

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

November 8, 2019

Ms. 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  
Washington, DC 20529-2140

Re: Public Comment Filed Opposing the Removal of the 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, DHS Docket No. USCIS-2018-0001, 84 F.R. 47148

Dear Chief Deshommes:

We write on behalf of Immigration Equality in response to the Department of Homeland Security (“DHS”) Notice of Proposed Rulemaking (“proposed rule”) on the Removal of the 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, DHS Docket No. USCIS-2018-0001, published in the Federal Register at 84 F.R. 47148 on September 9, 2019 (“Notice”). We strongly oppose the proposed changes to the 30-day processing time for asylum applicants who are seeking an employment authorization document (“EAD” or “work permit”) through Form I-765. The proposed rule will have grave effects on our client base of lesbian, gay, bisexual, transgender, queer (“LGBTQ”) and HIV-positive asylum seekers. Most significantly, the proposed rule would prevent or needlessly delay our clients from attaining self-sufficiency and would deny them access to critical necessities, including food, shelter, medication, health insurance and health services.

We, therefore, strongly urge that the proposed rule be withdrawn in its entirety and asylum seekers be allowed to apply for EADs concurrently with their asylum applications or, alternatively, that the current rule remain in effect, subject to the order in *Rosario v. USCIS*, No. C15-0813JLR (9<sup>th</sup> Cir. 2017), requiring DHS to comply with the 30-day deadline to adjudicate EAD applications.

## I. Immigration Equality

Immigration Equality is a national organization providing free legal services and advocacy for LGBTQ and HIV-positive immigrants. In more than 80 countries, it is either a crime or profoundly dangerous to be LGBTQ. Immigration Equality’s mission is centered around securing safety and freedom for LGBTQ and HIV-positive individuals. Our in-house legal team and pro bono network

of 130+ law firms in 150+ offices nationwide are currently providing legal representation to more than 600 asylum seekers, including securing EADs for many of these individuals.

Given our extensive experience, we understand at the most fundamental level the importance of securing work authorization for our clients as quickly as possible. Without the ability to work, our clients often are denied basic necessities, such as housing, food, medication and healthcare. Not only are these necessities critical for survival, but they are essential for individuals to effectively pursue their asylum claims.

## II. The Proposed Rule Radically Changes the Regulatory Deadline to Adjudicate Work Permits

Under the current system, asylum seekers must wait 150 days from the date they file an asylum application before applying for an EAD (if the applicant has caused delays in their asylum case, they must wait even longer). Pursuant to a regulation in place since 1994, USCIS is required to adjudicate EAD applications within 30 days of receiving them. Nonetheless, USCIS routinely failed to meet this deadline until July 2018, when a federal court hearing the case ordered the government to comply with the deadline. *See Rosario*, No. C15-0813JLR. Since that time, USCIS has adjudicated 99% of initial EAD applications within 30 days. Prior to the court's ruling in *Rosario*, USCIS adjudicated 47% of initial EAD applications within 30 days, an additional 31% of applications within 60 days, and 22% of applications in more than 60 days. 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." (Notice at 47153, fn. 11.)

The existing five-month wait period before applying for an EAD is already too long for asylum seekers who need a way to support themselves while waiting for their claims to be adjudicated. The delay is extremely burdensome, forcing many of our clients into homelessness, and making access to food, clothing, medication and health services impossible. The proposed rule would exacerbate this already precarious situation forcing asylum seekers to wait even longer before applying for work permits. Notably, the actual wait time for an EAD is usually much longer than six months because preparation of the underlying asylum application generally takes several months before it is filed.

Significantly, DHS has proposed no alternative timeline to the current 30-day deadline. DHS considered a 90-day timeframe, which would have been *three times* the current period, but ultimately rejected that idea removing the timeframe entirely. (Notice at 47166-47167.) This suggests that the agency anticipates these applications will be significantly delayed.

## III. The Proposed Rule Will Negatively Impact Immigration Equality Clients

Immigration Equality's client population is uniquely vulnerable. Many clients have endured extreme violence in their countries of origin on account of their sexual orientation, gender identity

and/or HIV status, and have fled to the United States with no financial resources or safety net to speak of. Obtaining permanent legal status in the U.S. is a crucial lifeline, and the ability to work while awaiting a determination on an asylum application is critical for survival. Simply put, without an EAD, many of our clients cannot eat, cannot access transportation, cannot secure housing and cannot access essential healthcare.

