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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-2019-0011 84 F.R. 62374, Notice of Proposed Rulemaking and Request for Comment on Asylum Application, Interview, and Employment Authorization for Applicants

Dear Ms. Deshommes:

On behalf of the Immigration & Nationality Law Committee of the New York City Bar Association[1] ("City Bar") we respectfully submit this comment in response to the above-referenced Proposed Rule Change, posted in the Federal Register on November 14, 2019 (84 Fed. Reg. 62374) (the "Proposed Rule"). The proposal stems from the April 2019 Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System.

I. INTRODUCTION

Through the Proposed Rule, the Department of Homeland Security ("DHS") seeks to double the waiting period for asylum-seekers' eligibility for an initial Employment Authorization Document ("EAD"). While its purported justification for the Proposed Rule is to curb fraud, we see this as another unjustified imposition of unnecessary obstacles that persecuted individuals would face in their increasingly difficult path toward winning asylum. Asylum applicants already must contend with United States Citizenship and Immigration Service ("USCIS") interviews or

[1] 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.

court backlogs and a six-month waiting period to be eligible to apply for an initial EAD. In addition to expanding the waiting period for asylum-seekers to apply for EADs, the Proposed Rule would also expand the bases to deny such EADs. When this Proposed Rule is considered in conjunction with other recent USCIS proposed rules, such as the elimination of the 30-day processing provision for Asylum Applicant-Related Employment Authorization Applications[2] and the Fee Change rules,[3] it is clear that virtually all asylum-seekers and their families will find it more difficult to support themselves while awaiting asylum decisions, and find it more difficult to win their cases.

While the City Bar opposes the Proposed Rule in its entirety, this comment will focus primarily on the proposal to extend the wait period for asylum-applicant EAD eligibility from 180 days to 365 days. The following discussion highlights the potential adverse effects of the Proposed Rule, on its own, and in conjunction with changes to processing times and fees.

II. DISCUSSION

The Proposed Rule will have far-reaching consequences for *all* asylum-seekers, leaving them with virtually no possibility to become self-sufficient and support their families as they await their asylum adjudications. This is true even though within the Proposed Rule, DHS has stated that its goal is to "reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization." With no ability to file an EAD application until a year after their asylum applications are received plus the attendant processing time of the EAD application, and no ability to work lawfully, asylum-seekers will suffer physically, emotionally, and psychologically. For those who are fleeing harm, often leaving behind everything they own, the impact is particularly severe.

Access to work authorization makes it easier for asylum-seekers to support themselves in safe and meaningful ways, while enduring extensive waiting periods for their opportunity to be heard and protected. The existing 180-day wait period already puts asylum-seekers in precarious situations; increasing that wait period to one year will be devastating. Asylum seekers are not eligible for most public benefits. If this rule is published as written, asylum seekers will have no ability to obtain a lawful source of income for more than a year after arriving in the United States. Instead, they will be forced to rely on charities, assistance from extended families, or to work without authorization. This rule, like other changes to the asylum system, is clearly designed to deter asylum seekers from coming to the United States[4] and exercising the right to seek asylum

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[2] Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, DHS Docket No. USCIS-2018-0001, 84 FR 47148. *See* New York City Bar Association, *Opposition to Removal of the 30-Day Processing Provision for EAD Cards: Comments*, Nov. 6, 2019, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-removal-of-the-30-day-processing-provision-for-ead-cards-comments. (All links cited in this letter were last visited on January 13, 2020.)

[3] USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, DHS Docket No. USCIS-2019-0010, 84 FR 62280.

[4] As stated by the United States Citizenship and Immigration Service ("USCIS") Acting Director Ken Cuccinelli, the Proposed Rule seeks to address "pull factors" alleged to encourage exploitation of the U.S. asylum framework, specifically, the filing of asylum applications for the primary purpose of obtaining employment authorization in the United States. Statement from USCIS Acting Director Ken Cuccinelli, https://www.uscis.gov/news/news-releases/uscis-deter-frivolous-or-fraudulent-asylum-seekers-obtaining-work-authorizations.

which the Immigration and Nationality Act ("INA") gives to any noncitizen who is in the United States.[5]

a. The Extension Of The Waiting Period For Employment Authorization From Six Months To One Year Will Impose Substantial Economic Hardship On Asylum-Seekers, And Harm Local Economies And Employers.

