



NEW YORK  
CITY BAR

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Samantha Deshommes  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services, Department of Homeland Security  
20 Massachusetts Avenue NW Mailstop #2140  
Washington, D.C. 20529-2140

*Submitted via <https://www.regulations.gov>*

**Re: DHS Docket No. USCIS-2018-0001; Comments on proposed rulemaking re:  
Removal of 30-day Processing Provision for Asylum Applicant-Related Form I-765  
Employment Authorization Applications**

Dear Ms. Deshommes:

We, the undersigned committee of the New York City Bar Association (“City Bar”)<sup>1</sup>, respectfully submit this comment on the Department of Homeland Security’s Proposed Rule to remove the regulatory provision which provides that United States Citizenship and Immigration Services (USCIS) has thirty (30) days from the date an asylum applicant files the initial Form I-765, Application for Employment Authorization to grant or deny that initial employment authorization application, as published in the Notice of Proposed Rulemaking (NPRM) published on September 9, 2019 in the Federal Register, Vol. 84, No. 174, at 47148-170.<sup>2</sup>

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<sup>1</sup> With 24,000 members, the City Bar has a longstanding mission to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society.

<sup>2</sup> Additionally, the Department of Homeland Security (DHS”) is considering in the Proposed Rule to remove 8 CFR § 208.7(d) which provides that in order for employment authorization to be renewed before its expiration, the application for renewal must be received by the Service 90 days prior to expiration of the employment authorization. The City Bar does not take a position on this rule change in light of the 180-day automatic extension of employment authorization for renewal applications filed before expiration, as provided for in 8 C.F.R. § 274a.13(d)(1)(iii).

## I. EXECUTIVE SUMMARY

The City Bar opposes the Proposed Rule because it will have a severely negative impact on asylum seekers' abilities to support themselves and their families while waiting for a final decision on their claims, as well as other substantial social and economic costs. The City Bar urges the Department of Homeland Security (DHS) to withdraw the Proposed Rule and continue complying with the existing terms of the *Rosario*<sup>3</sup> class action agreed partial implementation plan.

The current regulation requires that USCIS adjudicate an asylum applicant's initial application for employment authorization within 30 days. 8 C.F.R. § 208.7(a)(1). USCIS has the ability to stop the clock on the 30-day processing timeframe if it needs to request additional documentation from an applicant. Moreover, under the *Rosario* partial agreed implementation plan, USCIS must meet this regulatory requirement and provide regular updates to the district court regarding its compliance with the regulation. This regulation was promulgated under the authority of INA § 208(d)(2), which states that an applicant for asylum is not entitled to employment authorization prior to 180 days after the filing of the asylum application.

At the time of the implementation of the existing requirement, there was a clear recognition that the related 150-day post-asylum application period (before which an asylum applicant's initial application for employment authorization could not be filed) was a period "beyond which it would not be appropriate to deny work authorization to a person whose [asylum] claim has not been adjudicated." (59 CFR 14779-780).

The Proposed Rule would eliminate the 30-day processing deadline without replacing it with any other deadline and without any guarantee for the reasonable and timely adjudication of asylum applicants' initial employment authorization applications. While the City Bar believes that USCIS should comply with the *Rosario* class action agreed partial implementation plan and existing regulations, should the 30-day processing deadline be removed from the regulations, it must be replaced with a firm processing timeline that provides predictability to asylum seekers and their families. DHS claims that it will likely process applications for employment authorization documents (EADs) as it did in the pre-*Rosario* timeframe, so if it eliminates the 30-day rule it should replace it with a 60-day rule.<sup>4</sup>

The stated purpose of the Proposed Rule is to "ensure USCIS has sufficient time to receive, screen, and process applications for an initial grant of employment authorization based on a pending asylum application," and DHS states that the "change will also reduce opportunities for

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<sup>3</sup> The *Rosario* class action refers to *Rosario v. U.S. Citizenship & Immigration Servs*, No. 2:15-cv-00813-JLR, a class action brought in U.S. District Court for the Western District of Washington, in which plaintiffs sought to compel USCIS to adjudicate asylum applicants' initial application for employment authorization within 30 days as required by the regulations. The agreed partial implementation plan was made part of the court decision that ordered USCIS to cease "failing to adhere to the 30-day deadline" and to submit status reports every six months to inform the court of its compliance rates. *Rosario v. U.S. Citizenship & Immigration Servs*, No. 2:15-cv-00813-JLR (W.D. Wash. July 26, 2018).

<sup>4</sup> The NPRM considers and rejects imposing a 90-day processing rule. DHS does not offer any explanation why, if it intends to complete most processing within 60 days, it is not able to commit to processing all EADs under the regulation within 90 days. (84 FR 47166).

fraud and protect the security-related processes undertaken for each EAD application.” (84 FR 47149). However, as DHS itself recognizes in the NPRM, the 30-day deadline in 8 C.F.R. § 208.7(a)(1) was initially implemented “to ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible.” (84 FR 47153 at FN 11 (citing 59 FR 14779-780)).

