



January 13, 2020

Via Federal e-Rulemaking Portal

Acting Secretary Chad F. Wolf
U.S. Citizenship and Immigration Services
Department of Homeland Security
Washington, D.C. 20528

Samantha Deshommnes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
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Department of Homeland Security
20 Massachusetts Ave., N.W.
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RE: Asylum Application, Interview, and Employment Authorization for Applicants
84 Fed. Reg. 62374 (Nov. 14, 2019)
DHS Docket No. USCIS-2019-0011

Dear Acting Secretary Wolf and Samantha Deshommnes,

Brooklyn Defender Services (“BDS”) submits these comments to the Department of Homeland Security (“DHS”) Notice of Proposed Rulemaking (hereinafter, the “Notice” or “Proposed Rule”) regarding “Asylum Application, Interview, and Employment Authorization for Applications,” published in 84 Fed. Reg. 62374, issued on November 14, 2019, DHS Docket No. USCIS-2019-0011. For the reasons set forth below, BDS requests that DHS halt implementation of the Proposed Rule.

BDS is a full-service public defender organization in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 30,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 15,000 clients in immigration matters including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn’s criminal court system. About a quarter of BDS’s criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such

cases. BDS's immigration practice represents people in applications for immigration relief, including asylum, before U.S. Citizenship and Immigration Services ("USCIS"), and in non-detained removal proceedings in New York's immigration courts. In addition, BDS is one of three New York Immigrant Family Unity Project ("NYIFUP") providers and has represented more than 1,400 people in detained deportation proceedings since the inception of the program in 2013.

As set forth below, BDS strongly opposes the Proposed Rule that would make it significantly more difficult for asylum seekers to obtain valid employment authorization documents ("EADs") while their asylum cases are adjudicated—proceedings that can last several years. BDS, along with legal service providers across the country, represent underserved and vulnerable low-income immigrants, including asylum seekers. EADs allow asylum seekers to work lawfully, obtain a U.S. social security number, secure certain basic services and, in certain states, be issued a driver's license. The Proposed Rule would double the wait-time for an asylum applicant to be eligible for an initial EAD.¹ Under the Rule, the manner in which someone is able to flee to the United States for protection or how soon they applied after arriving could bar them from employment authorization for the duration of their asylum case. An arrest or a conviction—regardless of the seriousness or the reasons behind the incident—could bar them from obtaining an EAD and prevent them from being able to support themselves and their families.² Further, USCIS seeks to give itself broad, unprecedented, and unchecked discretion to deny eligible asylum applicants from obtaining an EAD for any other reason and to set the validity period for as short as it sees fit.³

The result is that more asylum seekers would be denied or have to wait a longer time for the life-sustaining stability that often comes with employment authorization and a U.S. social security number. Asylum seekers would be unable to provide food, housing, and safety for themselves and their family, and would be unable to access medical care and services to help remedy any physical or mental trauma caused by the persecution they experienced. Without financial stability, they may be forced to suffer further victimization, trafficking, or abuse and, without authorization to work, they would be forced into jobs paying less than minimum wage, with unsafe working conditions, and at high risk of exploitation. The Proposed Rule would force asylum seekers to balance exercising their right to apply for asylum in the United States against enduring financial distress, homelessness, and the inability to care for their children.⁴ Moreover, the Rule glosses over and fails to adequately consider that asylum applicants with employment authorization contribute substantially to our communities and to the U.S. economy.⁵

¹ 84 Fed. Reg. 62374, 62387 (Nov. 14, 2019).

² 84 Fed. Reg. at 62390.

³ 84 Fed. Reg. at 62390-91.

⁴ See *Ramos v. Thornburgh*, 732 F. Supp. 696, 699 (E.D. Tex. 1989) (If denied the authorization to work legally, some asylum seeker will be "compel[ed] . . . to abandon [their] asylum applications and return to [their] native country.").

⁵ See New American Economy, *From Struggle to Resilience*, June 2017, http://research.newamericaneconomy.org/wp-content/uploads/sites/2/2017/11/NAE_Refugees_V6.pdf;

DHS's purported concern with stemming fraudulent applications and simplifying the asylum process is just another poorly veiled attempt to attack vulnerable immigrants. This Proposed Rule is part of a larger agenda to prevent asylum seekers from entering the United States and requesting asylum. This aim flouts both U.S. law and the international obligations of the United States, because the United States is obligated to accept asylum seekers and allow them to apply for asylum. The 1967 Protocol of the 1951 Convention Relating to the Status of Refugees *requires* the United States to accept asylum seekers who ask for protection.⁶ The administration's alleged efforts to crack down on fraudulent applications will have a disastrous impact on asylum seekers, our communities, and the U.S. economy. BDS asks that DHS immediately halt implementation of the Proposed Rule, and recognize that all asylum seekers deserve a fair opportunity to have their asylum cases heard and to be protected from persecution and death, without the prospect of financial distress.

