**Guidance on Submitting a Comment:**

*Department of Homeland Security’s Proposed Regulation on Asylum Application, Interview and Employment Authorization for Applicants*

International Refugee Assistance Project (IRAP) and Asylum Seeker Advocacy Project (ASAP)

05 December 2019

**Important Details**

* The Notice with the proposed rule is available [here](https://www.regulations.gov/document?D=USCIS-2019-0011-0001).
* Comments must be submitted on or before **Monday, January 13, 2020**.
* Comments may be submitted online [here](https://www.regulations.gov/comment?D=USCIS-2019-0011-0001), by either copying/pasting your text into the “Comment” box or write “see attached” and upload a PDF file.

**Background**

When a federal government agency is considering a new regulation, the agency often publishes a proposed version of that regulation in a publication, available online, called the Federal Register, and asks the public, particularly stakeholders, to provide comments and feedback.

On November 14, 2019, the Department of Homeland Security (DHS) proposed a [regulation that significantly limits the eligibility for work authorization for asylum applicants and makes several changes to asylum application processing.](https://www.govinfo.gov/content/pkg/FR-2019-11-14/pdf/2019-24293.pdf) Currently, a person who has fled persecution in their home country and sought safety in the United States – an “asylum seeker” – may apply for an employment authorization document (EAD) that allows them to work legally. Under the current law, a person may apply for an EAD 180 days after they apply for asylum if their asylum case is still pending, and U.S. Citizenship and Immigration Services (USCIS) must grant or deny their initial application for work authorization within 30 days. This is important because there are huge backlogs in asylum case processing, and applicants often wait years before they receive a final decision on their asylum case. In the meantime, work authorization enables asylum seekers to support themselves and their families.

However, DHS proposed changes to the existing work authorization regulations that would make it significantly harder for asylum seekers to obtain employment authorization or to renew their current employment authorization when it expires. The proposed changes would cause hundreds of thousands of asylum seekers to wait for much longer periods of time before they could work legally, and would prevent many asylum seekers from receiving work authorization at all. Also, thousands of asylum seekers who have been legally working while their cases are pending will be unable to renew their work authorizations and will likely be forced to leave their jobs. The anticipated result is that many asylum seekers will have no choice but to join the shadow economy, where they would be subject to unsafe working conditions, payments at less than minimum wage, and other forms of exploitation.

DHS purports that its proposed changes will “simplify the adjudication process” for affirmative asylum and work authorization and improve the current asylum case backlog by discouraging noncitizens from filing “frivolous, fraudulent, or otherwise non-meritorious applications” and “intentionally delaying” their asylum cases in order to obtain and extend work authorization (Notice at p. 62375). DHS estimates that these proposed regulations would impact approximately 300,000 asylum seekers annually (Notice at p. 62396), and would result in about $269.5 million to $815.9 million annually in lost wages to asylum seekers and about $41.3 million to $125 million in lost contributions to Social Security and Medicare[[1]](#footnote-1) (Notice at p. 62409-10). DHS further estimates that for the residual population, the lost earnings would be about $1.2 billion to $3.6 billion and the tax transfers would be about $182 million to $551 million annually. (Notice at p. 62410).

However, DHS fails to consider the additional substantial burdens that the proposed rule will place on asylum seekers, such as financial costs to the family members they support and the loss of access to medical care and other necessary services. Additionally, DHS entirely fails to consider the estimated costs and substantial burdens that this proposed rule will likely create for social services organizations, legal services organizations, and businesses.

**Some of the notable changes include:**

* **Work Authorization**
  + Extending the waiting period before an asylum seeker can apply for an EAD from 5 months to 1 year.
  + Preventing asylum seekers from getting work authorization if they have done any of the following:
    - (i) crossed the border outside an official port of entry;
    - (iii) did not file for asylum within one year of their last entry into the U.S.; or
    - (iii) have been convicted of or arrested for certain crimes.
  + Denying EAD applications if the asylum seeker is currently causing a “delay” in their asylum case at the time of EAD adjudication– where “delay” may include providing updated information about the family members on the case or changed country conditions that are essential to the asylum claim.
    - As a result of other proposed rule changes which eliminate the current deadline for DHS to adjudicate EAD applications, applicants will have no way to know whether DHS will adjudicate their EAD application in a timely fashion (and thus, when to avoid filing information necessary to support their asylum claim).
  + Denying all EAD applications if the asylum seeker has been convicted of any offense falling within categories designated by the rule – even if that offense is not a crime under state law. The rule also requires line-level EAD adjudicators to make complex legal determinations about which offenses bar eligibility that are beyond their areas of expertise.
  + Considering whether to deny all EAD applications from people with humanitarian parole (rather than asylum) except where DHS determines that EADs are needed for foreign policy, law enforcement, or national security reasons.
* **Asylum Case Processing**
  + Eliminating the current requirement that affirmative asylum applications be determined to be “incomplete” within 30 days of filing or else will be deemed “complete” for adjudication purposes and retain that filing date. The practical effect of this change will be that all asylum applications deemed to be “incomplete” – even in the case of minor technical errors or a processing error by USCIS – will be rejected at intake. Because asylum seekers generally have only one year from their last entry into the U.S. to apply for asylum, the proposed change will likely prevent many from correcting deficiencies in their applications in time to reapply within the deadline.

