

**DEPARTMENT OF HOMELAND SECURITY****8 CFR Parts 208 and 274a**

[CIS No. 2648–19; DHS Docket No. USCIS–2019–0011]

RIN 1615–AC27

**Asylum Application, Interview, and Employment Authorization for Applicants****AGENCY:** Department of Homeland Security.**ACTION:** Final rule.

**SUMMARY:** On November 14, 2019, the Department of Homeland Security (DHS) published a notice of proposed rulemaking (NPRM) that would modify DHS's regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application. This final rule implements the proposed rule, with some amendments based on public comments received.

**DATES:** This final rule is effective August 25, 2020.

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**Table of Abbreviations**

- APA—Administrative Procedure Act
- ASC—Application Support Center
- BCR—Biometrics Collection Rate
- BFR—Biometrics Fee Ratio
- BIA—Board of Immigration Appeals
- BLS—Bureau of Labor Statistics
- CAM—Central American Minors Program
- CAT—Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- CBP—U.S. Customs and Border Protection
- CFR—Code of Federal Regulations
- CPMS—Customer Profile Management System
- DHS—U.S. Department of Homeland Security
- DOJ—Department of Justice
- DOS—Department of State
- E.O.—Executive Order
- EAD—Employment Authorization Document
- EOIR—Executive Office for Immigration Review
- FBI—Federal Bureau of Investigation
- FDNS—Fraud Detection and National Security Directorate
- FIFO—First in/First Out
- Form I–589—Application for Asylum and for Withholding of Removal
- Form I–765—Application for Employment Authorization
- Form I–863—Notice of Referral to Immigration Judge
- FY—Fiscal Year
- GSA—General Services Administration
- HSA—Homeland Security Act of 2002
- ICE—U.S. Immigration and Customs Enforcement
- IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996
- IJ—Immigration Judge
- INA—Immigration and Nationality Act
- INS—Immigration and Naturalization Services
- IRCA—Immigration Reform and Control Act of 1986
- ISO—Immigration Services Officer
- LCA—Labor Condition Application
- LIFO—Last In, First Out
- NEPA—National Environmental Policy Act
- NOID—Notice of Intent to Deny
- NPRM—Notice of Proposed Rulemaking
- NTA—Notice to Appear
- OMB—Office of Management and Budget
- PM—Presidential Memorandum
- PRA—Paperwork Reduction Act
- RFA—Regulatory Flexibility Act
- Secretary—Secretary of Homeland Security
- TPS—Temporary Protected Status
- TVPRA—The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
- UAC—Unaccompanied Alien Children
- UMRA—Unfunded Mandates Act of 1995
- UNHCR—United Nations High Commissioner for Refugees

U.S.C.—United States Code  
 USCIS—U.S. Citizenship and Immigration  
 Services  
 VAWA— Violence Against Women Act

## I. Executive Summary

### A. Proposed Rule

On November 14, 2019, DHS published a notice of proposed rulemaking (“NPRM”) entitled *Asylum Application, Interview, and Employment Authorization for Applicants*.<sup>1</sup> In the NPRM, DHS proposed amendments in order to (1) reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization pursuant to 8 CFR 274a.12(c)(8) (hereinafter “(c)(8) EAD” or “EAD”) or other non-asylum-based forms of relief such as cancellation of removal, and (2) discourage illegal entry into the United States. DHS also proposed changes to reduce incentives for aliens to intentionally delay asylum proceedings in order to extend the period of employment authorization based on the pending asylum application, and to simplify the adjudication process. DHS proposed further changes to prevent asylum applicants who have committed certain crimes from obtaining a (c)(8) EAD, and to make the decision to grant (c)(8) employment authorization to asylum applicants discretionary, in line with DHS’ statutory authority. DHS proposed to modify its regulations in the following areas:

1. *Extend the waiting period to apply for employment authorization:* DHS proposed that asylum applicants wait 365 calendar days from the date their asylum applications are received by USCIS or the Department of Justice, Executive Office for Immigration Review (DOJ–EOIR) before they may apply for an EAD. DHS also proposed that USCIS will deny requests for (c)(8) EAD applications if there are any unresolved applicant-caused delays on the date of the EAD adjudication.

2. *Eliminate the issuance of recommended approvals for a grant of affirmative asylum:* DHS proposed that USCIS will no longer issue recommended approvals for asylum. These are typically cases where an asylum officer has made a preliminary determination to grant asylum but has not yet received the results of the mandatory, confidential investigation of the alien’s identity and required background and security checks.

3. *Revise eligibility for employment authorization:* DHS proposed to exclude aliens who, absent good cause, entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry from eligibility for (c)(8) employment authorization. DHS also proposed to exclude from eligibility for employment authorization aliens who have failed to file for asylum within one year of their last entry, unless and until an asylum officer or immigration judge (IJ) determines that an exception to the statutory requirement to file for asylum within one year applies. DHS proposed to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer or an IJ during the 365-day waiting period or before the request for initial employment authorization has been adjudicated. DHS further proposed to exclude from eligibility for employment authorization aliens who have: (1) Been convicted of any aggravated felony as defined under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43); (2) been convicted of any felony in the United States or serious non-political crime outside the United States; or (3) been convicted in the United States of certain public safety offenses involving domestic violence or assault; child abuse or neglect; possession or distribution of controlled substances;<sup>2</sup> or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state or local jurisdiction. DHS proposed that it would consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses, warrant a favorable exercise of discretion.<sup>3</sup> DHS requested public comment on whether these and additional crimes should be included as bars to employment authorization. Because the one-year filing deadline does not apply to unaccompanied alien children (UACs), DHS proposed that the bar to eligibility for failing to meet the one-year filing deadline would not bar UACs who apply for asylum from eligibility for an EAD after the 365-day waiting period has expired. DHS also proposed to clarify that only applicants for asylum who are in the United States may apply for employment

authorization. Finally, DHS proposed a severability clause to ensure that in the event any of provision of the final rule is found by a court to be invalid, DHS could still implement the remaining provisions of the rule.

4. *Revise the provisions for EAD termination:* DHS proposed revising when (c)(8) employment authorization terminates. DHS proposed that when a USCIS asylum officer denies an alien’s request for asylum, any employment authorization associated with a pending asylum application would be terminated effective on the date of asylum application denial. If a USCIS asylum officer determines that the alien is not eligible for asylum, the asylum officer will typically refer the case to DOJ–EOIR. DHS proposed that if USCIS refers a case to DOJ–EOIR, employment authorization would continue, and the alien would be eligible to continue applying for EAD renewals, if needed, until the IJ renders a decision on the asylum application. If the IJ denies the asylum application, the alien’s employment authorization would terminate 30 days after denial, unless the alien filed a timely appeal with the Board of Immigration Appeals (BIA). Renewal of employment authorization would be available to the alien during the pendency of the appeal to the BIA. DHS, however, would prohibit employment authorization during the Federal court appeal process, unless the Federal court remanded the asylum case to the BIA. In such cases, the alien could reapply for a (c)(8) EAD once the case was pending before the BIA again.