1. USCIS Provides No Meaningful Justification For Doubling the Wait-Time For Asylum Seekers to Apply for Employment Authorization

The Proposed Rule would more than double the time period that asylum applicants must wait to apply for initial employment authorization.⁷ Currently, under 8 C.F.R. § 274a.12(c)(8), asylum applicants may apply for an EAD 150 days after filing their asylum application and may receive their EADs 180 days after filing.⁸ EADs for asylum applicants are referred to as “category (c)(8)” EADs after the applicable regulatory provision. Moreover, USCIS is currently obligated to adjudicate initial (c)(8) EADs within 30 days.⁹ The Proposed Rule would create a 365-day waiting period to *apply* for an EAD and, in a separate regulation, DHS has proposed to eliminate the 30-day adjudication window for initial EADs.¹⁰ As such, asylum applicants would spend *more* than a year without lawful employment authorization or a U.S. social security number.¹¹

The 180-day Clock was created 25 years ago in response to an upsurge in asylum applications. Now, DHS is attempting to justify *doubling* the waiting period for employment authorization without acknowledging the United States' obligation under domestic laws and international treaties to accept asylum seekers and to abide by the purpose of prior regulatory changes—as announced by the Department of Justice and

NYTimes, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, Sept. 18, 2017, <https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html>.

⁶ 1967 Protocol Relating to the Status of Refugees, arts. 31-33, Jan. 31, 1967, 19 U.S.T. 6223.

⁷ 84 Fed. Reg. at 62387.

⁸ 8 C.F.R. § 208.7(a)(1).

⁹ 8 C.F.R. § 208.7(a)(1); *see also Rosario v. USCIS*, 15-cv-00813-JLR (W.D. Wash. July 26, 2018) (ECF 127) (enjoining USCIS from further failing to adhere to the 30-day deadline for adjudicating category (c)(8) EAD applications).

¹⁰ *See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications*, DHS Docket No. USCIS-2018-0001, 84 F.R. 47148 (Sept. 9, 2019).

¹¹ 84 Fed. Reg. at 62387.

the Immigration and Naturalization Service (“INS”)¹²—to ensure that “bona fide” asylum applicants are eligible to obtain employment authorization “*as quickly as possible*.”¹³

In 1982, Congress passed the 1980 Refugee Act to bring the United States into compliance with the U.N. Refugee Convention and directed the Attorney General to establish a permanent and systemic asylum process.¹⁴ The result were regulations allowing asylum applicants to be granted permission to work while their cases were decided.¹⁵ Before 1995, employment authorization could be issued “to any non-detained [asylum applicant] against whom exclusion or deportation proceedings have been instituted.”¹⁶ Citing a backlog of asylum claims and an increase in applications, the asylum regulations were amended in 1995 to require applicants to wait 150 days to apply for employment authorization and an additional 30 days to receive authorization.¹⁷ Explaining the rationale for the chosen waiting period, the Department of Justice stated that it “selected 150 days as the period beyond which *it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated*.”¹⁸ When issuing the final rule, the Department of Justice responded to concerns in public comments that the new waiting period would “impos[e] economic hardship on asylum applicants” by clarifying that it expected asylum applicants would typically wait no more than 90 days for an EAD.¹⁹ The Affirmative Asylum Procedures Manual published by USCIS refers to this 180-day waiting period as the “180-day clock.”²⁰

There is an exception to the 180-day clock: if an asylum application has been recommended for approval, the applicant may apply for employment authorization upon receipt of the notice for recommended approval even if the 180 days have not lapsed.²¹ When justifying this exception, the Department of Justice stated that providing a final grant of asylum required time-consuming identity checks, and as a result, an immigrant “who would otherwise appear to be eligible for asylum may have to wait for a long period

¹² The INS is the predecessor agency to DHS.

¹³ 62 Fed. Reg. 10312, 10318 (Mar. 6, 1997) (emphasis added).

¹⁴ Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (codified in scattered sections of Title 8 of the United States Code (1982)).

¹⁵ See *Diaz v. I.N.S.*, 648 F. Supp. 638, 646 (E.D. Cal. 1986) (citing *Employment Authorization*, 45 Fed.Reg. 19563 (1980); 8 C.F.R. § 109.1(b)(2); 8 C.F.R. § 208.4.)

¹⁶ 59 Fed. Reg. 14779, 14780–81 (Mar. 30, 1994).

¹⁷ 59 Fed. Reg. 62284, 62290 (Dec. 5, 1994) (codified as amended at 8 C.F.R. § 208.7) (The amendments to 8 C.F.R. § 208.7 were first proposed in 59 Fed. Reg. 14779, 14780 (Mar. 30, 1994)). See 8 C.F.R. § 208.7(a) (2020); 8 C.F.R. §1208.7(a) (2020).

¹⁸59 Fed. Reg. at 14780 (emphasis added).

¹⁹ 59 Fed. Reg. at 62290–91.