According to Human Rights Watch, the existing 180-day wait period for asylum-seekers to apply for EADs already harms asylum applicants waiting to have their case heard before an adjudicator.[6] The Proposed Rule will cause undue economic hardship to asylum-seekers, which DHS acknowledges. The Proposed Rule states that DHS "recognizes that a number of aliens who are legitimate asylum-seekers may experience potential economic hardship because of the extended waiting period," but DHS finds that "the integrity and preservation of the U.S. asylum system takes precedence over potential economic hardship faced by alien arrivals who enjoy no legal status in the United States, *whether or not those aliens may later be found to have meritorious claims* [emphasis added]."[7] While the administration seeks to paint asylum-seekers generally as "fraudsters,"[8] a significant percentage of those seeking asylum win, despite the many obstacles they face procedurally and substantively in seeking asylum. According to the Department of Justice Statistics Yearbook for Fiscal Year 2018, the last year available online, 38% of asylum seekers won asylum or withholding of removal in immigration court.[9] In that same year, approximately 27% of asylum applications before USCIS were successful.[10]

The purpose of employment authorization while applications are pending is to allow benefit applicants to sustain themselves while awaiting a decision. Timely access to work authorization is critical in allowing asylum-seekers to achieve self-sufficiency in the United States, while also benefiting local employers and economies by allowing asylum-seekers to contribute tax revenues, fill skills gaps, and build vibrant workforces. As discussed above, even under the current 180-day rule, asylum-seekers struggle to sustain themselves and their families. Many already exhausted all of their savings and resources fleeing persecution, getting to, and surviving in the United States. They struggle to afford basic food and shelter with whatever remains and must rely on non-governmental organizations and extended family. The already lengthy time that asylum-seekers must wait to apply for work authorization is exacerbated by the extended time it takes USCIS to process such applications. Making matters worse, in 2019, USCIS proposed a rule which would eliminate the requirement that it process asylum seekers' EAD applications within 30 days. If this

[5] *See* INA § 208(a)(1).

[6] Human Rights Watch, *"At Least Let Them Work": The Denial of Work Authorization and Assistance for Asylum-seekers in the United States* (New York: Human Rights Watch, 2013), https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united.

[7] 84 Fed. Reg. 62389 (Nov. 14, 2019).

[8] *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, Oct. 12. 2017, https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

[9] Department of Justice Executive Office for Immigration Review, *Statistics Yearbook for Fiscal Year 2018*, https://www.justice.gov/eoir/file/1198896/download.

[10] *Id.* (It is not possible to tell from this report how many cases referred by the asylum office to immigration court were ultimately successful.)

is published as a final rule, asylum seekers will be forced to wait well over a year to receive their employment authorization. [11]

Exclusion of asylees from the workforce will lessen the reparative effects that employment can have on trauma suffered during the migratory process. In addition, exclusion from the workforce will exacerbate social exclusion and harm local economies. DHS acknowledges that the rule will impact "companies that would have continued to employ asylum–seeking applicants had they been in the labor market earlier, or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor,"[12] admitting that "USCIS does not know" what the next best alternative would be for these companies. DHS estimates $682.9 million in potential lost federal income tax receipts as a result of employment gaps that will be caused by the rule if it goes into effect.[13]

i. Costs on asylum-seekers

The Proposed 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 employment authorization, many asylum-seekers will have difficulty accessing essential services, healthcare, and housing. 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. Their inability to work will also lead to reduced educational attainment and overall productivity among asylum-seekers and their families. Furthermore, a prolonged period without employment authorization will most certainly force asylum-seekers into unauthorized employment as a way to survive, placing them at greater risk of exploitation and abuse by unscrupulous employers or of being arrested in such work settings.

In addition, without employment authorization, many asylum-seekers will be unable to afford legal counsel to represent them in their asylum applications. Asylum-seekers who cannot afford legal counsel are significantly less likely to win relief.[14] Nationwide, asylum-seekers are approximately four times more likely to prevail on their claims with legal representation than without.[15]

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[11] *See* New York City Bar Association, *Opposition to Removal of the 30-Day Processing Provision for EAD Cards: Comments*, Nov. 6, 2019, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-removal-of-the-30-day-processing-provision-for-ead-cards-comments

[12] 84 Fed. Reg. 62380 (Nov. 14, 2019).

[13] *Id.* at 62398.

[14] Although many lawyers provide counsel to asylum seekers on a pro bono basis, often under the guidance of legal services organizations, the demand far exceeds the supply of nonprofit and pro bono lawyers.

[15] *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.

ii. Costs on businesses

In a previous, related Proposed Rule that intended to eliminate the 30-day processing time requirement for adjudicating employment authorization documents, DHS acknowledged that 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 that Proposed Rule, would result in added costs to companies. In that Proposed Rule, USCIS admitted that the lost compensation due to the processing delays could range from $255.88 million to $774.76 million as it will lead to lost productivity and profits for businesses.[16] Lost compensation leads to loss of tax revenue to local and state governments, and to the federal government. DHS itself estimated the annual Medicare and social security revenue loss to the government to be between $39.15 and $118.54 million.[17] The fact that the government itself concedes that American businesses and tax payers will suffer by denying asylum seekers the ability to work is further evidence that this rule is arbitrary and designed primarily to punish asylum seekers.

iii. Costs on communities and service providers

In justifying the Final Rule expanding the public charge ground of inadmissibility, Congress stated that: "(…)(1)Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."[18] Asylum-seekers are categorically exempted from the public charge ground of inadmissibility. Nevertheless, we are concerned that it will be impossible for asylum-seekers, whose applications take years to adjudicate, to ever become self-sufficient when their ability to seek employment authorization is delayed beyond a year. The Proposed Rule would burden and stretch the capacity of charities and non-profit service providers if asylum-seekers are unable to obtain employment authorization in a timely manner.

b. The Proposed Rule Includes Further Provisions Which Will Harm Asylum Applicants By Preventing Them From Obtaining Employment Authorization.