5. *Change provisions for filing an asylum application:* DHS proposed to remove the requirement that USCIS return an incomplete application within 30 days or have it deemed complete for adjudication purposes. DHS also proposed that amending an asylum application, requesting an extension to submit additional evidence beyond a time that allows for its meaningful consideration prior to the interview, or failing to appear at a USCIS Asylum office to receive a decision as designated, would constitute an applicant-caused delay, which, if not resolved by the date the application for employment authorization is adjudicated, would result in the denial of that employment authorization application. DHS also proposed to clarify the effect of an applicant’s failure to appear for either an asylum interview or a scheduled biometric services appointment on a pending asylum application.

6. *Limit EAD validity periods:* DHS proposed to clarify that the validity period of (c)(8) employment

<sup>2</sup> See section 102 of the Controlled Substances Act (21 U.S.C. 802).

<sup>3</sup> See, e.g., INA sec. 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); INA sec. 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I); INA sec. 212(a)(2)(B), 8 U.S.C. 1182(a)(2)(B).

<sup>1</sup> *Asylum Application, Interview, and Employment Authorization for Applicants*, 84 FR 62374 (proposed Nov. 14, 2019). DHS incorporates by reference the NPRM in its entirety here.

authorization is discretionary and further proposed that any (c)(8) EAD validity period, whether initial or renewal, would not exceed increments of 2 years. DHS proposed to allow USCIS to set shorter validity periods for initial and renewal (c)(8) EADs.

7. *Incorporate biometrics collection requirements into the employment authorization process for asylum seekers:* DHS proposed to incorporate biometrics collection into the employment authorization process for asylum applicants, which would require applicants to appear at an Application Support Center (ASC) for biometrics collection and, if required, pay a separate biometric services fee. At present, USCIS biometrics collection generally refers to the collection of fingerprints, photographs, and signatures.<sup>4</sup> Such biometrics collection would allow DHS to submit a (c)(8) applicant's fingerprints to the Federal Bureau of Investigation (FBI) for a criminal history check, facilitate identity verification, and facilitate (c)(8) EAD card production. DHS proposed to require applicants with a pending application for an initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS indicated it would not collect a biometric services fee from these aliens. DHS proposed to contact applicants with pending asylum-based EAD applications and provide notice of the place, date and time of the biometrics appointment.

8. *Clarify employment authorization eligibility for aliens who have been paroled after being found to have a credible or reasonable fear of persecution or torture:* DHS proposed to clarify that aliens who have been paroled into the United States pursuant to section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), after establishing a credible fear or reasonable fear of persecution or torture under 8 CFR 208.30, may not request a discretionary grant of employment authorization under 8 CFR 274a.12(c)(11), but may still apply for a (c)(8) EAD, if otherwise eligible. DHS sought public comment on this proposal and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those aliens DHS determines are needed for foreign policy, law enforcement, or national security reasons, especially since parole is meant only as a temporary measure to allow an alien's physical presence in the

United States until the need for parole is accomplished or the alien can be removed.

9. *Specify the effective date:* DHS proposed to apply changes made by this rule only to initial and renewal applications for employment authorization under 8 CFR 274a.12(c)(8) and (c)(11) filed on or after the effective date of the final rule, with limited exceptions. DHS proposed that it would apply two of the ineligibility provisions—those relating to criminal offenses and failure to file the asylum application within one year of the alien's last entry to the United States—to initial and renewal applications for employment authorization applications pending on the effective date of the final rule. In order to implement the criminal ineligibility provision, DHS proposed to require applicants with an initial or renewal (c)(8) EAD application pending on the effective date of this rule to appear at an ASC for biometrics collection but DHS would not collect a biometric services fee from these aliens. DHS indicated it would contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment. It also noted that, if applicable, initial applications filed before the effective date of this Final Rule by members of the *Rosario* class would not be subject to any of the provisions of this proposed rule.<sup>5</sup> DHS also sought public comment on whether other aliens, such as those affected by the Settlement Agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D.Cal.1991), or those whose asylum applications predate the 1995 asylum reforms, should be subject to all, some or none of the provisions in this rule.

DHS also proposed revisions to existing USCIS information collections (forms) to accompany the proposed regulatory changes.

<sup>5</sup> On May 22, 2015, plaintiffs in *Rosario v. USCIS*, No. C15-0813JLR (W.D. Wash.), brought a class action in the U.S. District Court for the Western District of Washington to compel USCIS to comply with the 30-day provision of 8 CFR 208.7(a)(1). On July 26, 2018, the court enjoined USCIS from further failing to adhere to the 30-day deadline for adjudicating EAD applications. DHS published a proposed rule to remove this timeframe on September 9, 2019, where it proposed to grandfather into the 30-day adjudication timeframe those class members who filed their initial EAD applications prior to the effective date of any final rule that changes the 30-day DHS timeline. To ensure compliance with the court order and consistency with the 30-day proposed rule, USCIS will not apply this rule to any initial EAD application filed by a *Rosario* class member that is pending as of the effective date of this rule, so long as the *Rosario* injunction remains in effect. USCIS has not included proposed regulatory text to this effect, but would include such text in the event that members of the *Rosario* class remain as of the date of publication of a final rule.

## B. Major Provisions of the Proposed Rule

DHS proposed the following regulatory changes:

1. *Amending 8 CFR 208.3, Form of application.* DHS proposed removing the language providing that an application for asylum will automatically be deemed “complete” if USCIS fails to return the incomplete application to the alien within a 30-day period. The 30-day provision is inconsistent with how all other applications and petitions for immigration benefits are treated, creates an arbitrary circumstance for treating a potentially incomplete asylum application as complete, and imposes an unnecessary administrative burden on USCIS. DHS proposed to conform its current process for determining when an asylum application is received and complete to the general rules governing all other immigration benefits under 8 CFR 103.2, in addition to the specific asylum rules under 8 CFR 208.3 and 208.4. The regulations at 8 CFR 103.2(a)(7) state that USCIS will record the receipt date as of the actual date the immigration benefit request is received at the designated filing location, whether electronically or in paper, provided that it is signed with a valid signature, executed, and filed in compliance with the regulations governing that specific benefit request. If a fee is required, the immigration benefit request must also include the proper fee. Immigration benefit requests not meeting these acceptance criteria are rejected at intake. Rejected immigration benefit requests do not retain a filing date.