²⁰ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, AFFIRMATIVE ASYLUM PROCEDURES MANUAL 55 (2016), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AAPM-2016.pdf>.

²¹ 8 C.F.R. § 208.7(a)(1) (2020).

of time before he or she can be granted asylum or employment authorization.”²² When including the exception to the 180-day clock for applications recommended for approval, the Department of Justice explained that “one of the chief purposes of the asylum reforms brought about by the regulatory changes of January 1995” was “to ensure that bona fide asylees are eligible to obtain employment authorization *as quickly as possible*.”²³

DHS argues that eliminating the 180-day clock (and the sole exception²⁴) and instituting a blanket 365-day waiting period will “reduce incentives” for asylum applicants to file “frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization” and reduce incentives to “intentionally delay asylum proceedings.”²⁵ But DHS cannot justify doubling the waiting period for employment authorization based on alleged “frivolous, fraudulent, or otherwise non-meritorious claims,” when a Government Accountability Office (“GAO”) analysis determined that “neither USCIS or EOIR . . . has assessed fraud risks across the asylum process, in accordance with leading practices for managing fraud risks.”²⁶ Despite repeating this justification many times throughout the Notice, DHS fails to provide any evidence of such an analysis regarding fraud risks, any attempts to quantify how large the problem of fraudulent or frivolous applications is, or whether the Proposed Rule will actually reduce fraudulent applications rather than suppressing *all* applications of asylum seekers with the right to apply for asylum in the United States.

Moreover, asylum applications denied by an immigration judge are not, by definition, “fraudulent” or “frivolous.” As a result, equating references to “legitimate,” “meritorious,” and/or “bona fide” asylum applications with applications granted by an immigration judge is inappropriate. Asylum grant rates vary widely based on factors unrelated to the merits of the underlying asylum claim and about which the asylum applicant has no control, particularly as asylum is a discretionary form of relief. *See* U.S. GAO, “Variation Exists in Outcome of Applications Across Immigration Courts and Judges,” GAO-17-72, Nov. 14, 2016, at 31-32 (finding that asylum was granted at a higher rate based on factors including whether the applicant was represented by counsel, had at least one dependent, and if the immigration judge was appointed by a democratic administration). An asylum applicant can have a “legitimate,” “bona fide” claim yet be denied asylum by an immigration judge. An asylum applicant could have suffered substantial violence and persecution or may suffer a significant threat of violence and persecution in their home country, and be denied asylum by an immigration judge. This does not mean that the applicant was undeserving of the opportunity to present their asylum case. By improperly equating “fraudulent” and “frivolous”—legal terms that

²² *See* 62 Fed. Reg. 10312, 10317-18 (Mar. 6, 1997) (This exception was included in March 1997 revisions to 8 C.F.R. § 208.7(a)(1) in response to public comments).

²³ 62 Fed. Reg. at 10318 (emphasis added).

²⁴ The Proposed Rule would eliminate “recommended approvals,” such that individuals must wait 365 days for an EAD even if USCIS has found they qualify for asylum, but the lengthy background check process has not been complete. 84 Fed. Reg. 62390-91.

²⁵ 84 Fed. Reg. 62374-75

²⁶ U.S. Government Accountability Office, “ASYLUM, Additional Actions Needed to Assess and Address Fraud Risks,” GAO-16-50, December 2015 at 1, <https://www.gao.gov/assets/680/673941.pdf>.

require legal findings—with “non-meritorious” claims, the Proposed Rule exposes its true purpose: to prevent those fleeing persecution in their home countries from seeking asylum in the United States.

DHS further contends that doubling the waiting period will “help[] clear the way for meritorious asylum applications to be received, processed, and adjudicated. . . .”²⁷ However, because the Rule will apply to *all* asylum applicants regardless of the underlying merit of their claims, the Rule would also harm “non-fraudulent” asylum seekers by causing them to endure an additional six months without employment authorization. Indeed, DHS recognizes that a number of “legitimate asylum seekers” may “experience potential economic hardship because of the extended waiting period” and the heightened requirements for an EAD.”²⁸ This admission that all individuals will “experience economic hardship” as a result of the Proposed Rule directly contradicts—without justification—Department of Justice guidance that asylum applicants should be eligible for employment authorization “as quickly as possible.”²⁹

DHS attempts to justify the imposition of such economic hardship by stating that “the urgency to maintain the efficacy and the very integrity of the U.S. asylum and immigration system outweighs any hardship that may be imposed by the additional 6-month waiting period. The integrity and preservation of the U.S. asylum system takes precedence over potential economic hardship faced by [asylum seeker] arrivals . . . whether or not those [asylum seekers] may later be found to have meritorious claims.”³⁰ However, in this Proposed Rule, the administration is knowingly imposing economic hardship on the very persons whom the U.S. asylum system is meant to protect—thus, such rationales of maintaining the integrity and preserving the system are clearly pretext. Indeed, the practical effect of the Rule is to impose financial distress to deter individuals from applying for asylum or cause asylum seekers to abandon their applications, regardless of the merit of their claims.³¹ An asylum system entirely focused on deterring asylum applicants cannot be the definition of a system with “integrity.”³²

²⁷ 84 Fed. Reg. at 62383.