Notably, this proposed regulation is part of a broader effort by the Administration to restrict asylum seekers from obtaining or renewing employment authorization. In September and November 2019 respectively, DHS proposed (1) eliminating the 30-day deadline for the government to adjudicate initial employment authorization applications[[2]](#footnote-2); and (2) imposing a $490 fee for filing an employment authorization application.[[3]](#footnote-3)

If your organization represents, assists, or employs asylum seekers, you will likely be affected by the Administration’s new policy. The policy has not gone into effect yet, and you have only a short window of time to let the government know your concerns.

**How The Comment Process Works**

DHS has asked the public to submit comments sharing their feedback and concerns about the proposed rule and its consequences.

Comments can be submitted either online or via hard copy in the mail. Once the comment period has closed, comments will then be reviewed by DHS.

To submit online, go to [this website](https://www.regulations.gov/comment?D=USCIS-2019-0011-0001) and either copy/paste the text into the “Comment” box, or write “see attached” in the “Comment” box and upload a file with your comment. Comments must be submitted online **on or before January 13, 2020.**

To submit via hard copy, your comment must be **postmarked on or before January 13, 2020** and can be mailed to:

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

**Drafting a Comment**

IRAP and ASAP can assist you with drafting a comment, and we have also provided some template language below. **What is most helpful from you is language about how this regulation would impact you – describing, as specifically as possible, the ways in which this proposed rule would detrimentally impact your work and your employees or community.**

**Comment Template**

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

DHS Docket No. USCIS-2019-0011

84 F.R. 62374

[Date]

Re: Notice of Proposed Rulemaking and Request for Comment on Asylum Application, Interview, and Employment Authorization for Applicants

To Whom It May Concern:

[Company/Organization name] respectfully submits the following comments to the Department of Homeland Security’s Notice of Proposed Rulemaking and Request for Comment on Asylum Application, Interview, and Employment Authorization for Applicants, DHS Docket No. DHS-2019-0011, 84 F.R. 62374, issued November 14, 2019.

Interest in the Proposed Rule:

[Insert a description of your company’s/organization’s work or mission statement.]

Comments on the Proposed Rule:

[Insert concerns or feedback on the proposed regulation See section below.]

Conclusion:

For the above reasons, [Company/Organization name] urges the Department of Homeland Security to [retain the current processing regulations for work authorization and asylum OR to consider the alternatives discussed above...].

Sincerely,

[Name, Title, and Signature]

**Suggested Arguments/Talking Points**

**If you or your organization works directly with asylum seekers**, it would be particularly helpful to:

1. **describe (anonymized) real examples and stories of clients** that illustrate the potential impact of the proposed regulation (e.g., “Client Jane Doe, an asylum seeker who fled persecution in her home country of Guatemala, has two minor children and an elderly parent to support, but her family is now struggling because she is unable to obtain legal employment. If she had to wait a year before being able to apply for an EAD, she would not be able to provide sufficient food and clothing for her children”; “Client X is an asylum seeker living with [a chronic disease or a disability] and without an EAD, he has been unable to obtain the employment he needs to access healthcare and his condition has worsened significantly”). The more detail you can provide the better; and/or
2. **describe, quantitatively if possible, the impact the Rule could have on your organization’s work** (e.g., “if a significant number of EADs take longer to adjudicate and many are denied due to these new restrictions, more asylum seekers will need [X type of assistance] and my organization will be forced to divert resources from Y service to Z service to meet the need and we will no longer be able to provide Z service.”).

**If you or your organization employs asylum seekers,** it would particularly helpful to discuss the following points:

* My organization employs asylum seekers, and it would be difficult and costly to find replacement labor for their positions in light of their specialized skills, experience, etc.
* If my organization were unable to employ asylum seekers, we would lose [estimated amount of money, or “a significant amount”] in profits and other costs.
* Our asylum-seeking employees are an important part of the workplace culture and the community that enable my organization to thrive. Losing them as part of our workforce will impact company morale and the overall well-being of the business.

The above are just examples - if there are other specific negative impacts you anticipate, please describe those too!