2. *Amending 8 CFR 208.4, Filing the application.* The proposed amendments to this section provided that a request to amend a pending application for asylum or to supplement such an application may be treated as an applicant-caused delay, and if unresolved on the date the employment authorization application is adjudicated, will result in the denial of the application for employment authorization.

### 3. *Amending 8 CFR 208.7, Employment authorization.*<sup>6</sup>

a. *Jurisdiction.* The proposed amendments to this section clarified that USCIS has jurisdiction over all applications for employment

<sup>6</sup> DHS has published a notice of proposed rulemaking (NPRM) entitled “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications.” DHS Docket No. USCIS-2018-0001, separate from this NPRM, which addresses application processing times. Comments on the NPRM addressing removal of the 30-day processing provision are not addressed here.

<sup>4</sup> See <https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment> (describing biometrics as including fingerprints, photographs, and digital signature) (last visited July 11, 2019).

authorization based on pending or approved applications for asylum.

b. *365-day Waiting Period.* The proposed amendments to this section also replaced the 150-day waiting period and the 180-day asylum EAD clock. The proposed amendments would make asylum applicants eligible to apply for employment authorization 365 calendar days from the date their asylum application is received. The 365-day period was based on an average of the current processing times for asylum applications which can range anywhere from 6 months to over 2 years, before there is an initial decision, especially in cases that are referred to DOJ–EOIR from an asylum office. DHS also proposed that if any unresolved applicant-caused delays in the asylum adjudication exist on the date the (c)(8) EAD application is adjudicated, the EAD application would be denied. Consistent with the prior regulation, DHS also proposed to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer or an IJ during the 365-day waiting period or before the adjudication of the initial request for employment authorization.

c. *One-Year Filing Deadline.* The proposed amendments to this section excluded from eligibility for employment authorization aliens who have failed to file for asylum within 1 year unless and until an asylum officer or IJ determines that an exception to the statutory requirement to file for asylum within 1 year applies.

d. *Illegal Entry.* The proposed amendments to this section also made any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry ineligible to receive a (c)(8) EAD, with limited exceptions.

e. *Criminal convictions.* The proposed amendments to this section excluded from (c)(8) EAD eligibility any alien who has: (1) Been convicted of an aggravated felony as described in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43); (2) been convicted of any felony<sup>7</sup> in the United States; (3) been convicted of a serious non-political crime outside the United States; (4) been convicted in the United States of domestic violence or assault (except aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships), child abuse or neglect; possession or distribution of controlled substances; or driving or operating a motor vehicle

under the influence of alcohol or drugs, regardless of how the offense is classified by the state, local, or tribal jurisdiction. DHS proposed to consider, on a case-by-case basis, whether an alien who has unresolved domestic charges or arrests that involve domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol, warrants a favorable exercise of discretion for a grant of employment authorization.

f. *Recommended Approvals.* The proposed amendments to this section removed the language referring to “recommended approvals.” Under this proposal, USCIS would no longer issue recommended approvals as a preliminary decision for affirmative asylum adjudications.

g. *EAD Renewals.* The proposed amendments to this section permitted renewals during the pendency of the asylum application, including while the asylum application is still pending before the immigration court or at the BIA (if a timely appeal was filed), for such periods as determined by USCIS in its discretion, but not to exceed increments of 2 years.

h. *Submission of biometrics.* The proposed amendments to this section required applicants to submit biometrics at a scheduled biometric services appointment for all initial and renewal applications for employment authorization. DHS proposed to require applicants with an initial or renewal (c)(8) EAD pending on the effective date of the final rule to appear at an ASC for biometrics collection, but indicated it would not collect a biometric services fee from these aliens. DHS also proposed to contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment.

i. *Termination After Denial by USCIS Asylum Officer.* The proposed amendments to this section provided that when a USCIS asylum officer denies an alien’s request for asylum, any employment authorization associated with a pending asylum application, including any automatic extension of employment authorization, would be automatically terminated effective on the date the asylum application is denied. As is current practice, if a USCIS asylum officer determines that the alien has no lawful immigration status and is not eligible for asylum, the asylum officer will refer the case to DOJ–EOIR and place the alien in removal proceedings. Employment authorization would be available to the alien while the alien is in removal

proceedings and the alien’s application for asylum is under review before an IJ.

j. *Termination After Denial by an IJ or the BIA.* The proposed amendments to this section also provided that where USCIS refers a case to DOJ–EOIR, employment authorization would continue for 30 days following the date that the IJ denies the asylum application to account for a possible appeal of the denial to the BIA. If the alien filed a timely appeal, employment authorization would continue, and the alien would be able to file a renewal EAD application, if otherwise eligible and if the asylum application was still pending on review with the BIA prior to expiration of the alien’s EAD. Employment authorization would be prohibited during the Federal court appeal process. However, if the Federal court remanded the case to the BIA for a new decision, the alien could request a (c)(8) EAD once the asylum application was again pending with the BIA.

k. *Eligibility.* The proposed amendments to the section also clarified and codified that only an applicant who is in the United States may apply for employment authorization.

l. *Severability.* The proposed amendments to this section included a severability clause. This section was drafted with provisions separated into distinct parts. In the event that any provision is found by a court to be invalid, DHS intended that the remaining provisions be implemented as an independent rule in accordance with the stated purposes of this rule.

4. *Amending 8 CFR 208.9, Procedure for interview before an asylum officer.* The proposed amendments to this section clarified that an applicant’s failure to appear at a USCIS Asylum Office to receive and acknowledge receipt of the asylum decision following an interview, and an applicant’s request for an extension to submit additional evidence would be considered applicant-caused delays for purposes of eligibility for employment authorization. The proposed amendments also removed references to the “Asylum EAD clock” and required that documentary evidence to support a pending asylum application be submitted no later than 14 calendar days before the asylum interview. DHS proposed this change to allow USCIS asylum officers time to conduct a meaningful examination of the evidence prior to, and in preparation for, the asylum applicant’s interview. As a matter of discretion, the asylum officer can consider evidence submitted within the 14 calendar days in advance of the interview date, or may grant the

<sup>7</sup> See 18 U.S.C. 3156(a)(3) (the term “felony” means an offense punishable by a maximum term of imprisonment of more than 1 year).

applicant a brief extension of time during which the applicant may submit additional evidence.