²⁸ 84 Fed. Reg. at 62389.

²⁹ 62 Fed. Reg. 10312, 10,318 (Mar. 6, 1997).

³⁰ 84 Fed. Reg. at 62389.

³¹ Notably, in the 1970s, when Haiti asylum seekers sued the INS to be allowed to work while their asylum cases were heard, they similarly argued that “depriving asylum seekers of the ability to work while their claims were pending was an indirect attempt to expel them, a violation of international law.” WaPo, *Why forbidding asylum seekers from working undermines the right to seek asylum*, Nov. 18, 2019, <https://www.washingtonpost.com/outlook/2019/11/18/why-forbidding-asylum-seekers-working-undermines-right-seek-asylum/>.

³² Furthermore, as explained further in Part 4 below, while DHS acknowledges the imposition of such “economic” hardships on asylum seekers, DHS does not fully quantify or recognize such economic costs in its economic analyses of the rules. *See* 84 Fed. Reg. at 62379-82. Not only does DHS fail to recognize the direct and full costs to asylum applicants, DHS does not recognize the costs imposed on our broader communities. Thus, DHS has failed to effectively consider substantial economic costs in its justifications of the Rule.

Despite DHS' unwavering focus on deterrence, the United States' obligations under domestic laws and international treaties to accept asylum seekers and hear their asylum claims includes ensuring they are able to support themselves, and secure basic necessities like clothing, shelter, and food.³³ Doubling the waiting period for employment authorization and increasing the requirements for an EAD would force asylum applicants into an untenable and unacceptable situation where they are powerless to provide for themselves and their families despite being legally in this country and eligible for employment. The ability to work is especially important for asylum applicants who have, in many cases, been forced to flee their home countries without bringing financial resources with them or having contacts in the United States. Indeed, many have been excluded from economic opportunities in their home countries for the very reasons they are applying for asylum.

Thus, this proposed regulation is the quintessential example of “throwing the baby out with the bath water”: in a speculative effort to minimize allegedly fraudulent asylum applications, the Proposed Rule penalizes everyone. Asylum seekers are, by definition, traumatized and vulnerable. Under the current system, asylum seekers must spend at least six months relying on friends, family, and community organizations for support. And those without support networks are particularly vulnerable and ripe for exploitation. The Proposed Rule seeks to make a difficult situation even worse. Six months without employment authorization is a hardship, but an entire year at the mercy of others is indefensible and undermines the United States' obligation to accept asylum seekers. This is precisely why twenty-five years ago the Department of Justice stated that “it would not be appropriate” for asylum applicants to wait more than 150 days to apply for employment authorization³⁴ and that asylum applicants should be eligible for employment authorization “as quickly as possible.”³⁵

2. The Proposed Expansion of Criminal Bars Is Unwarranted and Unjustified

The Proposed Rule seeks to expand the criminal bars that asylum applicants are subject to when applying for an EAD without providing a rational justification for doing so. The current regulations only prohibit those with an “aggravated felony” conviction from applying for an EAD, as an aggravated felony is considered a “particularly serious crime” that bars an individual from applying for asylum.³⁶ The Proposed Rule would bar asylum seekers from receiving employment authorization if convicted of the following:

³³ *Cf. Ramos*, 732 F. Supp. at 699 (“It cannot validly be disputed that an unreasonable denial of work authorization, or an unlawful delay in adjudicating work authorization, results in a substantial threat of harm . . . by preventing them from working to support themselves pending resolution of their claims for asylum.”).

³⁴ 59 Fed. Reg. 14779, 14780 (Mar. 30, 1994).

³⁵ 62 Fed. Reg. 10312, 10318 (Mar. 6, 1997).

³⁶ *See* 8 C.F.R. § 208.7; 8 U.S.C. § 1158 (b)(2)(A), (B) (2020). Indeed, when 8 C.F.R. § 208.7 was originally contemplated, the Department of Justice noted that they chose to use the term “aggravated felonies” to exclude applicants who had committed “particularly serious crimes,” because it was consistent with “the intent of Congress.” 59 Fed. Reg. 14,779, 14,781 (Mar. 30, 1994).

(a) any felony in the United States; (b) any serious non-political crime outside the United States; or (c) certain “public safety offenses” in the United States, involving domestic violence or assault, child abuse or neglect, controlled substances, or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state or local jurisdiction.³⁷ A criminal conviction or offense does not make an asylum applicant less deserving of the opportunity to support themselves and contribute to their community.

