

## Completing Form I-9 for Certain Dependent Spouses

**Question:** What documents can I use to complete Form I-9 for an employee who is in E-1S, E-2S, E-3S, or L-2S status (for dependent spouses)?

**Answer:** Individuals in E-1S, E-2S, E-3S, or L-2S status may complete Form I-9 by using an Employment Authorization Document (EAD, or Form I-766), or a combination of a List B identity document and a List C document (the Form I-94).

### Analysis:

Historically, United States Citizenship and Immigration Services (USCIS) (and by extension, legacy INS), did not consider individuals in E-1S, E-2S, E-3S, or L-2S status as authorized to work because of to their status in the United States, despite legal authority to the contrary.

This meant that these individuals had to apply for an EAD to begin work in the United States. In 2021, a group of noncitizens filed a lawsuit over this practice. In November 2021, USCIS settled the matter, agreeing that individuals in these “S” statuses are work authorized.<sup>1</sup> As such, individuals in E-1S, E-2S, E-3S, or L-2S status could use their Form I-94, coupled with a List B identity document, to satisfy Form I-9 requirements.

In January 2022, Customs and Border Protection (CBP) began issuing updated Forms I-94 for E-1S, E-2S, E-3S, or L-2S dependent spouses with the “S” notation. On March 18,

<sup>1</sup> The Settlement Agreement can be found [here](#).



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2022,<sup>2</sup> USCIS released guidance on completing Form I-9 for these individuals, stating that either an EAD, or List B and C combination (with the Form I-94 as the List C document), are acceptable document combinations for these individuals. USCIS specified that Forms I-94 listing E-1S, E-2S, E-3S, or L-2S status *were the only* acceptable List C documents for this status. This is ostensibly because the List A foreign passport and Form I-94 document combination only pertain to nonimmigrants who derive their work authorization *because their employer petitioned for them*.

For example, individuals present on an H-1B, L-1, or E visa may only work for the employer who petitioned for them. Therefore, *these* are the individuals who are able to use the List A foreign passport and Form I-94 combination.<sup>3</sup>

This restriction presents two issues. First, the delay in EAD processing is several months long.<sup>4</sup> Second, many recently arrived nonimmigrants in E-1S, E-2S, E-3S, or L-2S status lack an acceptable List B document. This means that many times individuals must *apply* for an identity document before they can satisfy Form I-9 requirements. This is proving to be an issue nationwide, as organizations struggle to adapt to the new rules while employees grapple with the inability to work.

While attempts to get USCIS to loosen the rule have been unsuccessful, **Certiphi Screening** wanted to highlight that temporary or interim state-issued driver's licenses that include a photo or certain biographical details *are* acceptable as a List B document.<sup>5</sup> Each state is different, but California,

<sup>2</sup> The guidance can be found [here](#).

<sup>3</sup> Both the [List of Acceptable Documents](#) and the [implementing regulations](#) (at 8 C.F.R. § 274a.(b)(1)(v)(A)(5)) specify that the List A combination only applies to individuals who are work authorized incident to status with a specific employer.

<sup>4</sup> These delays were so great that they prompted USCIS to increase the automatic extension period for timely filed EAD renewals from 180 days to 540 days, as detailed [here](#).

<sup>5</sup> As outlined in the "List B Documents – Identity" section found [here](#).

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New York, New Jersey, and Pennsylvania (among many others) issue such documents. Providing the license meets the aforementioned criteria and any conditions are met (i.e. that if the state requires the document to be presented with the original license), this constitutes a valid List B document. Furthermore, the document is deemed valid until the expiration date printed on the temporary/interim document.

**Certiphi Screening** has also noticed a trend of individuals attempting to use receipts for the initial driver's license application to satisfy Form I-9 requirements. This is not an acceptable combination. As stated by USCIS and indicated by the regulations, only the receipt for an application to replace a lost, stolen, or damaged document is acceptable.<sup>6</sup>

**Certiphi Screening** is aware of the confusion and hardship the USCIS's rule regarding E-1S, E-2S, E-3S, or L-2S dependent spouses presents to clients. We are committed to supporting our clients through these rule modifications and will continue to publish any and all updates issued by USCIS. ■



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<sup>6</sup> Form M-274 outlines the rule [here](#), while the implementing regulation can be found [here](#) (at 8 C.F.R. § 274.a(b)(1)(vi)).