

E-3 Visas and Navigating the Impact of COVID-19: A Guide for E-3 visa holders

Please note, the information provided below is specifically for E-3 visa holders. If you are an employer of an E-3 visa holder, please refer to the information sheet provided specifically for employers.

Guidance for E-3 visa holders affected by COVID-19

Being on an E-3 visa in the US right now can feel scary. Not having a plan in place for managing this situation is what underlies that sense of fear. We are here to guide you and reassure you. There is a solution, even if temporary, for everyone. If you are worried you will need to leave the country but do not want to, we can help keep you remain here in legal status. If you are worried because you were unable, or cannot leave, to renew or apply for a visa, we can help you too. Below is some guidance to address the main questions and concerns we have received from our clients on an E-3 visa.

My visa is expiring; or I need to apply for a new E-3 visa with a new employer; or my visa appointment abroad got cancelled. I am still in the US and I cannot leave the US due to travel and quarantine restrictions – what do I do?

If your visa is expiring, you are in the US and you are renewing your E-3 with the same employer, you can renew your E-3 from within the US by filing an extension petition with USCIS. You will automatically be granted a continuation of authorized employment for a period of up to 240 days. Your petition should be adjudicated within that time. This means that you can continue working for your employer even after your visa expires and before the approval of the extension is received.

If you wish to change to a new employer, you can file a change of employer petition within the US, but unfortunately you are NOT allowed to start working for the new employer until the petition is approved. Currently these petitions are taking 2.5 – 4 months to be adjudicated and premium processing (asking to pay for expedited adjudication) is not available for E-3 petitions. If you are in this situation, please contact our office and we can navigate options to try to get you working for the new employer sooner rather than later. If your previous visa is about to expire and you are not in a position to leave to consular process (as is the case currently) then you may opt to file a change of employer petition with USCIS in the US as a means to keep you in the country until you can leave the US to consular process your application (if your USCIS petition is not adjudicated beforehand). Again, this is something our office can strategize with you and help you navigate.

My I-94 expires long after my E-3 visa and LCA expiry date – does this allow me to stay and continue working?

The I-94 expiry date for E-3 visa holders should match the LCA end date attached to that visa. You will notice more recent E-3 visas now have the LCA number and end date annotated on the visa itself. Earlier E-3 visas did not annotate the LCA end date – for those E-3 visas the correct I-94 is supposed to match the end date of the visa. However, what we have seen happen, is I-94's with expiry dates that are two years from the last date of admission to the US after international travel. This is not proper practice,

CAMMISA MARKEL

however, many CBP Officers confuse the rules associated with the E1 and E2 visas (which require an I-94 to expire 2 years from the date of admission to the US) with the rules of the E-3 visa (I-94 should match LCA expiry date). Where this occurs, CBP Officers are inadvertently (or unknowingly) applying the E-1 and E-2 rules pertaining to the I-94 to the E-3 visa holder.

You are only authorized to work on your E-3 in the US as long as your I-94 and LCA are valid. This means that, in a situation where your I-94 exceeds your LCA, your authorization to work ends when your LCA expires.

Clients have asked if they can just file a new LCA in that instance to extend the period of work authorization. The true answer to this question is that it is a grey area. There is no specific regulation or rule that states that this is ok. At the same time, the *Foreign Affairs Manual* guides the consular officers that when there are multiple LCA's each one needs to be adjudicated on its own merits and the multiple LCA numbers and dates need to be annotated on the visa. Additionally, the E-3 visa was modeled on the H-1B visa. The H-1B specifically requires a new petition to be filed with USCIS containing the new LCA. Both of these instances would point to a conclusion that it likely is not ok to just file a new LCA. Others argue that since only status (as provided by an I-94) and a valid LCA are required, then the extended I-94 and a new LCA may suffice.

Given there are no regulations or guidance from USCIS on this matter, I have been advising clients that the most prudent and correct thing to do is to renew the visa (either by filing a petition with USCIS or via consular processing a new E-3 visa application) by the LCA expiry date. We have used an LCA for "bridging" purposes for some clients but only for a short enough period that it would not affect a subsequent visa application should USCIS determine that it definitively is not allowed to simply file a new LCA. This situation should be carefully navigated and strategized with our firm or with another immigration attorney.

I'm getting terminated or laid off. What are my options?

The first thing you need to do is check the expiry dates of the following documents: your visa, your I-94 and your LCA. If you have more than 60 days remaining on your I-94 from the date that you stop working, then you will have access to a full 60-day grace period to be able to remain in the US. Within that 60 day period, you can apply for a visa with a new employer (either by filing with USCIS in the US or by traveling abroad once the travel restrictions are lifted) or you can apply to USCIS in the US to change status to B2 tourist status or another status to remain in the US. If you do not pursue one of these options, then you must leave the US by the end date of your 60-day grace period.

