UPDATED GUIDANCE

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

AUGUST 16, 2021

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 rule², 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 de Maryland (CASA), Asylum Seeker Advocacy Project (ASAP), and several other advocacy organizations filed a federal lawsuit captioned CASA v. Mayorkas (previously, 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, and has issued guidance on how members of ASAP and CASA should apply for EADs to benefit from the injunction. Please see the guidance under the “Update: Preliminary Injunction Impacting CASA and ASAP Members” section of the I-765 website. Based on the language of the injunction, 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. 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

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.
application. Links to ASAP and CASA’s websites are included at the end of this advisory. Sample cover letters for initial and renewal (c)(8) EAD applications are 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. Please see Practice Tip 1 below.
### PRACTICE TIP 1

This EAD ban for people who entered the country without inspection does not apply to people who entered the country before August 25, 2020. If your client entered without inspection before August 25, 2020, you will still need to answer Questions 30.b. – 30.g. in Part 2 of the I-765. Your answer for Item 30.g., however, should state that the client entered the United States without inspection before August 25, 2020 and therefore the bar on EADs for applicants who entered without inspection does not apply to them.

| 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. The New Rules cross-referenced a separate rule that was published on October 21, 2020 and which was slated to go into effect on November 20, 2020. This October 21, 2020 rule added 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 barred 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 the October 21, 2020 rule many more asylum seekers would have been precluded from obtaining a (c)(8) EAD. A preliminary injunction has enjoined the implementation of the October 21, 2020 rule. However, the criminal bars to obtaining an EAD as set forth in the New Rules are still in place. 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.** Please see the “Update: Preliminary Injunction Impacting CASA and ASAP Members” section of the I-765 website for more details. 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.

**PRACTICE TIP 2**

Make sure you include proof of ASAP or CASA membership **directly after** the last page of the I-765. There should be no pages, including tab pages, between the last page of the I-765 and the proof of ASAP or CASA membership. In addition, you should highlight on the cover letter that the client is a member of ASAP or CASA. You should also use a sticky tab or a post-it note on the proof of ASAP or CASA membership, and write on the tab “PROOF OF ASAP (or CASA) MEMBERSHIP.”

**PRACTICE TIP 3**

Due to the COVID-19 pandemic, USCIS has been experiencing **significant delays** in issuing receipt notices and adjudicating applications. In order to receive an electronic notification that the application has been received by USCIS, we highly recommend submitting **Form G-1145, E-Notification of Application/Petition Acceptance**, along with the EAD application. The Form G-1145 should be placed at the very top of the application package, and should be placed before the cover letter.

**PRACTICE TIP 4**

If your client is a member of ASAP or CASA, and has an initial application for a (c)(8) EAD pending before USCIS, your client may also benefit from the **Rosario Class Action** which requires USCIS to adjudicate initial employment authorization applications based on a pending asylum application within 30 days. If your client’s application for an initial (c)(8) EAD has been pending for 25 days, you should follow the **guidance issued by USCIS** to ensure that your client receives an EAD in a timely manner.
In addition to providing proof of membership, attorneys should also indicate such membership in a cover letter. We have attached sample initial and renewal (c)(8) EAD cover letters 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 on or after August 25, 2020, 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.

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3 Please refer to Practice Tip 1 for tips on how to fill out the I-765 for clients who entered the United States without inspection prior to August 25, 2020.
SAMPLE INITIAL (c)(8) EAD COVER LETTER
SUPERVISOR REVIEW
CLASS MEMBER OF CASA DE MARYLAND, INC. V. WOLF
INITIAL (c)(8) EAD APPLICATION
NO FILING FEES OR BIOMETRICS FEES REQUIRED
DO NOT REJECT

August 8, 2021

BY FEDEX

USCIS
Attn: I-765 C08 (650888)
2501 S. State Hwy. 121
Business Suite 400
Lewisville, TX 75607

Applicant: LAST NAMES, First and Middle Name
A-Number: XXX XXX XXX
I-589 Receipt Number: ZXXXXXXXXXXXX
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 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;
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
SAMPLE RENEWAL (c)(8) EAD COVER LETTER
August 5, 2021

BY FEDEX

USCIS
Attn: I-765 C08 (650888)
2501 S. State Hwy. 121
Business Suite 400
Lewisville, TX 75607

Applicant: LAST NAMES, First and Middle Name
A-Number: XXX XXX XXX
I-589 Receipt Number: ZXXXXXXXXXXXX
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/the Immigration Court, which was received on DATE. Because Mr. LAST NAME is a member of the Asylum Seeker Advocacy Project (“ASAP”), he is exempt from paying the $85 biometrics fee, per the order in Casa de Maryland, Inc. v. Wolf.1

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;

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3. A copy of Mr. LAST NAME’s ASAP membership card, ID# NUMBER
4. A copy of the front and back of Mr. LAST NAME’s EAD card
5. A copy of the USCIS Receipt Notice of Mr. LAST NAME’s I-589 Application (Receipt Number XXXXXXXXXXXXX);
6. A copy of Mr. LAST NAME’s government-issued photo ID;
7. A print-out of Mr. LAST NAME’s most recent I-94;
8. Two (2) recent passport-style photographs of Mr. LAST NAME; and
9. 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;

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