NEW RULES RESTRICT ACCESS TO WORK PERMITS FOR ASYLUM SEEKERS

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The U.S. Department of Homeland Security (DHS) published two rules in late June which severely restrict access to Employment Authorization Documents (EADs) for asylum seekers.

The first rule, published on June 22, 2020, removes a provision which requires U.S. Citizenship and Immigration Services (USCIS) to adjudicate initial applications for EADs based on pending asylum applications ((c)(8) EADs) in 30 days from the date the application for the (c)(8) EAD was filed. This rule goes into effect on August 21, 2020.

The second rule, which was published on June 26, 2020 and which goes into effect on August 25, 2020, severely restricts who is eligible to apply for a (c)(8) EAD, increases the waiting period before which an asylum applicant can apply for a (c)(8) EAD from 150 days to 365 days, and imposes procedural changes which make applying for asylum increasingly difficult.

SUMMARY OF CHANGES

1. Extending the Waiting Period to apply for a (c)(8) EAD from 150 days to 365 days

Currently, applicants for asylum have to wait for 150 days after the receipt of their asylum application by USCIS or an Immigration Court to file an application for a (c)(8) EAD. Under the current system, USCIS may adjudicate the application for a (c)(8) EAD 180 days after the asylum application was received by USCIS. This 180 day “clock” is subject to starts and stops based on whether the asylum applicant caused a delay in the adjudication of their asylum application. The new rule cancels the 180-day EAD clock, including the start and stop calculations. Asylum seekers will now have to wait for 365 days after their asylum application is received by USCIS in order to apply for a (c)(8) EAD. If there is an applicant-caused delay on the asylum application at the time the applicant files the application for an initial (c)(8) EAD, the application for the (c)(8) EAD will be denied.

1 The information contained herein is for reference only and may not be up to date. It does not constitute legal advice. This advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client’s case. You should always consult an attorney regarding your matter. Counsel should independently confirm whether the law has changed since the date of this publication.
by USCIS. Note that filing documentary evidence fewer than 14 calendar days
before an asylum interview may be considered an applicant-caused delay for
purposes of (c)(8) EAD eligibility.

2. Certain applicants for asylum are excluded from obtaining a (c)(8) EAD

Under the new rule, the following asylum applicants will not be eligible to obtain a (c)(8)
EAD:

a. Asylum seekers who enter, or attempt to enter, the United States without
inspection on or after August 25, 2020. There is a limited exception to this
when an asylum applicant is able to demonstrate that they (1) presented
themselves without delay to DHS no later than 48 hours after the entry or
attempted entry; (2) indicated to DHS an intention to apply for asylum or
expressed a fear of persecution or torture; and (3) otherwise had good
cause for having entered, or having attempted to enter, without inspection.
The rule does not define what constitutes good cause.

b. Asylum seekers who have been in the United States for more than a year
and file their asylum application on or after August 25, 2020. Such asylum
seekers will only be eligible to obtain a (c)(8) EAD if an immigration judge
finds that they qualify for an exception, or if they are a child who is
designated an “unaccompanied minor” at the time the asylum application is
filed.

c. Asylum seekers who have been convicted of a Particularly Serious Crime on
or after August 25, 2020. Note, however, that there is a separate rule that
has been proposed jointly by DHS and the Department of Justice (DOJ). If
this proposed rule is finalized, it is likely that any criminal history, no matter
how minor, and regardless of whether there was a conviction, would
exclude an asylum seeker from obtaining a (c)(8) EAD. Accordingly, all
applicants for (c)(8) EADs will have to appear for a Biometrics appointment.

d. Asylum seekers who committed or have been convicted of a Serious
Nonpolitical Crime on or after August 25, 2020. Accordingly, all applicants
for (c)(8) EADs will have to appear for a Biometrics appointment.

e. Asylum seekers who have been convicted of an Aggravated Felony,
regardless of the date of conviction. Accordingly, all applicants for (c)(8)
EADs will have to appear for a Biometrics appointment.
f. Asylum seekers whose applications for asylum have been denied by an Immigration Judge during the 365-day waiting period or before USCIS adjudicates the application for the initial (c)(8) EAD.

3. Validity Period and Termination of (c)(8) EADs

The new rule mandates that USCIS may issue initial and renewal (c)(8) EADs with validity periods of no more than 2 years. Additionally, the rule changes when EADs terminate as follows:

a. If an application for asylum is denied at the asylum office level, and the asylum applicant is not put in removal proceedings, any (c)(8) EAD based on the denied asylum application is immediately terminated.

b. If an application for asylum is denied at the asylum office level, and the asylum applicant is put in removal proceedings, the (c)(8) EAD based on the denied asylum application remains valid, and may be renewed, as long as the application is pending before the Immigration Judge.

c. If an application for asylum is denied by an Immigration Judge, any (c)(8) EAD based on the denied asylum application will remain valid for 30 days after the denial. If the asylum applicant timely files an appeal with the Board of Immigration Appeals (BIA), the (c)(8) EAD will continue to remain valid, and may be renewed, during the pendency of the appeal.

d. If an appeal at the BIA is dismissed, any (c)(8) EAD will be immediately terminated. Even if an asylum applicant chooses to appeal the BIA’s dismissal of the appeal in Federal court, the (c)(8) EAD will remain terminated, and the asylum applicant will be unable to apply for employment authorization, unless the Federal courts remand the case to the BIA.