These provisions are highly problematic for several reasons. First, the proposed criminal bars are exceedingly broad in both the convictions and conduct covered. For example, under the Proposed Rule, an asylum seeker who was convicted of a marijuana possession violation, N.Y.P.L. § 221.05,³⁸ or driving while ability impaired violation in New York State, V.T.L. § 1192(1), could be categorically ineligible for employment authorization—despite the fact that these offenses are not crimes under New York law.³⁹ The Proposed Rule would categorically bar asylum seekers with nearly any conviction from receiving employment authorization, even where the conviction is not an aggravated felony and is extremely unlikely to be deemed a particularly serious crime that would render the person ineligible for asylum. Thus, due to minor infractions eligible asylum seekers, including those who may ultimately win their asylum cases, would be denied work authorization for the many years that it can take to get a final decision on their asylum case. Moreover, the proposed criminal bars are overly broad because they cover conduct that disproportionately stems from homelessness, lack of resources, trauma, and over-policing. Asylum seekers often come from vulnerable communities that are at heightened risk for arrest and policing, such as communities of color, and lesbian, gay, and transgender individuals, and may be more susceptible to have minor infractions or low-level offenses.

Second, the breadth of the proposed criminal bars means that USCIS officers would be required to make complex determinations about whether a particular offense falls into one of the categories that could bar an asylum applicant from employment authorization. However, the Proposed Rule provides no opportunity for an EAD applicant to present evidence that provides context for or mitigates their criminal convictions; rather, the only analysis conducted by USCIS is whether a conviction exists. This goes against any notion of procedural fairness. In the asylum case itself an applicant will have an opportunity to present favorable evidence in support of their asylum claim and a favorable exercise of discretion.⁴⁰ For example, asylum applicants may be charged with and convicted of non-political crimes in their home countries, often without due process or the right to counsel, and those charges and convictions can serve as an example

³⁷ 84 Fed. Reg. at 62390.

³⁸ DHS proposes that all individuals convicted of a “controlled substance” offense be categorically ineligible for employment authorization and refers to section 102 of the Controlled Substances Act, which includes marijuana. 21 U.S.C. § 812(c) Schedule I(c)(10).

³⁹ A violation under New York law is not a crime. See New York State Penal Law, Article 10.

⁴⁰ See 8 U.S.C. § 1158 (d)(5)(A)(ii); 8 C.F.R. § 208.9.

of the persecution suffered, such as LGBTQ individuals or ethnic minorities.⁴¹ In a hearing before an immigration judge, they would be able to make these points.⁴² As a result of trauma suffered, asylum applicants may have been homeless, in abusive relationships, or have dealt with substance abuse which can lead to low-level offenses that could be deemed “public safety offenses” under the Rule. Before an immigration judge, they may be able to provide this important context for the conviction, and explain the steps taken since. The Proposed Rule does not give asylum seekers this opportunity, before depriving them of an EAD.

Third, DHS does not provide any justification for why asylum seekers with a broad range of offenses should all be denied employment authorization and the opportunity to support themselves and their families. DHS’ stated purpose in developing the proposed criminal bars is “to prevent those asylum applicants who have committed certain crimes from obtaining a (c)(8) employment authorization document.”⁴³ However, DHS does not explain what purpose is served by barring asylum seekers from obtaining employment authorization for years and preventing them from supporting themselves and their families, solely because of a past conviction. DHS provides no justification for the Proposed Rule’s inconsistent treatment of criminal bars for work authorization while an asylum application is pending versus criminal bars to the underlying asylum claim, and DHS provides no justifications for treating the same applicants differently before and after they obtain asylum. The proposed criminal bars do nothing to disincentivize “fraudulent” or “frivolous” applications—a justification for the Rule that DHS recites throughout. Nor do the broad criminal bars “simplify the adjudication process”;⁴⁴ in fact, they do the opposite. USCIS officers would be required to conduct complicated and lengthy analysis of the legal codes of various states and countries to determine whether an applicant’s behavior fits into the vague criminal categories proposed by the Rule.⁴⁵

Finally, DHS proposes these criminal bars without having any quantitative data or analysis on how the proposal will impact asylum seekers, and admits it does not have any estimates of the number of individuals impacted, the forgone earnings, or lost tax

⁴¹ For example, political prisoners in Azerbaijan may be convicted of smuggling currency across the border, hooliganism, inciting religious hatred, etc. And a person in Azerbaijan may be denied right to counsel or a fair public trial if the case is politically motivated. See *2018 Country Reports on Human Rights Practices: Azerbaijan*, U.S. DEP’T OF STATE, <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/azerbaijan/> (last visited Jan. 10, 2020).

⁴² As a further example, the INA only authorizes the Attorney General to deny an asylum petition when “*there are serious reasons for believing* that the [asylum applicant] has committed a serious nonpolitical crime outside the United States prior to” their arrival in the United States, 8 U.S.C. §1158 (b)(2)(iii) (2020), and, in practice, an adjudicator would review and analyze the “serious nonpolitical crime” before making a decision. The Proposed Rule, however, denies an applicant’s EAD if they are convicted of a serious nonpolitical crime outside the United States. 84 Fed. Reg. at 62422. The Proposed Rule only calls for a determination on the face of the conviction—*i.e.*, whether the applicant has been convicted—and does not allow for further considerations on the merits. As such, the Proposed Rule goes beyond the INA’s authorization and is much stricter than the INA.