Moreover, the fraud and national security vetting procedures that DHS claims require the elimination of the processing deadline have been in place for more than a decade and, for more than a year, USCIS has been able to show substantial compliance with the *Rosario* agreed partial implementation plan. The elimination of this deadline not only significantly delays employment authorization but also fails to propose any timeline for adjudication.

Under INA § 208(d)(2), asylum seekers may not be granted an initial EAD until their asylum applications have been pending for 180 days. However, nothing prevents USCIS from accepting initial EAD applications concurrently with the filing of the asylum application. Indeed, prior to 1994, asylum seekers could apply for employment authorization at the same time as they filed for asylum. Returning to this system, now that the INA prohibits granting the EAD until 180 days have passed, would give USCIS sufficient time to perform vetting without unduly prejudicing the asylum seeker by delaying adjudication of the EAD.

In the NPRM, DHS itself has underlined numerous uncertainties as to the consequences of the drastic change it proposes. This lack of clarity adds an unpredictability that will increase hardship to asylum applicants, their families and their communities who bear the cost of being denied opportunities to work lawfully in the United States while their claims are being processed.

## **II. DISCUSSION**

### **a. The Proposed Rule Substantially Erodes the Rights of Asylum Seekers Without Proper Justification.**

Asylum applicants are, by definition, a vulnerable group of individuals who have fled their home countries due to threat of persecution. Upon arrival in the United States, asylum seekers may not have family, friends or community support on which to rely financially. The regulatory history of asylum reform is grounded in assisting bona fide asylum applicants to obtain their employment authorization as quickly as possible to encourage self-sufficiency, a necessary step towards their integration in U.S. society. As DHS recognizes in the NPRM, “one of the chief purposes” of the 30-day deadline was “to ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible.” 62 FR at 10318 (March 6, 1997). The Proposed Rule is contrary to a basic principle of United States immigration law since its earliest immigration statutes: self-sufficiency as stated in §1601 of Title 8 of the US Code. Self-sufficiency starts with promptly providing bona fide asylum applicants with employment authorization within the processing time prescribed in the regulations.

DHS states in the NPRM that it believes that the “30-day timeframe is outdated, [and] does not account for the current volume of applications....” DHS underscores that, as of March 12,

2018, the affirmative asylum backlog stood at 317,395 applications and has been growing for several years. However, in 1994, in the NPRM relating to Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, the Justice Department, through the former Immigration and Naturalization Service (INS), similarly stated that “the existing system for adjudicating asylum claims cannot keep pace with incoming applications...” (59 FR 14770, March 30, 1994, at 14780). The Justice Department noted that “[o]n October 1, 1990 the INS had a backlog of approximately 90,000 asylum claims. Since that date, approximately 250,000 cases have been added to that backlog.” Therefore, in 1994, the Department had accumulated a backlog of up to 340,000 asylum applications – higher than the amount reported in the NPRM. And yet even within that context, the Justice Department decided to promulgate the current rule requiring prompt adjudication of applications for employment authorization within 30 days of their receipt, and consistent with the statute. Moreover, DHS *has* been able to comply fairly with the Rosario mandate of processing employment authorization applications within the 30-day time frame which it now seeks to remove without any satisfactory justification.

**b. The Proposed Rule Inflicts Uncalculated Costs on Asylum Seekers, Their Families, and Communities.**

*i. Costs on asylum seekers*

The Rule would cause significant financial hardship to asylum applicants who are otherwise unable to work and to those who depend on them financially—destabilizing the financial situation of persons already traumatized by the threats and persecution that led them to apply for asylum.

Without an EAD and access to lawful employment, many asylum-seekers will have difficulty accessing drivers’ licenses, banking services, adequate housing, and healthcare. This, in turn, will lead to increased rates among asylum seekers and their families of homelessness, hunger, and the use of emergency services and hospital emergency rooms as a primary source of health care, leading to delayed treatment of health conditions and overall worse health outcomes for themselves and for the general public. It will also lead to reduced educational attainment and overall productivity among asylum seekers and their families. Furthermore, without an EAD and access to lawful employment, asylum seekers will most certainly be forced into unauthorized employment as a way to survive, placing them at greater risk of exploitation and abuse by unscrupulous employers.

Without the ability to lawfully earn income, asylum seekers will be unable to afford legal counsel to help them prepare and prosecute their asylum applications. Asylum seekers who cannot afford legal counsel are significantly less likely to win relief. Nationwide, asylum seekers are approximately four times more likely to prevail on their claims with legal representation than

without.<sup>5</sup> Because asylum seekers are not entitled to publicly-funded counsel, the Proposed Rule has a direct effect on whether asylum seekers are able to successfully obtain status.