4. Adjudication period for initial (c)(8) EAD applications

The rule removes the 30-day processing deadline for the adjudication of initial (c)(8) EAD applications for all initial (c)(8) EAD applications filed on or after August 21, 2020.

5. EADs for individuals who have been granted Humanitarian Parole

Under the final rule, individuals who have passed their credible fear interviews and who have been granted humanitarian parole will no longer be allowed to file for employment authorization on the basis of the parole ((c)(11) EAD).
6. Procedural Changes to Filing an Application for Asylum

An asylum application is no longer deemed to be complete and filed if USCIS fails to return an I-589 to an asylum seeker within a 30-day time period. Additionally, Asylum offices will no longer issue recommended approvals. Finally, filing documentary evidence fewer than 14 calendar days before an asylum interview may be considered an applicant-caused delay for purposes of (c)(8) EAD eligibility.

PRACTICE POINTERS
These practice pointers are general guidelines and are not legal advice or a substitute for legal advice. You should always discuss the specifics of your case with a qualified attorney before making any decisions or submitting any applications for immigration and related benefits.

1. If you currently have 150 days or more on your asylum clock, or if your asylum clock reaches 150 days before August 21, 2020, you should consider filing your application for an initial (c)(8) EAD as quickly as possible, and in any case, before August 21, 2020. Note that your application should be received by USCIS before this date. You should ensure that the application is properly filled out, all the instructions have been followed, and all the evidence has been included, so USCIS will not reject the application. If your application for an initial (c)(8) EAD is pending with USCIS before August 21, 2020, USCIS will have to give you a decision on the application in 30 days.

2. If your asylum clock will reach 150 days between August 21, 2020 and August 25, 2020, you should ensure that your application is received by USCIS before August 25, 2020. Doing so will ensure that you will not have to wait for 365 days before applying for an initial (c)(8) EAD. You should ensure that the application is properly filled out, all the instructions have been followed, and all the evidence has been included, so USCIS will not reject the application.

3. If you are eligible to file an application to renew your (c)(8) EAD before August 25, 2020, you should ensure that your application is received by USCIS before August 25, 2020. You should ensure that the application is properly filled out, all the instructions have been followed, and all the evidence has been included, so USCIS will not reject the application.

4. If you have been in the United States for more than a year or will be in the United States for more than a year by August 25, 2020 and you are already in removal proceedings in immigration court, consider filing your asylum application as soon as
possible if you have not already done so. If you are in this situation, it is very important to submit your asylum application such that it is stamped by the Immigration Court before August 25, 2020 to be able to apply for a (c)(8) EAD in the future.

5. If you have been in the United States for more than a year and you are not in proceedings, you should consult with an attorney to see if you qualify to apply for asylum by meeting an exception to the One-Year Filing Deadline (OYFD). You should discuss all the pros and cons of your case with a qualified immigration attorney. If you choose to apply for asylum based on an exception to the OYFD, you should ensure that your application is received by the asylum office before August 25, 2020 to be able to apply for a (c)(8) EAD in the future.

6. Before filing an asylum application, make sure all of the instructions have been complied with, especially after August 25, 2020. USCIS has been returning applications as incorrectly filed for minor technical and formatting errors. If USCIS returns the application to you, you may have already missed your OYFD or lost your ability to qualify for an exception to the OYFD. You should speak with a qualified immigration attorney before filing the application and also if your application is rejected by USCIS.

7. You should submit all corroborating evidence for your asylum claim well before the interview, and in any case, more than 14 days before the asylum interview.

8. If you have been granted Humanitarian Parole, you should consider filing your (c)(11) EAD before August 25, 2020, i.e., your application has to be received by USCIS before August 25, 2020. You should ensure that the application is properly filled out, all the instructions have been followed, and all the evidence has been included, so USCIS will not reject the application.

9. If you have been convicted of a crime or are currently a defendant in a criminal case, you should consult with an immigration attorney before filing an application for Employment Authorization. Depending on the circumstances of your case, you may want to file your application for initial or renewal EADs before August 25, 2020.

10. If you have a recommended approval notice from USCIS, and you qualify to apply for a (c)(8) EAD, you should file your initial or renewal (c)(8) EAD applications such that they are received by USCIS before August 25, 2020.

11. If your case is denied by an Immigration Judge, and should you wish to appeal the decision, you should make sure to timely file a Notice of Appeal with the BIA.