

UPDATE: I-94s for Workers Authorized "Incident to Status" Causing Problems for Spouses of E and L Visa Holders in the U.S.



Immigration Blog

By [Elizabeth M. Klarin](#)

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Our office is issuing a warning to workers who are in the U.S. and work authorized “incident to status”—including E-1S, E-2S, E-3S and L-2S workers—that they may encounter issues with their employment through U.S. companies, if their I-94 Arrival/Departure record does not show “S” as part of their status designation.

Yesterday, I received notification from a spouse of an E-2 visa holder—who was admitted to the U.S. as a spouse also in E-2 status, but whose I-94 does not specifically say “E2S”—that she was being terminated by her (major multinational corporate) employer, because they cannot properly verify that she is employment authorized. The company was unable to employ her despite her authorized E-2 status because her I-94 Arrival/Departure Record issued by Customs and Border Protection (CBP) upon her most recent entry to the U.S. did not include the “S” after “E2”, where it notes her status.

While initially and for some time in 2022 and beyond, CBP was correctly issuing I-94s that included the “S”

designation, it appears that this has stopped for the most part, with nonimmigrant spouses in these categories largely being admitted in simple “E1”, “E2” or, “L2” status. The “S” designation does appear to be required by Department of Homeland Security in order to verify an E or L nonimmigrant spouse’s work authorized status, for I-9 verification purposes.

While USCIS specifically states on its website that spouses of E-1, E-2, E-3 and L-1 workers in valid status are considered employment authorized incident to status” and do not need to apply for or present a separate Employment Authorization Document in order to work in the U.S., it appears that the “S” designation is necessary in order for employers to confirm that their employees are, in fact, work authorized, according to I-9 Employment Eligibility Verification rules. Specifically, the USCIS Handbook for Employers (M-274) states:

“The nonimmigrant employee of a treaty trader is admitted in E-1 status, and the employee of a treaty investor is admitted in E-2 status. Certain E nonimmigrant spouses are employment authorized incident to status. As of January 30, 2022, with limited exceptions noted below, these spouses [should] receive a Form I-94, Arrival/Departure Record with a Class of Admission (COA) of E-1S, E-2S or E-3S when they are admitted into the U.S. or if USCIS approves their application for extension or change of status as an E nonimmigrant spouse. Prior to January 30, 2022, these E nonimmigrant spouses received Forms I-94 with a COA of E-1, E-2, E-3, E-3D, or E-3R.”

Likewise, it is acknowledged on the USCIS website here that “The [correct] designations for E nonimmigrant spouses are E-1S, E-2S, E-3S, and L-2S for nonimmigrant L spouses. Forms I-94 containing these code designations are acceptable as a List C, #7 Employment Authorization Document issued by the Department of Homeland Security” for I-9 employment verification purposes.”

Employers are especially eager to remain compliant with I-9 regulatory requirements for verifying work eligibility of all employees in today’s heightened enforcement environment. As such, a properly issued I-94 containing the “S” designation has become a critical document for these spouses, in order for them to be permitted to work or continue to work in the U.S. incident to their status (without having to obtain separate proof of this work authorization).

What Can I Do?

If you are a spouse of an E or L visa/status holder, please check your online I-94 at CBP’s I-94 website after each and every entry to confirm that you have been admitted in the correct status (including the “S”). If you have not been, please find your nearest CBP Deferred Inspection site, and call or email them per the instructions on the linked webpage to request a correction to your I-94. If the port where you entered has a Deferred Inspection site, please reach out to that location; if not, or if the port where you entered is not responding, please reach out to the Deferred Inspection site closest to where you live or are traveling to in the U.S.

Both E and L nonimmigrant dependent spouses who wish to avoid having to check (and possibly continuously request an amendment to) their I-94 can also apply for an Employment Authorization Document (EAD) through DHS by properly filing an Application for Employment Authorization (Form I-765) with the appropriate fee. The EAD may be presented as a List A document for Form I-9 completion. Under certain circumstances, EADs may be automatically extended.

If you have questions or concerns, please reach out to a qualified U.S. immigration professional. Our Immigration

Practice Team at Lippes Mathias LLP stands ready to assist. Please contact Elizabeth M. Klarin (eklarin@lippes.com) or Eileen M. Martin (emartin@lippes.com) with any questions.

Related Team



Elizabeth M. Klarin
Partner



Eileen M. Martin
Partner | Team Co-
Leader - Immigration
| Team Leader -
Canada-U.S. Cross
Border

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