⁴³ 84 Fed. Reg. at 62375.

⁴⁴ *Id.*

⁴⁵ 84 Fed. Reg. at 62389.

revenue.⁴⁶ DHS is obligated to provide a basis and rationale for significantly broadening the criminal bars to EADs for asylum applicants and denying them the opportunity to live and work in safety while their asylum cases are heard. It has failed to do so.

3. The Proposed Rule Gives USCIS Undue Discretion to Further Limit Otherwise Eligible Applicants From Obtaining an EAD

While asylum relief itself is discretionary,⁴⁷ under current regulations, USCIS does not have discretion to deny category (c)(8) EADs filed by an asylum applicant.⁴⁸ Currently, regulations provide that “The approval of applications filed under 8 CFR § 274a.12(c), *except for 8 C.F.R. § 274a.12(c)(8)*, are within the discretion of USCIS.”⁴⁹ As such, employment authorizations for asylum applicants are explicitly carved out as not being discretionary. This should not change. The Proposed Rule would amend 8 C.F.R. § 274a.13(a)(1) to grant USCIS discretion when adjudicating a (c)(8)-based EAD application. This discretion would contain no perimeters or limitations. DHS justifies this proposal by stating that it seeks to make category (c)(8) EADs “consistent” with the other EADs listed in 8 C.F.R. § 274a.13(a)(1).

DHS seeks to override this carve-out without justification. In doing so, DHS ignores that the carve-out of category (c)(8) EAD applications—the sole exception from the discretion otherwise conferred for other categories of employment authorization—is no accident. The fact that it is the sole exception and that it is explicit does not imply an oversight in need of correction or an inconsistency to be eliminated, but rather demonstrates that the exception was deliberate and meaningful. The ability of asylum seekers to work lawfully is an essential component of the humanitarian protection of asylum.⁵⁰ A report by the organization Human Rights Watch, released in 2013, catalogued the array of hardships faced by asylum seekers as a direct result of the United States’ punitive policies around work authorization, and concluded that “the prohibition on work authorization and social benefits for asylum seekers under US law is

⁴⁶ 84 Fed. Reg. at 62379-80.

⁴⁷ The matter of discretion in asylum cases generally has long been a source of both interpretive debate and practical difficulty. *See, e.g.*, Kate Aschenbrenner, Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum, 45 U. MICH. J. L. REFORM 595 (2012), <https://repository.law.umich.edu/mjlr/vol45/iss3/3>; *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

⁴⁸ *See* 8 C.F.R. § 274a.13(a)(1) (2020) (“The approval of applications filed under 8 CFR 274a.12(c), *except for 8 CFR 274a.12(c)(8)*, are within the discretion of USCIS”) (emphasis added). In addition, as provided under 8 C.F.R. § 208.7(a)(1), “an applicant for asylum who [does not have an aggravated felony conviction] *shall* be eligible . . . to request employment authorization” (emphasis added). The Supreme Court has recognized that the word “shall” generally indicates *mandatory* language and no discretion whatsoever. *See, e.g., Kingdomware Techs., Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”).

⁴⁹ 8 C.F.R. § 274a.13(a)(1) (emphasis added).

⁵⁰ WaPo, *Why forbidding asylum seekers from working undermines the right to seek asylum*, Nov. 18, 2019, <https://www.washingtonpost.com/outlook/2019/11/18/why-forbidding-asylum-seekers-working-undermines-right-seek-asylum/> (explaining that the “right” of asylum seeker to work “was fought over and ultimately won through debate and litigation in the 1970s and 1980s,” because it is central to U.S. obligations under international law).

incompatible with international human rights standards and . . . with the treatment of asylum seekers in other countries.”⁵¹ The exception should be maintained in light of our international obligations and the particular vulnerability of the population it directly affects.

Moreover, DHS argues this proposed amendment is in keeping with its statutory authority under INA § 208(d)(2), 8 U.S.C. § 1158(d)(2),” and is meant to make 8 C.F.R. § 274a.13(a)(1) “consistent” with the statute.⁵² INA 208(d)(2) provides, “An applicant for asylum is not entitled to employment authorization, but such authorization *may be provided under regulation* by the Attorney General.” (emphasis added). Thus, the statute allows DHS to engage in unambiguous rulemaking and clear guidance, but not the kind of “blank check” discretion proposed in the Rule. In fact, the statute contemplates the granting of employment authorization under appropriate circumstances, and relies upon the establishment of clear and uniform regulations to make the determination of whether and when employment authorization may be granted. This is easily distinguishable from the Proposed Rule, which parrots the statute, but does not formulate any actual regulation (as the statute requires) to create a consistent process through which adjudication is carried out. The Proposed Rule, thus, departs from decades of precedent and would inject unpredictability and inefficiency into the asylum process, which would not only deprive eligible asylum applicants of employment authorization, but also frustrate the stated aims of DHS to make a “simpler” asylum system with more “integrity.”