Ninety-nine percent of our clients live at or below 250% of the poverty line when they are accepted into our legal services program with a substantial portion living at or below the poverty line. Forty-four percent are under the age of 30. Moreover, LGBTQ and HIV-positive individuals often seek asylum in the United States as a result of persecution by their own families and communities. Thus, our clients often cannot rely on family or community networks in the United States for financial support the way some other asylum seekers do. Accordingly, it is crucial that they have immediate means to support themselves.

Studies show that asylum seekers who lack community support are likely to become “homeless, live in overcrowded or unsafe conditions, and lack basic needs like food and clothing.”<sup>1</sup> This has been true for many of our clients who, with the delay in securing an EAD under the current scheme, routinely face homelessness and hunger. Moreover, homeless LGBTQ individuals are particularly vulnerable to exploitation, trafficking, and underground economy risk. The National Coalition for the Homeless reports that “LGBT individuals experiencing homelessness are often at a heightened risk of violence, abuse, and exploitation compared with their heterosexual peers. Transgender people are particularly at physical risk due to a lack of acceptance and are often turned away from shelters; in some cases signs have been posted barring their entrance.”<sup>2</sup>

Further, many health care exchanges require work authorization documents to qualify. Thus, our clients have medical needs that often go unmet due to lack of income and access to medical insurance under the current rule. This situation will only worsen if the proposed rule takes effect. For example:

- HIV treatment, known as anti-retroviral therapy, is prohibitively expensive. Having to wait for work authorization for longer periods of time will hamper efforts by asylum seekers living with HIV to access necessary medical treatment and medication. This is not only devastating to the health of the individual, but could also have negative health consequences on the community at large, as disruptions in HIV care and treatment—especially resulting in reduced adherence or medication rationing—can lead to drug resistant strains of HIV. In short, the proposed rule could have a ripple effect on public health.

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<sup>1</sup> Human Rights First, Callous and Calculated: Longer Work Authorization Bar Endangers Lives of Asylum Seekers and Their Families, (Apr. 29, 2019), [https://www.humanrightsfirst.org/sites/default/files/Work\\_Authorization.pdf](https://www.humanrightsfirst.org/sites/default/files/Work_Authorization.pdf).

<sup>2</sup> National Coalition for the Homeless, LGBT Homelessness, <https://nationalhomeless.org/issues/lgbt/> (last visited Nov. 7, 2019).

- Transgender clients who discontinue hormone therapy due to lack of financial resources can experience severe health consequences. Hormone therapy “is a medically necessary intervention for many transsexual, transgender, and gender-nonconforming individuals with gender dysphoria.”<sup>3</sup> However, it is expensive and needs to be ongoing and closely monitored by healthcare professionals.<sup>4</sup> Ceasing treatment due to a lack of income and medical insurance can result in serious negative physical and mental health outcomes.<sup>5</sup>
- Many of our clients faced extreme violence and trauma in their country of origin and are in desperate need of mental health counselling services. These services are often inaccessible to asylum applicants without income or acceptable identification documents like an EAD.

In addition, many of our clients arrive to the U.S. without recognized forms of identification and cannot access social services without appropriate documents. An EAD is often the only form of picture identification an asylee can provide to social services agencies to access the resources they desperately need. It is also one of the few forms of travel documents permitted by TSA in order to travel within the United States.<sup>6</sup>

Federal law does not provide asylum seekers with public assistance, such as income, housing or food assistance.<sup>7</sup> While federal law permits states to provide state-funded benefits for asylum seekers, this is entirely discretionary and only about half the states have extended any programs providing benefits. Moreover, eligibility can be extremely limited.<sup>8</sup>

It is a constant struggle for us to find social and medical service providers to fill the gap. The need is simply too great for the available resources. As a result, many of our clients suffer needlessly, with dire consequences for their health and well-being. This also has an impact on their underlying asylum claims. For example, without income, clients do not have money for transportation and miss appointments. Without housing, a consistent address and an ability to pay

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<sup>3</sup> World Professional Association For Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, 33 (2011), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

<sup>4</sup> *Id.* at 65.

<sup>5</sup> American Psychiatric Association, What is Gender Dysphoria, (Feb. 2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

<sup>6</sup> Transportation Security Administration, Travel: Identification, <https://www.tsa.gov/travel/security-screening/identification> (last visited Nov. 7, 2019).

<sup>7</sup> Human Rights First, *supra* note 1.

<sup>8</sup> Human Rights First, *supra* note 1.

for phone service, attorneys have difficulty reaching clients and clients struggle to collect the necessary evidence to support their claims. Without appropriate mental healthcare resources, clients who have suffered severe trauma are retraumatized every time they discuss their experiences with their attorneys.