*ii. Costs on businesses*

The NPRM acknowledges the current low unemployment rate in the United States and the risk that businesses may not find reasonable substitutes for labor as a result of the Proposed Rule, resulting in a cost for companies. The NPRM admits that the lost compensation due to the processing delays could range from \$255.88 million to \$774.76 million as it will generate lost productivity and profits for businesses. (84 FR 47150). Additionally, DHS itself recognizes that the Proposed Rule is being introduced without adequate study of the alternatives, including the costs of hiring additional officers to adjudicate the EAD applications (84 FR 47149), or the full costs to US businesses that will be unable to hire the most qualified workers for their open positions (84 FR 47150-151). This lost compensation will, in turn, lead to loss of tax revenue to local and state governments, and to the federal government. DHS itself estimates that the *annual* Medicare and social security revenue loss to the government to be between \$39.15 and \$118.54 million. (84 FR 47157).

*iii. Costs on communities and service providers*

Less than a month after the Final Rule on the public charge ground of inadmissibility was published in the Federal Register of August 14, 2019 (Vol. 84, No. 157), which discourages immigrants to avail themselves of public benefits to which they are entitled, DHS is now attempting to make it more difficult for asylum applicants to obtain an EAD, which would allow them to become self-sufficient. Congress states in US Code, Title 8, §1601 that: “(...) (1) Self-sufficiency has been a basic principle of United States immigration law since this country’s earliest immigration statutes,” which begs the question of how asylum seekers can be expected to become self-sufficient without timely approvals of their EADs. DHS acknowledges in the NPRM that “[a]ny delay beyond the regulatory 30-day timeframe would prevent an EAD applicant, if his or her applicant were approved, from earning wages and other benefits until authorization is obtained” (84 FR 47163), but it does not address how asylum seekers are then expected to financially survive without an EAD until their application is approved. The Proposed Rule would burden and stretch the capacity of charities and non-profit service providers if asylum-seekers are unable to obtain an EAD in a timely manner. Under such circumstances, asylum seekers would have no alternative than to rely on other forms of support (i.e. financial, housing, legal, etc.) administered at the local, state, and federal level.

**c. Removal of the Deadline Without Replacing It with Any Other Deadline Creates Uncertainty and Unpredictability**

The Proposed Rule would eliminate the 30-day processing deadline without replacing it with any other time frame and without any guarantee for the reasonable and timely adjudication

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<sup>5</sup> See, Human Rights First, *Fact Sheet: Central Americans were Increasingly Winning Asylum Before President Trump Took Office*, (Jan. 2019), [https://www.humanrightsfirst.org/sites/default/files/Asylum\\_Grant\\_Rates.pdf](https://www.humanrightsfirst.org/sites/default/files/Asylum_Grant_Rates.pdf). (All links cited in this letter were last visited on November 6, 2019.)

of asylum applicants' initial employment authorization applications. It is essential that a processing deadline be incorporated in the adjudication of applications for employment authorization.

In February 2016, the City Bar submitted comments opposing the repeal of former 8 C.F.R. § 274a.13(d), which guaranteed the adjudication of employment authorization applications for most immigrant and nonimmigrant categories within 90 days.<sup>6</sup> Notwithstanding broad opposition to the rule change, the Service implemented the rule, and substituted it with an inadequate automatic 180-day extension on timely filed renewal applications for some categories (including pending asylum applications). *See* 8 C.F.R. § 274a.13(d)(1). Yet, the lack of any processing deadline on initial applications has caused significant disruption in the lives of immigrants and nonimmigrants subject to the changed rule which, as of January 2017, has resulted in interrupted employment and associated lost income and benefits, lost business opportunities for workers and their employers, and suspended driver licenses, among other problems. In the NPRM, DHS claims that the Proposed Rule to remove the 30-day processing deadline on initial asylum EADs is motivated by bringing these adjudications in line with the other categories. However, for the same reasons the City Bar opposed the 2017 rule change, we oppose this change as well: without a clear processing deadline, asylum seekers and their families are faced with uncertainty as to whether they will be able to support themselves, and this unpredictability will severely impact them and their communities.

### III. CONCLUSION

Based on the foregoing, the City Bar respectfully opposes the removal of the 30-day processing provision for Asylum Applicant-Related Form I-765 Employment Authorization Card Applications. In light of the lack of proper justification for the rule change, combined with the deleterious effects such rule change will have on asylum seekers, their families and communities as well as associated negative impacts on businesses, service providers, and public health, the Proposed Rule can only be viewed as part of a larger effort on behalf of this administration to delay, derail, and discourage asylum seekers from seeking safety in the United States and obtaining benefits as a matter of right under asylum law.

Respectfully,



Victoria F. Neilson, Chair  
Immigration & Nationality Law Committee

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<sup>6</sup> New York City Bar, Comments opposing proposal to repeal 8 C.F.R. § 274a.13(d) providing that USCIS must adjudicate employment authorization applications within 90 days, or in the alternative issue interim employment authorization document, (February 29, 2016), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comment-opposing-proposed-rule-eliminating-the-requirement-that-uscis-adjudicate-an-application-for-employment-authorization-within-90-days-of-the-application>.