The exercise of USCIS discretion is particularly inappropriate where used to deny employment authorization for asylum seekers with arrests, open cases, or minor infractions. For example, the Proposed Rule would explicitly give USCIS the discretion to deny employment authorizations for asylum seekers with open criminal cases, regardless of the eventual outcome of the case, if they have “unresolved domestic charges or arrests that involve domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol.”⁵³ For these applicants, USCIS will decide “on a case-by-case basis” whether the applicant warrants “a favorable exercise of discretion for a grant of employment authorization.”⁵⁴ Thus, before an individual is afforded the constitutionally-mandated protection of due process in their criminal case, they are required to litigate a criminal defense before USCIS (which should be an administrative agency). And USCIS feels empowered to inflict punitive actions based only on unfounded allegations and the fact that an arrest occurred before the criminal justice proceeding takes place. Notably, this exercise of discretion reaches beyond the discretion exercised for other employment authorizations, where the I-765

⁵¹ Human Rights Watch, *At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States*, Nov. 2013, <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>. The Report recommends, among other reforms, that an application for work authorization be filed at the same time as the asylum application, and work authorization only revoked if and when there was a determination of a fraudulent or frivolous application.

⁵² 84 Fed. Reg. at 62378-79.

⁵³ 84 Fed. Reg. at 62377.

⁵⁴ *Id.*

application does not require disclosure of criminal history.⁵⁵ It is also likely that USCIS would use their discretion to unfairly deny EADs for asylum applicants with arrests—even if state law enforcement decided not to bring charges or if the charges were dismissed by a state court judge—or where an infraction is minor. USCIS should not have a blank check to subvert the criminal justice system and inflict undue punishment based only a pending arrest, for which an individual is presumed innocent until proven guilty. This is particularly the case where, as explained above, asylum seekers are often part of vulnerable populations subject to over-policing.

The Proposed Rule also provides that USCIS will use its discretion to bar asylum seekers who entered or attempted to enter the United States at any place other than through a U.S. port of entry, unless they can show “good cause” for doing so.⁵⁶ “Good cause” is determined by a USCIS officer on a “case-by-case basis,” and can include “requiring immediate medical attention or fleeing imminent serious harm.”⁵⁷

The expanded discretion conferred by the Proposed Rule would lead to arbitrary and inconsistent outcomes in EAD adjudications for asylum seekers and substantially complicate the process. Although DHS justifies the Proposed Rule by explaining it will “simplify the adjudication process,”⁵⁸ expanding discretion would do the opposite. USCIS officers would be charged with reviewing criminal arrest and conviction records from across the country and the world and balancing this information against mitigating evidence submitted. To determine whether an applicant had “good cause” to enter the country outside of a port of entry, USCIS officers may have to analyze medical records, including from overseas, or lengthy declarations from applicants setting forth their reasons for fleeing their home countries. If USCIS officers determine they need further information to adjudicate the application, they may issue Requests for Evidence (“RFEs”), which further delay and complicate the process. USCIS does not—and cannot—explain how the consideration of a plethora of evidence on a “case-by-case basis” with no rule-based guidance will make the asylum system any more efficient.

Lastly, a further example of the broad scope of the discretion conferred by the Proposed Rule is the proposed restrictions on the duration of the initial and renewal EAD, to be set at the discretion of USCIS, “but not to exceed increments of two years.”⁵⁹ An unduly short period of employment authorization is likely to be tantamount to no authorization if asylum seekers must continually leave their jobs every time their EAD expires with no guarantee of renewal, putting asylum-seekers at a further, massive disadvantage. The Proposed Rule provides no factors that an USCIS officer would consider when determining the duration of the EAD, nor any guidelines to ensure

⁵⁵ See, e.g., Form I-765 (Part 2, Question 30) and Instructions where only those applying for employment authorization under category (c)(8) need to provide criminal history.

⁵⁶ 84 Fed. Reg. at 62404, 62393. In 1986, a federal judge enjoined the INS from considering manner of entry in deciding whether to grant work authorization. See *Diaz v. INS*, 648 F. Supp. 638 (E.D. Cal. 1986).

⁵⁷ 84 Fed. Reg. at 62392.

⁵⁸ 84 Fed. Reg. at 62375.

⁵⁹ 84 Fed. Reg. at 62377.

expiration dates are not arbitrary. Thus, this amendment too would result in chaotic implementation and inconsistent outcomes. The conferral of discretion and establishment of a maximum duration of EAD validity without the correlative establishment of a minimum seems entirely antithetical to the stated aims of a more efficient process and a “carefully implemented” rule.