The timeframe under the current rule already causes hardship to our clients. The situation will worsen considerably if the proposed rule takes effect as it may remove the ability to hold USCIS accountable to any deadline.

Our clients are resilient, resourceful and want to be self-sufficient. After obtaining work authorization, they are successful and go on to be significant contributors to American society, pursuing careers in business, education, healthcare, the arts, and activism, among others.

For example, one of our clients is now a successful painter and graphic designer in New York City. Another former client founded a full-service media company empowering communities through storytelling. He also runs a refugee shelter. Yet another is an activist advocating for the rights and needs of LGBTQ communities, while also working as a case manager at a community health center and pursuing her political science degree as a full-time student. Another former client is an entrepreneur and small business owner with an office on Fifth Avenue in Manhattan. In short, our clients thrive when given the opportunity.

#### IV. The Proposed Rule Is Costly and Is Not Supported by DHS's Rationale

By DHS's own data estimates, the proposed rule change could result in \$255.88 million to \$774.76 million in lost compensation for asylum seekers annually. (Notice at 47150). Revenue losses to the federal government in the form of lost contributions to Medicare and social security would "rang[e] from \$39.15 million to \$118.54 million" annually. *Id.*

Notably, DHS's estimates of costs rely on its assumption that without the 30-day deadline, USCIS' case processing timelines will return to what they were before the *Rosario* decision. However, there is no guarantee. This assumption fails to account for asylum backlog that has grown every year over the past five years, according to DHS, and is one of the primary reasons DHS cites for wanting to eliminate the 30-day deadline.

DHS claims that implementing the proposed rule will result in overall cost savings to the agency in the form of fewer personnel needed to process EAD applications. However, DHS has not estimated these personnel costs, nor has DHS estimated:

- losses to businesses that currently employ asylum-seekers
- losses to small businesses in asylum-seekers' communities
- losses to asylum-seekers' family members and networks
- losses to organizations that provide services to asylum-seekers

- losses to federal, state, and local governments in the form of loss income tax

The economic estimates and justification of the proposed rule are not backed up by the data and warrant deeper analysis.

DHS claims that it seeks to eliminate the 30-day processing deadline because the regulatory deadline does “not provide sufficient flexibility” for the agency to address (1) the “increased volume of affirmative asylum applications and accompanying Applications for Employment Authorization”; (2) “changes in intake and EAD document production” over the last two decades; and (3) “the need to appropriately vet applicants for fraud and national security concerns.” (Notice at 47155). However, the changes the government identifies in intake and document production have been in place for more than a decade and a half. (Notice at 47154, fn. 17). Similarly, the additional fraud and national security vetting the government identified has been implemented since September 11, 2001 and the creation of the Office of Fraud Detection and National Security (FDNS) in 2004. (Notice at 47154-55). Despite the existence of these production and vetting changes, USCIS has been able to comply for more than a year with the *Rosario* court’s order requiring it process initial EAD applications in 30 days.

With respect to *Rosario*, DHS says that in order to comply with the court’s order it has been forced to “redistribute[] its adjudication resources,” and the proposed elimination of the 30-day requirement would allow those redistributed resources to be reallocated, “potentially reducing delays in processing of other applications, and avoiding costs associated with hiring additional employees.” (Notice at 47150). As noted above, however, DHS has failed to include any estimated costs of hiring additional employees so those number can be compared to the lost revenue and income noted above.

In support of the proposed rule, USCIS makes frequent reference to a rise in national security threats as a reason to spend more time and resources on each decision. However, as noted above, USCIS has been able to decide 99% of EADs within the 30-day timeframe over the past year. Therefore, USCIS has proven its ability to vet requests in a timely fashion. Moreover, its argument regarding increased threats serves only to prompt the need for a speedier process to properly protect national security, rather than its request to delay the process further. This need for a speedier process is further compounded by the fact that the EAD applicants are asylum-seekers already residing in the United States. If vetting must be done to prevent security risks, then having unvetted people in the U.S. subjected to a potentially indefinite review period seems contrary to the department’s stated interests.

## V. Conclusion

For these reasons, DHS should immediately withdraw its current proposal, and allow for the 30-day EAD processing timeframe to remain in place or, alternatively, allow asylum seekers to apply for an EAD concurrently with their asylum application. We urge DHS to dedicate its efforts

to advancing policies that strengthen rather than undermine the ability of immigrants to support themselves and their families in the future.

Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact Bridget Crawford at [bcrawford@immigrationequality.org](mailto:bcrawford@immigrationequality.org) to obtain further information.

Sincerely,

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