If your I-94 expires before 60 days, then you must leave the US (or file an application for extension of stay or change of status with USCIS) by your I-94 end date. It is important to always remember your I-94 trumps everything else: your visa end date, your LCA end date, and your 60-day grace period. You must always leave (or file an extension of stay or change of status) by your I-94 end date, regardless of the end dates of those other documents. I cannot stress this enough.

Ask your company if there is a chance of being rehired within 60 days. If so, then technically you have a 60-day grace period between being terminated and getting re-hired (even if that re-hire is with your previous employer). We can guide you and your employer on the actions required on your LCA and I-9

CAMMISA MARKEL

paperwork to document this accurately so that your employer is compliant and your E-3 visa will not be affected and you can remain in the US.

If there is no chance of being rehired in 60 days, then you must ask yourself whether you want to leave the US or try to remain longer.

If you want to leave the US, then you must leave by the 60th day in order to avoid future visa applications being jeopardized.

If you want to stay in the US, then your options include:

- A) Finding a new employer who can prepare your new visa paperwork within the 60-day grace period. In this situation you would apply for your new E-3 visa by or before that 60th day by either consular processing at a US consulate abroad or, if international travel is still restricted in 60 days from now, by filing a change of employer petition from within the US; or
- B) If you have not found a new employer then there is the option of filing an application with USCIS to change your status to tourist status. This option allows you to request up to an additional 6 month stay in the US as a tourist. Note that you cannot work during that period and you cannot leave and re-enter the US during this period. Our office can assist you with this option so as to ensure a filing that will not jeopardize any future visa application.

Can my employer pause my pay; or can I take unpaid leave?

Unpaid leave, pause in pay, furlough or "benching " is not allowed under the E-3 visa because your employer is obligated by the LCA to pay the rate as specified in the LCA attached to your visa.

There are certain circumstances when a pause in pay is allowed but only when it is at your request, not your employer's request. These circumstances are when a situation not related to work would prevent you from being able to do your duties properly, such as maternity leave, an accident, or you want to take unpaid leave after your paid leave to extend a holiday, pursuant to company policy. It seems that COVID-19 is not a reason you can request unpaid leave.

What are alternatives to unpaid leave?

Your employer could terminate you and then rehire you 60 days later.

If your employer cannot rehire you then just before you come to the end of your 60 day grace period (or I-94 end date, whichever is sooner), you can apply to change status to B2 status from within the US. Please ask us about this option and we can help you file the paperwork. This will allow you to remain up to an additional 6 months as a tourist in the US and in that time as a tourist you are not allowed to get paid. This gives you effectively up to 8 months of unpaid time in the US. At any point in this time, your employer can decide to rehire you, or you can find employment with a new employer. Before you start to work for your previous employer again, or a new employer, you will need to re-active an unexpired E-3 with the previous E-3 employer or apply for a new E-3 with the new employer. There is specific paperwork involved with both options that we can assist you with.

Both of the above options are dependent on your I-94 and LCA end dates and may require LCA withdrawals and re-filings, petitions filed within the US or consular processing, so please ask our office

to assist you so that this is done properly to ensure that you maintain status and your employer is compliant.

Can I continue to work but get paid less?

Your employer cannot pay you less than what was listed on your LCA filed with your visa application.

You employer could however make a material change to your employment by making you a part-time employee instead of a full-time employee. In this case your employer can then pay you an hourly rate rather than a full time salary rate. Your employer would be required to file a new LCA and file an amended E-3 petition for you (or you could leave and consular process the new visa with the new LCA – however, during this time of COVID-19 this is not immediately possible).

Can I apply for Unemployment Insurance (UI)?

The short answer is not really.

You need to check the regulations specific to your state to check whether you qualify to apply for unemployment insurance on all other grounds other than your visa status.

Typically, as an E-3 employee if you apply for UI, you are confirming you are unemployed. Once unemployed, or not working, you are no longer maintaining E-3 status. The maximum amount of time you can no longer be working is the 60 days accorded by the new grace period that went into effect in January 2017 (before then the grace period was 10 days). So even if you did qualify for UI, you could only receive it during that 60-day grace period. Note that applying for a change of status to B2 to remain in the US for a longer period than the 60 days grace does not extend the time that you can receive UI. To receive UI you must be ready, willing, and able to accept work and when in B2 status you are not readily able nor allowed to accept work.

Effectively, applying for UI is only a real consideration if you already hold a green card. If you apply for UI as a permanent resident (green card holder), it will not trigger the public charge rule when/if you decide to apply for US citizenship.

Disclaimer

This alert is written to give you guidance on options that are available during this difficult time of COVID-19. It is by no means intended to be used as legal advice for your particular situation. Every individual's situation is different. If you would like our firm's legal advice and a strategy particular to your situation, please reach out to us by email at: info@cammisamarkel.com. We are here to assist you, to hold your hand (figuratively, in-line with social distancing) and create a personalized plan for you, whatever your situation might be. We are here to take away, or at least minimize, your anxiety by providing you with a plan of action specifically tailored to your situation, taking into account your needs and desires regarding your future in the US.