USCIS should not have the unbridled power to prevent an asylum seeker from being able to support themselves and their families for any minor mistake or, really, for any reason at all.

4. DHS Fails to Fully Consider and Analyze the Substantial Harm the Proposed Rule will Have on Asylum Seekers, Our Communities, and the U.S. Economy

The Proposed Rule follows an established pattern by this administration of seeking to prevent immigrants from gaining the ability to work and support themselves and their families, while helping to boost their communities and the larger economy. The Notice attempts to justify its efforts by repeating the words of the President that there is “rampant abuse in our asylum process,”⁶⁰ but does not provide any statistical basis for the assertion. Nor is any direct or recent evidentiary support given for the assertion in the Proposed Rule that employment authorization for asylum seekers constitutes a “pull” factor.⁶¹

In fact, DHS admits that it does not have the data necessary to fully quantify the impacts of the Proposed Rule. None of DHS’ estimated costs include asylum applicants in defensive cases, because “DHS has no information to estimate the number of individuals impacted in defensive cases.” Thus, “all estimates are solely for affirmative asylum cases.”⁶² Furthermore, DHS “does not know”⁶³ how many individuals will be subject to several of the proposed provisions, because DHS “does not have the data necessary to quantify the impacts” of these provisions, including barring asylum applicants with certain criminal history, barring those who did not enter at a U.S. port of entry, and barring those who did not file for asylum within one year of their last arrival to the United States.⁶⁴ As such, DHS cannot quantify the lost earnings of asylum seekers or lost tax revenue for cities, states, and the federal government.⁶⁵ DHS cannot justify the Proposed Rule and the substantial harm to asylum seekers, our communities, and the U.S. economy, without fully considering and quantifying the impact of the proposed provisions. It has failed to do so here.

⁶⁰ 84 Fed. Reg. at 62383.

⁶¹ 84 Fed. Reg. at 62386 (emphasis added and internal citations omitted).

⁶² 84 Fed. Reg at 62379.

⁶³ 84 Fed. Reg. at 62380.

⁶⁴ 84 Fed. Reg at 62379.

⁶⁵ 84 Fed. Reg. at 62380.

Furthermore, DHS ignores that the real economic and social value of granting asylum seeker employment authorization is undeniable. Employment authorization confers cascading benefits for the applicant and their families once obtained, as an EAD “can be used not just for employment purposes, but also as a form of government identification and to obtain a restricted social security number.”⁶⁶ This is a good thing; the essentiality of employment and stability for asylum seekers during the pendency of an application is thoroughly documented.⁶⁷ So, too, is the benefit to the United States in having an economically productive population of asylum seekers.⁶⁸

Immigrants with eligibility to work earn higher wages than those that do not and are, therefore, better able to provide for the housing, food, safety, health, and educational needs of themselves and their families. They also pay more in federal and state taxes, and have more to spend on goods and services within their communities.⁶⁹ Both delaying and denying employment authorization to eligible asylum applicants undermines these substantial advantages that asylum seekers provide. USCIS fails to account for the costs to our communities and the U.S. economy if fewer individuals have permission to work. Immigrants breathe life and fuel prosperity into our nation when given the opportunity.

* * * *

For the reasons provided here, BDS requests that DHS consider these recommendations and immediately halt the implementation of the Proposed Rule.

⁶⁶ National Immigrant Justice Center, “Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings,” 61 (July 2018), https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-10/NIJC%20Asylum%20Manual_final%2007%202018.pdf.

⁶⁷ See, e.g., Human Rights Watch, “At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States”, Nov. 2013, <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>.

⁶⁸ See, e.g., New American Economy, From Struggle to Resilience, June 2017, http://research.newamericaneconomy.org/wp-content/uploads/sites/2/2017/11/NAE_Refugees_V6.pdf; Letter dated November 8, 2019 of Gurbir S. Grewal, Attorney General of the State of New Jersey, and Xavier Becerra, Attorney General of the State of California, Re: Comments on Removal of 30-Day Processing Provision for Asylum Applicant Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47,148 (Sept. 9, 2019), RIN 1615-AC19; NYTimes, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, Sept. 18, 2017, <https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html>.

⁶⁸ See 1967 Protocol Relating to the Status of Refugees, arts. 31-33, Jan. 31, 1967, 19 U.S.T. 6223.

⁶⁹ Tom Jawetz, *Testimony Before the U.S. House Committee on the Budget, Building a More Dynamic Economy: The Benefits of Immigration*, June 26, 2019, <https://www.americanprogress.org/issues/immigration/reports/2019/06/26/471497/building-dynamic-economy-benefits-immigration/>.

Please do not hesitate to contact us if you have questions regarding our comments.
Thank you for your attention and consideration of our concerns.

Sincerely,

/s/ Nyasa Hickey

Nyasa Hickey

Director of Immigration Initiatives

/s/ Sonia Marquez

Sonia Marquez

Civil Rights—Immigration Attorney