*5. Amending 8 CFR 208.10, Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application.*

The proposed amendments to this section clarified that an asylum applicant's failure to appear for an asylum interview or biometric services appointment may lead to referral or dismissal of the asylum application, and may be treated as an applicant-caused delay affecting eligibility for employment authorization. In addition, DHS proposed to clarify that USCIS is not obligated to send any notice to the applicant about his or her failure to appear at a scheduled biometrics appointment or an asylum interview as a prerequisite to making a decision on the asylum application, which may include dismissing the asylum application or referring it to an IJ. DHS proposed these amendments to facilitate more timely and efficient case processing when applicants fail to appear for essential appointments. Finally, the amendments replaced references to fingerprint processing and fingerprint appointments with the term presently used by USCIS—"biometric services appointment."

*6. Amending 8 CFR 274a.12, Classes of aliens authorized to accept employment.* The proposed amendments to this section removed the language in 8 CFR 274a.12(c)(8) referring to "recommended approvals." The amendments also deleted an obsolete reference to the Commissioner of the former Immigration and Naturalization Service (INS) and replaced it with a reference to USCIS. DHS further proposed to clarify that aliens who have been paroled into the United States after being found to have a credible fear or reasonable fear of persecution or torture may not apply under 8 CFR 274a.12(c)(11) (parole-related EADs), but may apply for employment authorization under 8 CFR 274a.12(c)(8) if they apply for asylum in accordance with the rules for (c)(8) EADs and if they are otherwise eligible. The proposed amendments also provided that employment authorization would not be granted if a denial of an asylum application is under judicial review, in conformity with amendments proposed at 8 CFR 208.7. DHS requested public comment on these proposals and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those DHS determines are needed for foreign policy, law enforcement, or national

security reasons, especially since parole is meant only as a temporary measure to allow an alien's physical presence in the United States until the need for parole is accomplished or the alien can be removed.

*7. Amending 8 CFR 274a.13, Application for employment authorization.* The proposed amendments to this section removed unnecessary references to the supporting documents required for submission with applications for employment authorization based on a pending asylum application and clarified that such employment authorization applications, like all other applications, petitions, or requests for immigration benefits, must be filed on the form designated by USCIS, in accordance with the form instructions, and along with any applicable fees. DHS also proposed to amend 8 CFR 274a.13(a)(1) so that USCIS has discretion to grant applications for employment authorization filed by asylum applicants pursuant to 8 CFR 274a.12(c)(8), in keeping with its discretionary statutory authority under INA 208(d)(2), 8 U.S.C. 1158(d)(2). To conform the current automatic extension and termination provisions to the changes proposed under 8 CFR 208.7(b), the proposed amendments to this section also provided that any employment authorization granted under 8 CFR 274a.12(c)(8) that was automatically extended pursuant to 8 CFR 274a.13(d)(1) would automatically terminate on the date the asylum officer, IJ, or the BIA denies the asylum application.

*8. Amending 8 CFR 274a.14, Termination of employment authorization.* For purposes of clarity, the proposed amendment to this section added a new paragraph at 8 CFR 274a.14(a)(1) that cross-references any automatic EAD termination provision elsewhere in DHS regulations, including the automatic termination provisions being proposed by this rule in 8 CFR 208.7(b).

*9. Effective date:* DHS proposed that, with limited exceptions, the rules in effect on the date of filing Form I-765, Application for Employment Authorization, would govern all initial and renewal applications for a (c)(8) EAD based on a pending asylum application and a (c)(11) EAD based on a grant of parole after establishing a credible fear or reasonable fear of persecution or torture. DHS proposed that the criminal provisions and the failure to file the asylum application within 1 year of last entry would apply to initial and renewal EAD applications pending on the date the final rule is

published. In order to implement the criminal ineligibility provision, DHS proposed to require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS would not collect the biometrics services fee from these aliens. DHS indicated it would provide notice of the place, date and time of the biometrics appointment to applicants with pending (c)(8) EAD application. DHS also proposed that, if applicable, initial (c)(8) EAD applications filed before the effective date of the final rule by members of the *Rosario* class would not be affected by this proposed rule. DHS proposed to allow aliens with pending asylum applications that have not yet been adjudicated and who already have received employment authorization before the final rule's effective date to retain their (c)(8) employment authorization until the expiration date on their EAD, unless the employment authorization is terminated or revoked on the grounds noted in the regulations that existed before the effective date of the proposed rule. DHS proposed to allow aliens who have already received employment authorization before the final rule's effective date under the (c)(11) eligibility category based on parole/credible fear to retain that employment authorization until their EAD expired, unless the employment authorization was terminated or revoked on the grounds noted in the regulations that existed before the effective date of the proposed rule. DHS also noted that the proposed rule would not impact the adjudication of applications to replace lost, stolen, or damaged (c)(8) or (c)(11) EADs.

*C. Summary of Changes in the Final Rule*

Following careful consideration of public comments, DHS has made some changes to the regulatory text proposed in the NPRM.<sup>8</sup> As discussed in detail elsewhere in this preamble, the changes in this final rule include the following:

1. Effective Date

In the NPRM, DHS proposed to apply the one-year filing deadline and criminal provisions to (c)(8) EAD applications pending on the effective date of the final rule. In light of the comments and concerns about the retroactive application of these provisions to applications pending prior to the effective date of this final rule, DHS has determined that it will not

<sup>8</sup> *Asylum Application, Interview, and Employment Authorization for Applicants*, 84 FR 62374 (proposed Nov. 14, 2019).

apply any provisions of this rule to applications for employment authorization under 8 CFR 274a.12(c)(8) and (c)(11) that are pending on the final rule's effective date. Except as noted below, the provisions of this rule will apply only to applications for employment authorization based on pending asylum applications ((c)(8) initial and renewal applications) and applications for employment applications based on parole ((c)(11) initial and renewal applications) that are postmarked (or if applicable, electronically submitted) on or after the effective date; EAD applications that were postmarked before the effective date of this final rule, accepted as properly filed by USCIS pursuant to 8 CFR 103.2(a)(1) and (a)(2), and are deemed pending on the effective date of this final rule, will be adjudicated under the respective prior regulations. As the criminal provisions will not be applied to aliens with initial and renewal EAD applications under (c)(8) or (11) that are pending on the effective date of this final rule as initially proposed, DHS will not require these aliens to appear for biometrics collection associated with their pending EAD applications. This amendment is reflected by the deletion of proposed 208.7(a)(1)(iv).

DHS will only apply the termination provisions to aliens who filed their applications for employment authorization (initial and renewal) on or after the effective date of this final rule, regardless of whether their asylum application was filed before or after the effective date of the final rule. DHS will only apply the illegal entry bar to eligibility for employment authorization to aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry on or after the effective date of this final rule. This change is reflected in 208.7(a)(1)(iii)(G).

