



UPDATED GUIDANCE

PRACTICE ADVISORY: NEW RULES RESTRICT ACCESS TO WORK PERMITS FOR ASYLUM SEEKERS¹

NOVEMBER 18, 2020

In August 2020, the U.S. Department of Homeland Security (DHS) enacted two regulations that severely restrict access to Employment Authorization Documents (EADs) for asylum seekers.

The [first rule](#), which went into effect on August 21, 2020, removes a provision which requires U.S. Citizenship and Immigration Services (USCIS) to adjudicate initial applications for EADs based on pending asylum applications (i.e., “(c)(8)” EADs) within 30 days from the date the application for the (c)(8) EAD was filed.

The [second rule](#)², which went 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.

CASA, Asylum Seeker Advocacy Project (ASAP), and several other advocacy organizations filed a federal lawsuit captioned [CASA v. Wolf](#) challenging these regulations. On September 11, 2020, Judge Paula Xinis issued a [preliminary injunction](#) in the case. She held that Chad Wolf was likely illegally appointed, and temporarily barred the government from enforcing parts of the new work restrictions on members of plaintiff organizations, including ASAP and CASA. USCIS has acknowledged the injunction, however, it has not issued detailed guidance for applicants who are members of ASAP and CASA. Based on the language of the injunction, it appears that all members of ASAP and CASA should benefit under the injunction, even if they became an ASAP or CASA member after the injunction was issued. At the time of this practice advisory, however, USCIS had not specifically taken a position on the issue. If your client could benefit from the injunction per the guidelines on ASAP membership outlined below, we encourage you to help your clients apply for ASAP membership and include proof of such membership with their EAD application. Links to ASAP and CASA’s websites are included at the end of

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.

² The first rule and the second rule are referred to collectively as the “New Rules” throughout this advisory.



this advisory. A sample cover letter for an initial (c)(8) EAD application is also included at the end of this advisory.

SUMMARY OF CHANGE UNDER THE REGULATIONS

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

Prior to the New Rules, applicants for asylum had 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 that system, USCIS could then adjudicate the application 180 days after the asylum application was received by USCIS. This 180 day “clock” was subject to starts and stops based on whether the asylum applicant caused a delay in the adjudication of their asylum application.

The New Rules cancel 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 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 Rules, the following asylum applicants are 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 was published on October 21, 2020 and goes into effect on November 20, 2020. This new rule adds many new bars to asylum eligibility based on legal infractions, including immigration offenses such as any unlawful re-entry conviction, misdemeanor drug possession for personal use, or any felony regardless of specific findings of danger. It also bars people from asylum if a judge determines there is “reason to believe” they have committed an act of domestic violence. Thus, as a result of this new rule many more asylum seekers will be precluded 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 New Rules remove 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. Biometrics fees for all (c)(8) EAD applications

The New Rules now make it compulsory for all initial and renewal (c)(8) EAD applicants to submit a biometrics fee along with their applications. This fee can be combined with the application fee.

6. EADs for individuals who have been granted Humanitarian Parole

Under the New Rules, 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).

7. 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.



BENEFITS OF INJUNCTION FOR MEMBERS OF ASAP AND CASA

As noted above, parts of the new rules have been [enjoined](#) for members of ASAP and CASA. Specifically, members of these organizations still can:

1. Apply for a work permit 150 days after filing an asylum application, and become eligible to receive a work permit after 180 days.
2. Apply for a work permit even if they filed their asylum application more than a year after arriving in the United States.
3. Have their work permit processed within 30 days.
4. Have an asylum application “deemed complete” if it has been pending with USCIS for more than 30 days, ensuring that an asylum applicant can request employment authorization 150 days after submitting their asylum application.

In addition, members of ASAP and CASA are NOT subject to:

1. Biometrics fees: ASAP and CASA members will not be required to submit additional biometric information if they have already done so for their asylum application, nor will they be required to pay \$85 for fulfilling the new biometrics requirement.
2. Discretionary denials: ASAP and CASA members who are eligible for work authorization must receive that authorization.

If you are a member of ASAP or CASA, you should submit evidence of your membership along with your application for a (c)(8) EAD, such as your membership card or a letter from the organization certifying your membership. **Evidence of membership should be placed immediately behind Form I-765.** Members of CASA and ASAP who have further questions should contact CASA or ASAP directly to ensure USCIS is able to process their applications in accordance with the court’s order.