Furthermore, there are several other changes within the Proposed Rule that would completely bar asylum applicants from obtaining employment authorization unless and until they win on the merits of their case, a process which can take several years. The proposed rule would also allow USCIS to deny asylum seekers employment authorization outright for:

- Missing the one-year filing deadline for asylum;
- Conviction for certain offenses; and
- Crossing the border other than at designated Points Of Entry (POE).

The requirement that asylum-seekers cross the U.S. border at POEs[19] should be viewed in tandem with the current Administration's well documented policy of "metering" through which

[16] *See* 84 Fed. Reg. 47150.

[17] *See* 84 Fed. Reg. 47157.

[18] *See* Inadmissibility on Public Charge Grounds, Vol. 84, No. 157, Fed. Reg. 41306 (Aug. 14, 2019).

[19] Requiring asylum-seekers to enter only at ports of entry violates domestic and international law, thus asylum seekers should not be unfairly penalized by preventing them from obtaining employment authorization on this basis. *See* New York City Bar Association, *City Bar Statement Opposing the Presidential Proclamation and Interim Final*

Customs and Border Protection limits the number of asylum-seekers who can enter at POEs each day. As of August 2019, there were over 26,000 asylum-seekers waiting on the Mexican side of the border for the opportunity to request asylum in the United States. Rendering asylum-seekers who do not cross the border at POEs ineligible for work authorization will only serve to funnel more people into a backlog of claimants waiting in dangerous conditions in Mexico to assert their right to seek asylum in the United States.[20]

In addition to these outright bars, the proposed rule would allow USCIS adjudicators to consider an asylum seeker's submission of supplementary evidence, i.e. an amended application or an additional document, to be an "applicant caused delay" in the adjudication, which would stop the clock on counting the required 365 day waiting period. USCIS should not penalize asylum seekers for updating their applications and submitting evidence that is required to prove their cases, especially given that many asylum seekers wait in a years-long backlog[21] only to have their case scheduled on very short notice.

Similarly, asylum-seekers who miss the one-year filing deadline for asylum eligibility should not be further penalized with EAD ineligibility. In order for such applicants to be granted asylum, they already have the increased burden of proving that they qualify for either of two stringent exceptions to the one-year deadline. Many of these exceptions are based on the physical, mental, emotional, or social incapacity of the applicant or an immediate family member. Prolonging such asylum-seekers' ineligibility for an EAD while they sit in an asylum backlog would be unjust and cruel.

As with the expanded waiting period, the additional grounds for denying asylum-seeker EAD applications are unnecessary obstacles that would make the lives of asylum-seekers more difficult. The City Bar opposes all of these proposals.

III. CONCLUSION

Based on the foregoing, the City Bar opposes the expansion of the EAD waiting period from 180 days to 365 days, as well as the new grounds for barring asylum applicants from obtaining employment authorization outright. This Proposed Rule, if implemented in tandem with other recent Proposed Rules, including DHS Docket No. USCIS-2018-0001 ("Removal of 30-Day Processing Provision for Asylum") and DHS Docket No. USCIS-2019-0010 ("U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements"), will have the cumulative result of putting employment authorization out of reach for many asylum-seekers. We are concerned that the combined effects of these changes

Rule to Limit Asylum Eligibility, Nov. 8, 2018, https://www.nycbar.org/media-listing/media/detail/city-bar-statement-opposing-the-presidential-proclamation-and-interim-final-rule-to-limit-asylum-eligibility.

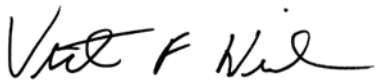
[20] *See*, Jason Kao and Denise Lu, *How Trump's Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, THE NEW YORK TIMES, Aug. 18, 2019, https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html.

[21] As of January 2019, the last publicly available statistics, USCIS had a backlog of 325,277 pending affirmative asylum cases. USCIS, *Affirmative Asylum Statistics January 2019 (PDF, 90 KB)*, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsJan2019.pdf.

will essentially make work authorization unattainable for asylum-seekers who otherwise have no means to access work, income, or self-sufficiency in this country.

We urge DHS to withdraw this rulemaking in its entirety. Asylum seekers need employment authorization to survive; this crucial benefit for those who have sought asylum should not be used as a deterrent to future asylum seekers.

Respectfully,



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