DHS will only apply the one-year filing deadline provision to aliens who filed their asylum application on or after the effective date of this rule. This change is reflected in 208.7(a)(1)(iii)(F). DHS will only apply the criminal bars for particularly serious crimes and serious non-political crimes where the conviction or offense triggering the bar occurred on or after the effective date of the rule. DHS will apply the aggravated felony bar to any conviction regardless of the conviction date. These changes are reflected in 208.7(a)(1)(iii)(A)–(C).

## 2. Illegal Entry

DHS proposed to exclude from (c)(8) EAD eligibility any alien who entered or attempted to enter the United States at a place and time other than lawfully

through a U.S. port of entry, with the limited exception of when an alien demonstrates that he or she: (1) Presented himself or herself without delay to the Secretary of Homeland Security (or his or her delegate); (2) indicated to a DHS agent or officer an intent to apply for asylum or expressed a fear of persecution or torture; and (3) otherwise had good cause for the illegal entry or attempted entry. In the final rule, DHS is clarifying that to meet the first prong of this three-part exception, the alien must present himself or herself without delay, but no later than 48 hours after the entry or attempted entry, to the Secretary or his or her delegate.

## 3. One-Year Filing Deadline

DHS is emphasizing the importance of the statutory one-year filing in this final rule by providing that aliens who fail to file their asylum applications within 1 year of their arrival into the United States will be ineligible for a (c)(8) EAD while their asylum application is pending until an asylum officer or an IJ has determined that the alien meets an exception under INA section 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). However, DHS is making a clarifying amendment to 8 CFR 208.7(a)(1)(iii)(F) to replace the word “beyond” with “after” to more clearly indicate that aliens are not eligible for a (c)(8) EAD if the alien filed his or her asylum application *after* the statutory one-year filing deadline. DHS is also amending 8 CFR 208.7(a)(1)(iii)(F) to clarify that the one-year filing requirement does not apply if the alien was a UAC on the date their asylum application was filed. For additional discussion, see section IV. Discussion of the Final Rule, ¶ B. One-Year Filing Deadline.

## 4. Criminal Bars to Eligibility

In the NPRM, DHS proposed to exclude from eligibility for employment authorization aliens who have: (1) Been convicted of any aggravated felony as defined under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43); (2) been convicted of any felony in the United States or serious non-political crime outside the United States; or (3) been convicted in the United States of certain public safety offenses involving domestic violence or assault; child abuse or neglect; possession or distribution of controlled substances; or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state or local jurisdiction. DHS proposed that it would consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign

criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses, warrant a favorable exercise of discretion. DHS requested public comment on whether these and additional crimes should be included as bars to employment authorization.

DHS carefully considered the public comments received, including those suggesting that bars to (c)(8) EAD eligibility should align with bars to asylum. DHS disagrees that (c)(8) EAD bars *must* align with asylum bars. DHS recognizes that DOJ and DHS have proposed a separate joint rule enumerating similar criminal bars to asylum, and has chosen to adopt the bars in that rule, if finalized, based on the similarity to offenses initially proposed in this rulemaking and the similar impact of protecting public safety by preventing aliens with significant criminal histories from obtaining a discretionary benefit.<sup>9</sup> The bars proposed in the DOJ–DHS joint NPRM will replace the public safety offenses and arrests DHS initially proposed in this rulemaking. DHS also revised the bar relating to serious non-political crimes committed outside the United States to align with the statutory bar to asylum and to reflect that a serious non-political crime does not require a conviction.<sup>10</sup> These changes are reflected at 208.7(a)(1)(iii)(B)–(D). For additional discussion, see section IV. Discussion of the Final Rule, ¶ C. Criminal Bars to Eligibility.

## 5. Applicant-Caused Delays

In the NPRM, DHS proposed that any delay in the asylum adjudication requested or caused by the applicant that was outstanding or had not been remedied by the time USCIS adjudicates the alien's (c)(8) EAD application would result in denial of the EAD application. DHS has considered whether the alien would have sufficient notice of the EAD adjudication date, which USCIS proposed to use to determine EAD eligibility, and determined that the alien would have little control over the date of adjudication. Therefore, in this final rule, DHS has amended the provision to provide that any delay requested or caused by the applicant that is

<sup>9</sup> See Proposed rule: *Procedures for Asylum and Bars to Asylum Eligibility*, 84 FR 69640 (Dec. 19, 2019). By reference to 8 CFR 208.13(c), DHS does not intend that these criminal bars incorporate INA 208(b)(2)(A)(1)(i), (iv), or (v) (as referenced via 8 CFR 208.13(c)(1)), or 8 CFR 208.13(c)(2)(C), (E), or (F).

<sup>10</sup> An alien is barred from asylum if there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside of the United States. See INA section 208(b)(2)(A)(iii) of the INA, 8 U.S.C. 1158(b)(2)(A)(iii).

outstanding or has not been remedied at the time the initial (c)(8) EAD application is filed will result in the denial of the EAD application. Unlike the date of adjudication, the alien has control over the date of filing. DHS is making this change in response to public comments proposing that DHS consider alternative ways to protect due process and gain efficiencies in the adjudication of the asylum application. DHS believes this modification will provide the applicant with certainty of their eligibility requirements under the applicant-caused delay provision of the rule, while disincentivizing applicants from prolonging the adjudication of their asylum application.

Further, DHS provided examples of what may constitute an applicant-caused delay in the NPRM but did not clearly indicate whether applicant-caused delays would affect applications for initial (c)(8) EADs or renewal EADs or both. DHS is clarifying that applicant-caused delays only apply to initial applications for (c)(8) EADs by adding the word “initial” to 8 CFR 208.7(a)(1)(iv).

*D. Summary of Costs, Benefits, and Transfer Payments*

This rule amends the (c)(8) EAD process by extending the period that an asylum applicant must wait in order to be employment authorized, and by disincentivizing asylum applicants from causing delays in the adjudication of

their asylum applications. DHS has considered that some asylum applicants may seek unauthorized employment without possessing a valid employment authorization document, but does not believe this should preclude the Department from making procedural adjustments to how aliens gain access to employment authorization based on a pending asylum application. The provisions herein seek to reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization and remain for years in the United States for economic purposes, and to disincentivize criminal behavior and illegal entry into the United States.