In addition to providing proof of membership, attorneys should also indicate such membership in a cover letter. We have attached a sample (c)(8) EAD cover letter to this advisory.

It is important to note that the injunction is only on parts of the rules. **ASAP and CASA members are still subject to other parts of the new rules**, including the bar on a (c)(8) EAD for asylum applicants who entered the U.S. without inspection or without presenting at a port of entry, the bar on (c)(8) EADs for asylum applicants who have committed or been convicted of certain crimes, and the automatic termination of (c)(8) EADs.



BECOMING AN ASAP OR CASA MEMBER

For information on how to become a member of ASAP, please refer to [this link](#). ASAP currently does not charge a membership fee.

For information on how to become a member of CASA, please refer to [this link](#). CASA currently charges a membership fee of \$35.00. Please note, CASA will need photo identification (passport, identification card, driver license from your country, or other legal U.S. ID). If your client does not have a photo ID, they will have to go to CASA's office with a birth certificate, and a friend or family member with photo identification who will verify your client's address and identity.



SAMPLE INITIAL (c)(8) EAD COVER LETTER



SUPERVISOR REVIEW

PLEASE NOTE: THE APPLICANT IS A MEMBER OF THE ASYLUM SEEKER ADVOCACY PROJECT (ASAP) AND IS A CLASS MEMBER OF CASA DE MARYLAND, INC. V. WOLF, NO. 8:20-CV-02118-PX, — F. SUPP. 3D —, — N.3, 2020 WL 5500165 (D. MD. SEPT. 11, 2020). PER COURT ORDER, SINCE THE APPLICANT IS A CLASS MEMBER, THEY DO NOT HAVE TO PAY THE \$85 BIOMETRICS FEE. ADDITIONALLY, [THE 08/25/2020 EDITION OF THE FORM IS THE CURRENT VERSION OF THE FORM PER USCIS POLICY].

CLASS MEMBER OF CASA DE MARYLAND, INC. V. WOLF

INITIAL (c)(8) EAD APPLICATION

NO FILING FEES OR BIOMETRICS FEES REQUIRED

DO NOT REJECT

October 9, 2020

BY FEDEX

USCIS

Attn: I-765

2501 S. State Hwy. 121

Business Suite 400

Lewisville, TX 75607

RE: I-765 Application for Employment Authorization Document
Applicant: LAST NAMES, First and Middle Name
A-Number: XXX XXX XXX
I-589 Receipt Number: ZXXXXXXXXXXXXX
Category: (c)(8)

Dear Sir or Madam:

On behalf of my client, **FULL NAME** (A# XXX-XXX-XXX), please find enclosed Mr. **LAST NAME**'s completed and signed Form I-765 Application for Employment Authorization. Mr. **LAST NAME** has an I-589 Application for Asylum and for Withholding or Removal on file with USCIS, which was received on **DATE** and has now been pending for **151** days. Because Mr. **LAST NAME** is a member of the Asylum Seeker Advocacy Project ("ASAP"), he is eligible for employment authorization 150 days after the

Commented [AP1]: Always doublecheck the most current version of the form. You can find the current version by going to the edition date section of the website for the form - <https://www.uscis.gov/i-765>. Always ensure that you are filling out the most recent version of the form and also ensure that the version of the form you have filled out is indeed the most recent version before you submit the application. The edition date can be found at the **bottom** of the page on the form and instructions. Dates are listed in mm/dd/yy format. Always make sure to read all of the form instructions.

Commented [AP2]: Always double check the address - <https://www.uscis.gov/i-765>

Commented [AP3]: If applicable. You will only have a receipt number if the application is affirmative. If you have filed the asylum application with an Immigration Court, you will not include a receipt number.

Commented [AP4]: This should be the "date received" which is listed on the I-589 receipt notice, or the date that the application was filed with the Immigration Court. To find the date the application was filed with Immigration Court, you should look at the court stamp on your copy of the I-589.

