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Seyfarth Synopsis: *This is the second installment in a series of recommendations to the Biden Administration on immigration reform previously published by the Cato Institute in "Deregulating Legal Immigration: A Blueprint for Agency Action." Read the first installment here. A total of five installments will be published on a weekly basis. Please stay tuned for additional updates.*

Let L-2 and E Spouses Work without an Employment Authorization Document

USCIS should expressly authorize employment for L-2 and E spouses without requiring the spouse to apply for an employment authorization document.

The L-1 visa category allows multinational companies to transfer certain skilled foreign employees to the United States, such as managers, executives, and skilled workers with specialized knowledge. The E visa allows similar categories of foreign nationals from countries where the United States has "a treaty of commerce and navigation" to carry out substantial trade (E-1), develop and direct the operations of a business (E-2), or perform services in a specialty occupation if from Australia (E-3). The law entitles the spouses of these workers to derivative status,[i] and it requires that USCIS "authorize the alien spouse to engage in employment in the United States and provide the spouse with an 'employment authorized' endorsement or other appropriate work permit."[ii]

This statute clearly requires that, while USCIS must separately issue a "work permit," the agency must authorize E and L-2 spouses to work whenever they are in the United States without such a permit. The Social Security Administration (SSA) recognizes their eligibility for employment incident status—that is, based on their admission as an L-2 or E spouse. SSA issues a Social Security card "valid for work only with specific DHS authorization."[iii] An admission stamp entered into the passport of an E or L-2 spouse with a handwritten notation showing a period of authorized stay by a DHS border inspector should suffice as a DHS authorization.[iv]

USCIS seems also to adopt the view that E or L-2 employment is authorized as an inherent attribute of spousal derivative status. Its approval notices for L-2 and E spouses refer to USCIS's regulation that lists noncitizens authorized to accept employment "incident to status."[v] Yet the regulation itself does not actually include L-2 or E spouses.[vi] Moreover, USCIS's Handbook for Employers (M-274) implies that L-2 and E spousal status does not suffice to prove employment authorization.[vii] USCIS should modify its regulations so that individuals are authorized for employment based on their spousal relationship and thus do not appear to violate their status or lose eligibility to change or adjust their status by working as the statute allows.

Agency action is also necessary because as long as the USCIS's M-274 Handbook for Employers is left unchanged, the Justice Department's Immigrant and Employee Rights (IER) unit could penalize employers who follow it.[viii] Employers that decline to accept an unexpired foreign passport containing an L-2 or E dependent's entry stamp issued by DHS would be engaging in "unfair documentary practices" related to verifying the employment eligibility of employees. The IER states that "when verifying a workers' employment authorization, employers … are not allowed to demand more or different documents than necessary" to verify identity and employment eligibility.[ix] With the backing of SSA's interpretation, L-2 or E derivative spouses would have a claim of unfair documentary practices if an employer rejected them for failing to produce a USCIS employment authorization document. Thus, by policy memorandum and later by regulation, USCIS should conform its interpretation to that of the SSA and explicitly provide L-2 and E spouses employment authorization incident to their status.

[i] **8 USC § 1101(a)(15)(E), (L)** (2018)(All hyperlinks in the endnotes last visited on April 28, 2021).

[ii] **8 USC § 1184(c)(2)(E)**; and **8 USC § 1184(e)(2)** (2018).

[iii] Social Security Administration, "**Program Operations Manual System (POMS)—Policy For Non-Immigrant Employment Authorization**," RM 10211.420.

[iv] Border inspectors are part of U.S. Customs and Border Protection (CBP), which is a component of DHS.

[v] When USCIS issues work permits to L-2 and E spouses, it annotates the approval with a code, "A17" (for E nonimmigrant spouses) or "A18" (for L-2 spouses)—two reserved sections of **8 CFR § 274a.12(a)** (2019) applicable to classes of noncitizens authorized to accept "employment incident to status."

[vi] **8 CFR § 274a.12(a)** (2019).

[vii] U.S. Citizenship and Immigration Services, "**12.0 Acceptable Documents for Verifying Employment Authorization and Identity**." The M-274 does not explain what an employer should do if the prospective employee presents a List B driver's license and a Social Security number card stating that it is valid for work only with DHS authorization, and the employee also presents DHS authorization in the form of a CBP-issued L-2 admission stamp in his or her passport.

[viii] **8 USC § 1324b(a)(6)** (2018).

[ix] Immigrant and Employee Rights Section, "**Types of Discrimination**," Department of Justice.