The quantified maximum population this rule will apply to is about 290,000 annually. DHS assessed the potential impacts from this rule overall, as well as the individual provisions, and provided quantitative estimates of such impacts where possible and relevant. For the provisions involving biometrics and the removal of recommended approvals, the quantified analysis covers the entire population. For the change to a 365-day waiting period to file an EAD, the quantified analysis also covers the entire population; however, DHS relies on historical data to estimate the costs for affirmative cases and certain assumptions to provide a maximum potential estimate for the

remaining affected population. For the provisions that will potentially end some EADs early, DHS estimated only the portion of the costs attributable to affirmative cases because DHS has no information available to estimate the number of defensively-filed cases.

DHS provides a qualitative analysis of the provisions to terminate EADs earlier for asylum cases denied/dismissed by an IJ, to remove employment eligibility for asylum applicants under the (c)(11) category, and to bar employment authorization for asylum applicants with certain criminal history, who did not enter at a U.S. port of entry, or who, with certain exceptions, did not file for asylum within one year of their last arrival to the United States. As described in more detail in the unquantified impacts section, DHS does not have the data necessary to quantify and monetize the impacts of these provisions.

To take into consideration uncertainty and variation in the wages that EAD holders earn, all of the monetized costs rely on a lower and upper bound, benchmarked to a “prevailing” minimum wage and a national average wage, which generates a range. Specific costs related to the provisions are summarized in Table 1. For the provisions in which impacts could be monetized, the single midpoint figure for the range capturing a low and high wage rate is presented.<sup>11</sup>

TABLE 1—SUMMARY OF COSTS AND TRANSFERS

Provision summary	Annual costs and transfers (mid-point)
<p>I. Quantified:</p> <p>365-day EAD filing wait period (for DHS affirmative asylum cases and partial estimates for DHS referrals to DOJ).</p> <p>365-day EAD filing wait period (for the residual population).</p>	<p>1. Population: 39,000.</p> <p>2. Cost: \$542.7 million (quantified impacts for 39,000 of the 153,381 total population).</p> <p>3. Reduction in employment tax transfers: \$83.2 million (quantified impacts for 39,000 of the 153,381).</p> <p>4. Cost basis: Annualized equivalence cost.</p> <p>5. Summary: Lost compensation for a portion of DHS affirmative asylum cases who will have to wait longer to earn wages under the rule; nets out cost-savings for aliens who will no longer file under the rule; includes partial estimate of DHS referral cases to DOJ–EOIR. It does not include impacts for defensively-filed cases.</p> <p>DHS emphasizes that the costs of the rule in terms of lost or deferred labor readings will potentially depend on the extent of surplus labor in the labor market. In the current environment with COVID–19-related layoffs and unemployment, there is the potential that the impacts will be mainly transfers and less in terms of costs.</p> <p>1. Population: 114,381.</p> <p>2. Cost: \$2.39 billion (quantified impacts for the remaining 114,381 of the 153,381 total population).</p> <p>3. Reduction in employment tax transfers: \$366.2 million (quantified impacts for the remaining 114,381 of the 153,381).</p> <p>4. Cost basis: Annualized equivalence cost.</p>

<sup>11</sup> The populations reported in Table 1 reflect the maximum population that could be covered by each provision. Some of the populations that would incur monetized impacts are slightly different due to technical adjustments. DHS notes that the maximum population is smaller than that in the NPRM baseline because, in this final rule, DHS will not apply any provisions of this rule to applications for employment authorization based on pending asylum applications ((c)(8) or pending EAD

applications based on parole ((c)(11)) that are pending before or on the effective date of this final rule. In the NPRM, the pending pool was 14,451 at the time the data was obtained. The pending population at any point in time can vary due to many factors. In the NPRM, the pending population was not slated to pay the biometric services fee, hence the difference in cost in this final rule only accrues to the time and travel-related costs of submitting biometrics. Based on an estimated

12,805 persons in the pending pool who would submit biometrics under the original proposal, the difference in cost for the rule in the first year the rule will take effect at the low and upper wage bounds are \$921,389 and \$2,078,200, respectively. DHS also removed qualitative cost discussion for pending EAD applicants who would not be subject to the criteria proposed in the NPRM.

TABLE 1—SUMMARY OF COSTS AND TRANSFERS—Continued

Provision summary	Annual costs and transfers (mid-point)
Biometrics requirement .....	<p>5. Summary: Lost compensation for the population of approved annual EADs for which DHS does not have data to make a precise cost estimate. The costs reported are a maximum because the potential impact is based on the maximum impact of 151 days; in reality there will be lower-cost segments to this population and filing-cost savings as well.</p> <p>1. Population for initial and renewal EADs: 290,094.</p> <p>2. Cost: \$36.3 million.</p> <p>3. Reduction in employment tax transfers: None.</p> <p>4. Cost basis: Annualized equivalence cost.</p> <p>5. Summary: For initial and renewal EADs, there will be time-related opportunity costs plus travel costs of submitting biometrics, as well as \$85 fee for (c)(8) I-765 initial and renewal populations subject to the biometrics and fee requirements. A small filing time burden to answer additional questions and read associated form instructions in the I-765 is consolidated in this provision's costs.</p>
Eliminate recommended approvals .....	<p>1. Population: 1,930 annual.</p> <p>2. Cost: \$13.9 million.</p> <p>3. Reduction in employment tax transfers: \$2.13 million.</p> <p>4. Cost basis: Annualized equivalence cost.</p> <p>5. Summary: Delayed earnings and tax transfers that would have been earned for an average of 52 calendar days earlier with a recommended approval.</p>
Terminate EADs if asylum application denied/dismissed (DHS).	<p>1. Population: 575 (current and future).</p> <p>2. Cost: \$31.8 million.</p> <p>3. Reduction in employment tax transfers: \$4.9 million.</p> <p>4. Cost basis: Maximum costs of the provision, which would apply to the first year the rule takes effect.</p> <p>5. Summary: Forgone earnings and tax transfers from ending EADs early for denied/dismissed DHS affirmative asylum applications. This change will affect EADs that are currently valid and EADs for affirmative asylum applications in the future that will not be approved. DHS acknowledges that as a result of this change, businesses that have hired such workers will incur labor turnover costs earlier than without this rule.</p>
<p>II. Unquantified:</p> <p>Clarify employment eligibility under (c)(11) category for I-765.</p>	<p>a. Population: 13,000.</p> <p>b. Cost: Delayed/forgone earnings.</p> <p>c. Cost basis: N/A.</p> <p>d. Summary: DHS does not know how many of the actual population will apply for an EAD via the (c)(8) I-765, but the population would be zero at a minimum and 13,000 at a maximum, with a mid-point of 6,500. The population would possibly incur delayed earnings and tax transfers by being subject to the 365-day EAD waiting period (it is noted that this population would also incur costs under the biometrics provision, above), or lost earnings if they do not apply for a (c)(8) EAD.</p>
Criminal activity/illegal entry bar .....	<p>DHS is unable to estimate the number of aliens impacted that will no longer be eligible to receive an EAD while their asylum applications are being adjudicated. Impacts would involve forgone earnings and potentially lost taxes.</p>
One-year filing deadline .....	<p>Some portion of the 8,326 annual filing bar referrals will no longer be eligible to receive an EAD while their asylum applicants are being adjudicated. Impacts would comprise deferred/delayed or forgone earning and potentially lost taxes. DHS does not have data on filing bar cases referred to DOJ-EOIR.</p>
Terminate EADs if asylum application denied/dismissed (DOJ-EOIR).	<p>DOJ-EOIR has denied an average of almost 15,000 asylum cases annually; however, DHS does not have data on the number of such cases that have an EAD and are employed. Costs would involve forgone earnings and tax transfers for any such EADs that would be terminated earlier than they otherwise would, as well as forgone future earnings and tax transfers. DHS acknowledges that as a result of this change businesses that have hired such workers will incur labor turnover costs earlier than without this rule. Businesses unable to replace these workers will also incur productivity losses.</p>