Commented [AP5]: Calculate the days that have elapsed between the "receipt date"/Court filing date and the date of this letter. You should confirm that the days match what is listed by entering the receipt number on <https://egov.uscis.gov/casestatus/landing.do> (for affirmative applications) or by calling the EOIR hotline (1-800-898-7180) and checking the EAD clock by selecting the option "case processing information" (for defensive applications). Should there be issues with the number of days elapsed on the EAD clock, you should contact the asylum office with jurisdiction over the application (for affirmative cases) or the court administrator for the Immigration Court at which your client's case is venued (for defensive cases). You should make sure that the clock is still running and matches your calculation for the number of days elapsed. We recommend that you not file this application till the EAD clock is fixed. If it is urgent to file the application, you may file the application, but promptly work on correcting the EAD clock. If the EAD clock is not corrected by the time USCIS adjudicates the application, USCIS will either issue a Request for Evidence to ensure the correct amount of time on the clock, which may delay adjudication, or it may deny the EAD application. If USCIS denies the application, you may resubmit the application.



submission of his Form I-589, per the recent order in *Casa de Maryland, Inc. v. Wolf*.¹ This order also exempts Mr. **LAST NAME**, as an ASAP member, from paying the \$85 biometrics fee, and as an initial (c)(8) EAD applicant, Mr. **LAST NAME** is not required to pay a filing fee.

In support of Mr. **LAST NAME**'s I-765 application and as evidence of his eligibility, please also find enclosed the following:

1. Form G-28, Notice of Entry of Appearance as Attorney;
2. Form I-765, Application for Employment Authorization Document
3. A copy of Mr. **LAST NAME**'s ASAP membership card, ID# **NUMBER**.
4. A copy of the USCIS Receipt Notice of Mr. **LAST NAME**'s I-589 Application (Receipt Number **ZXXXXXXXXXXXX**);
5. A copy of Mr. **LAST NAME**'s currently valid passport;
6. A print-out of Mr. **LAST NAME**'s most recent I-94;
7. Two (2) recent passport-style photographs of Mr. **LAST NAME**;
8. A copy of the September 11, 2020 order in *Casa de Maryland, Inc. v. Wolf*, which enjoins the new requirements of 365-day waiting period and biometrics fees for all ASAP members; and

As always, thank you for your expedited processing of this application. Please do not hesitate to contact me by telephone at (XXX) XXX-XXXX or by email at email@email.com if you have any questions or require any additional information.

Respectfully submitted,

Attorney Name, Esq.
Enclosures

¹ No. 8:20-CV-02118-PX, — F. Supp. 3D —, — N.3, 2020 WL 5500165 (D. Md. Sept. 11, 2020).

Commented [AP6]: Make sure you leave **absolutely no blank spaces** on any USCIS forms. Remember, USCIS now has a "no blank space" policy - do not leave **any** spaces on any forms blank. The no-blank space policy is applicable for every form which is to be submitted to USCIS, including G-28s. For spaces that you do not have information for, use "not applicable," "not available," "unknown," or "none." While the instructions may say to use "N/A," we have had several applications rejected for just using "N/A." We highly recommend that you use one of the four options. You should also fill out sections where the form instructs you to leave the section blank or where the form instructs you to skip to the next section. The form might not allow you to type answers in some spaces. In such spaces, you will have to **handwrite** these answers **in black ink**. Even signature blocks where there will be no signature (e.g., law student or translator), you will have to write in "not applicable." Remember - **Absolutely no textboxes or spaces in which numbers and/or letters can go should be left blank**. If a question is a yes/no question, and there is no box for "N/A," you may leave the yes/no boxes blank, **but** if the question then continues and says "if you answered yes/no then ..." and a text box follows, you have to fill that text box with "Not applicable." Additionally, in the addresses, if you fill out a State and Zip Code, the form will not let you type in the Province or Postal Code. You will have to **handwrite** "Not Applicable" in those fields in black ink. For USCIS Account Number, if you don't have one, make sure you write in "NONE."

Commented [AP7]: Proof of Membership **MUST** be placed immediately behind the I-765. You should also add a sticky tab to the side of the page to highlight that you have included proof of membership.

Commented [AP8]: Or, for defensive asylum applications, copy of the court-stamped I-589, showing that the I-589 is pending with the Immigration Court as of [DATE].

Commented [AP9]: Each photo **must** have the client's full name and alien number written on the back in pencil or in sharpie.