Anticipated Effects of the Rule on Different Stakeholders

* Social services organizations:More asylum seekers will be unable to work and will thus be forced to rely on social services organizations that currently provide financial, housing, or other services. Therefore, such organizations are likely to have their resources stretched beyond capacity.
* Legal service organizations:The proposed rule will increase the complexity and uncertainty of the affirmative asylum application and the EAD application processes. These changes will force organizations that provide legal assistance to asylum seekers to spend more time on each application and to serve fewer clients as a result.
* Businesses**:** Companies that currently hire asylum seekers may lose their employees who are unable to renew their existing work authorization, with the attendant loss of skills, knowledge, and experience. Such employers and other companies that would otherwise hire asylum seekers will be unable to rely on asylum seekers to fill their employment needs. The net result will likely be substantial lost profits and productivity.

Impact on Asylum Seekers

* The proposed regulation would cause significant financial hardship to asylum applicants who are 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 and potentially leading to a cascade of collateral consequences on their ability to maintain adequate housing, receive sufficient healthcare, eat nutritious meals, etc.
* Without an EAD and associated access to employment, asylum seekers will have difficulty obtaining drivers’ licenses, banking services, healthcare, and legal counsel for their asylum applications.
* Without an ability to lawfully work, asylum seekers are likely to be unable to afford legal counsel and thus significantly less likely to win asylum. Nationwide, immigrants who are represented by counsel are nearly 5 times more likely than their unrepresented counterparts to obtain the relief sought, such as asylum.
* Even for those asylum seekers who currently have employment authorization and are able to renew it under this proposed rule, the cumulative effect of the Administration’s several recent proposed rule changes will be that asylum seekers will be caught in an endless cycle of applying for employment authorization renewals, which will cost $490 each time. The Administration has proposed eliminating the current regulatory deadline for the government to adjudicate employment authorization applications – with the anticipated effect of significant processing delays. Other proposed changes are likely to result in asylum seekers receiving employment authorization for shorter time periods (e.g., one year instead of two).
  + The net result: asylum seekers may need to start the EAD renewal process as soon as they receive employment authorization to avoid having their status expire and will continually incur $490 in fees.

Impact on Pro Se Asylum Applicants and Legal Practitioners

* DHS proposes that it will reject any “incomplete” asylum application (rather than the current rule that such applications are accepted if not deemed to be “incomplete” and returned within 30 days). Given that asylum applications can be rejected long after they are filed, the likely result will be that affirmative asylum applicants will not know that their application is deemed incomplete until after the one-year deadline to file for asylum has passed, thus losing the opportunity to resubmit their application within the deadline.
* Any minor, technical mistake on an asylum application made by pro se applicants or legal practitioners may lead to automatic rejection of the asylum application. Without notification, many asylum seekers risk losing the opportunity to reapply within the one-year filing deadline for asylum. Further, USCIS has been rejecting an increased amount of asylum applications due to incompleteness for various reasons, making it even more unclear what factors USCIS considers in deeming an application “complete.”
* DHS proposes that it will deny EAD applications where asylum seekers are currently causing any unresolved, “applicant-caused” delay in their asylum application on the date of the EAD adjudication. Given that DHS previously proposed to eliminate its deadline for processing EAD applications, applicants will have no way of knowing when DHS will adjudicate their EAD application.
  + The result: legal practitioners and pro se asylum applicants will have to make difficult decisions about whether to add information necessary to support their asylum claim and risk losing eligibility for employment authorization. This will be especially difficult given that asylum applicants bear the burden of corroborating their asylum claims, which include information the changed circumstances of asylum applicants and changing conditions in their home countries.
* Because every immigration court has its own rules, it will be difficult for legal practitioners to predict how these proposed regulations will be applied across the country. This will make it more difficult to place cases with pro bono service providers, who may be less likely to take on representation of increasingly complex and uncertain cases.

**Further Questions?**

Please contact Geroline Castillo at [gcastillo@refugeerights.org](mailto:gcastillo@refugeerights.org).

1. Note DHS calculated the lost wages to asylum seekers and lost contributions to Social Security and Medicare by analyzing the impact of only about a quarter of EAD holders that the agency determined would be affected (39,000 of the 153,458 EADs affected annually) (Notice at p. 62409-10). As such, these calculations are based on an impact to only a quarter of EAD holders, which is likely an underestimation of the impacted population. [↑](#footnote-ref-1)
2. *See*[Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications](https://www.govinfo.gov/content/pkg/FR-2019-09-09/pdf/2019-19125.pdf), DHS Docket No. USCIS-2018-0001, in the Federal Register at 84 F.R. 47148. [↑](#footnote-ref-2)
3. *See* [USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements](https://www.govinfo.gov/content/pkg/FR-2019-09-09/pdf/2019-19125.pdf), DHS Docket No. USCIS-2019-0010, in the Federal Register at 84 F.R. 62280. [↑](#footnote-ref-3)