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.<sup>12</sup> The transfers would fall on the asylum applicants who would be delayed in entering the

U.S. labor force or who would leave the labor force earlier than under current regulations. The transfers would be in the form of lost compensation (wages and benefits). A portion of this lost compensation might be transferred from asylum applicants to others who are currently in the U.S. labor force or eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the effects of this rule would also be borne by companies that would have

hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These companies will incur a cost, as they will be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided and by having to

<sup>12</sup> Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB Circular A-4 pages 14 and 38 for further discussion of transfer payments and distributional effects. Circular A-4 is available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.



pay workers to work overtime hours. DHS does not know what this next best alternative may be for those companies. As a result, DHS does not know the portion of overall effects of this rule that are transfers or costs, but estimates the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies are able to easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will bear little or no costs, so \$4.459 billion (annualized at 7 percent) will be transferred from asylum applicants to workers currently in the labor force or induced back into the labor force (we assume no tax losses as a labor substitute was found). Conversely, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then \$4.459 billion is the estimated maximum monetized cost of the rule, and \$0 is the estimated minimum in monetized transfers from asylum applicants to other workers. In addition, under this scenario, because the jobs would go unfilled there would be a loss of taxes. DHS estimates \$682.5 million as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

Because the biometrics requirement implemented in this rule is a cost to applicants and not a transfer, its

minimum annual value of \$27.08 million is the minimum cost of the rule. The range of impacts described by these two scenarios, plus the consideration of the biometrics costs, are summarized in Table 2 below (Table 2A and 2B capture the impacts a 3 and 7 percent rates of discount, respectively).

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect the amount of time an asylum applicant is employed. However, DHS is aware that the outbreak of COVID-19 will likely impact these estimates in the short run.<sup>13</sup> As discussed above, the analysis presents a range of impacts, depending on if companies are able to find replacement labor for the jobs asylum applicants would have filled. In April 2020, the unemployment rate increased by 10.3 percentage points to 14.7 percent.<sup>14</sup> This marks the highest rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948). By comparison, the unemployment rate for the same month in 2019 was 3.6%.<sup>15</sup> DHS assumes that during the COVID-19 pandemic, with additional available labor nationally, companies are more likely to find replacement labor for the job the asylum applicant would have filled.<sup>16</sup> Thus, in the short-run during the pandemic and the ensuing economic

recovery, the lost compensation to asylum applicants as a result of this rule is more likely to take the form of transfer payments from asylum applicants to other available labor, than it is to be costs to companies for lost productivity because they were unable to find replacement labor. DHS notes that although the pandemic is widespread, the severity of its impacts varies by locality, and there may be structural impediments to the national and local labor market. Consequently, it is not clear to what extent the distribution of asylum applicants overlaps with areas of the country that will be more or less impacted by the COVID-19 pandemic. Accordingly, DHS cannot estimate with confidence to what extent the impacts will be transfers instead of costs.

DHS's assumption that all asylum applicants with an EAD are able to obtain employment (discussed in further detail later in the analysis), also does not reflect impacts from the COVID-19 pandemic. It is not clear what level of reductions the pandemic will have on the ability of EAD holders to find jobs (as jobs are less available), or how DHS would estimate such an impact with any precision given available data. Consequently, the ranges projected in this analysis regarding lost compensation are expected to be an overestimate, especially in the short-run.

TABLE 2A—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 3%  
[\$ millions]

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	\$0.0	\$0.0	\$1,473.2	\$4,459.0	\$2,229.5
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225.5	682.4	0.0	0.0	341.2
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements .....	27.1	45.5	27.1	45.5	36.35
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,473.2	4,459.0	0.0	0.0	2,229.5

<sup>13</sup> On March 13, 2020, the President declared that the COVID-19 outbreak in the United States constitutes a national emergency. See 'Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,' available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>14</sup> Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: [https://www.bls.gov/news.release/archives/empsit\\_05082020.pdf](https://www.bls.gov/news.release/archives/empsit_05082020.pdf).

<sup>15</sup> Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020, Employment Situation Summary Table A. Household data, seasonally adjusted. Available at:

[https://www.bls.gov/news.release/archives/empsit\\_05082020.pdf](https://www.bls.gov/news.release/archives/empsit_05082020.pdf).

<sup>16</sup> The Congressional Budget Office estimates the unemployment rate is expected to average close to 14 percent during the second quarter. See: CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021, <https://www.cbo.gov/publication/56335>, April 24, 2020.

TABLE 2A—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 3%—Continued  
[\$ millions]

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Total Costs ....		1,500.2	4,504.5	27.1	45.5	2,265.8

TABLE 2B—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 7%  
[\$ millions]

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	\$0.00	\$0.00	\$1,473.3	\$4,459.5	\$2,229.7
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225.5	682.5	0	0	341.2
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements .....	27.1	45.5	27.1	45.5	36.3
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,473.3	4,459.5	0.0	0.0	2,229.7
Total Costs ....		1,500.4	4,505.0	27.1	45.5	2,266.1

As required by Office of Management and Budget (OMB) Circular A-4, Table 3 presents the prepared A-4 accounting statement showing the impacts associated with this regulation:

TABLE 3—OMB A-4 ACCOUNTING STATEMENT  
[\$ millions, 2019]  
[Period of analysis: 2020–2029]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)	
Benefits:					
Monetized Benefits .....	(7%) (3%)	N/A N/A	N/A N/A	N/A N/A	RIA.
Annualized quantified, but un-monetized, benefits .....	N/A	N/A	N/A	N/A	RIA.
Unquantified Benefits .....	The benefits potentially realized by the rule are qualitative and accrue to a streamlined system for employment authorization for asylum seekers that will reduce fraud, improve overall integrity and operational efficiency, and prioritize aliens with bona fide asylum claims. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large. The rule aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. The biometrics requirement will enhance identity verification and management.			RIA.	
Costs:					
Annualized monetized costs (discount rate in parenthesis) .....	(7%) (3%)	\$2,266.1 2,265.8	\$27.08 27.08	\$4,505.0 4,504.5	RIA. RIA.
Annualized quantified, but un-monetized, costs .....	N/A	N/A	N/A	N/A	RIA.

