP in Canada can assist clients with U.S. immigration matters.*

**The information contained in this newsletter was submitted by the KPMG International member firm in Canada.**

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