TABLE 3—OMB A-4 ACCOUNTING STATEMENT—Continued  
 [\$ millions, 2019]  
 [Period of analysis: 2020–2029]

Category					
Qualitative (unquantified) costs .....	In cases where companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, affected companies would also lose profits from the lost productivity. In all cases, companies would incur opportunity costs by having to choose the next best alternative to immediately filling the job the pending asylum applicant would have filled. There may be additional opportunity costs to employers such as search costs. Estimates of costs that will involve DOJ–EOIR defensively-filed asylum applications and DHS-referrals could not be made due to lack of data. Potential costs would involve delayed/deferred or forgone earnings.				RIA.
	There would also be delayed or forgone labor income for EAD applicants impacted by the criminal and 1-year filing provisions, renewal applicants, transfers from the (c)(11) group, and filing bar cases, all of whom would be subject to some of the criteria being implemented in this rule. In addition, such impacts could also affect those who would be eligible currently for an EAD, or have such eligibility terminated earlier, but would be ineligible for an EAD under the rule.				
	Delaying and/or eliminating employment authorization eligibility would have a negative impact on asylum seekers' welfare. The removal or delay of some workers regarding employment could have an adverse effect in terms of their health insurance.				
Transfers:					
Annualized monetized transfers: "on budget" .....	(7%) (3%)	0 0	0 0	0 0	RIA.
From whom to whom? .....	N/A				N/A.
Annualized monetized transfers: Compensation .....	(7%) (3%)	2,229.7 2,229.5	0.00 0.00	4,459.5 4,459.0	RIA.
From whom to whom? .....	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals). Some of the deferred or forgone earnings could be transferred from asylum applicants to workers in the U.S. labor force or induced into the U.S. labor force. Additional distributional impacts from asylum applicant to the asylum applicant's support network that provides for the asylum applicant while awaiting an EAD; these could involve burdens to asylum applicants' personal private or familial support system, but could also involve public, private, or charitable benefits-granting agencies and non-governmental organizations (NGOs).				RIA.
Annualized monetized transfers: Taxes .....	(7%) (3%)	341.2 341.2	0.00 0.00	682.5 682.4	RIA.
From whom to whom? .....	A reduction in employment taxes from companies and employees to the Federal Government. There could also be a transfer of Federal, state, and local income tax revenue (provisions: 365-day wait + end EADs early + end recommended approvals) that are not quantified.				
Category	Effects				Source citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments .....	DHS does not know how many workers will be removed from the labor force due to this rule. There may also be a reduction in state and local tax revenue, including state, and local income tax revenue. Budgets and assistance networks that provide benefits to asylum seekers could be impacted negatively if asylum applicants request additional support.				RIA.
Effects on small businesses .....	This rule does not directly regulate small entities, but has indirect costs on small entities. DHS acknowledges that ending EADs linked to denied DHS affirmative asylum claims and EADs linked to denied asylum cases under DOJ–EOIR purview will result in businesses that have hired such workers incurring labor turnover costs earlier than without this rule. Such small businesses may also incur costs related to a difficulty in finding workers that may not have occurred without this rule.				RFA.
Effects on wages .....	None .....				RIA.

Category	Effects	Source citation (RIA, preamble, etc.)
Effects on growth .....	None .....	RIA.

As will be explained in greater detail later, the benefits potentially realized by the rule are qualitative. This rule will reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization or other forms of non-asylum-based relief from removal, thereby allowing aliens with bona fide asylum claims to be prioritized. A streamlined system for employment authorization for asylum seekers will reduce fraud and improve overall integrity and operational efficiency. DHS also believes these administrative reforms will encourage aliens to follow lawful processes to immigrate to the United States.<sup>17</sup> These effects stand to provide qualitative benefits to asylum seekers, communities where they live and work, the U.S. government, and society at large.

The rule also aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD process. While this rule will not implement labor market tests for the (c)(8) EAD process, it will put in place mechanisms to reduce fraud and deter those without bona fide claims for asylum from filing applications for asylum primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal. DHS believes these mechanisms will protect U.S. workers.

The biometrics requirement will provide a benefit to the U.S. government by enabling DHS to know with greater certainty the identity of aliens requesting EADs in connection with an asylum application. The biometrics requirement also will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant's biometrics against government databases (for example, FBI databases) to determine if he or she

matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production.

Along with the changes summarized above and discussed in detail in the preamble and regulatory impact sections of this rule, DHS will modify and clarify existing regulations dealing with technical and procedural aspects of the asylum interview process, USCIS authority regarding asylum, applicant-caused delays in the process, and the validity period for EADs. DHS discusses these provisions in the unquantified impacts section of the analysis.

## II. Purpose of This Rule

On April 29, 2019, the White House issued a Presidential Memorandum (PM) entitled, "Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System."<sup>18</sup> The White House, referencing the President's earlier Proclamations, noted that "our immigration and asylum system is in crisis as a consequence of the mass migration of aliens across our southern border" and that the "emergency continues to grow increasingly severe. In March, more than 100,000 inadmissible aliens were encountered seeking entry into the United States. Many aliens travel in large caravans or other large organized groups, and many travel with children. The extensive resources required to process and care for these individuals pulls U.S. Customs and Border Protection (CBP) personnel away from securing our Nation's borders. Additionally, illicit organizations benefit financially by smuggling aliens into the United States and encouraging abuse of our asylum procedures. This strategic exploitation of our Nation's humanitarian programs undermines our Nation's security and sovereignty. The purpose of this memorandum is to strengthen asylum procedures to safeguard our system against rampant abuse of our asylum process."<sup>19</sup>

The PM directs the Secretary of Homeland Security to propose regulations to bar aliens who have entered or attempted to enter the United States unlawfully from receiving employment authorization prior to

being approved for relief and to immediately revoke the employment authorization of aliens who are denied asylum or become subject to a final order of removal.

Through this rule, DHS is addressing, in part, the national emergency and humanitarian crisis at the border<sup>20</sup> by (1) reducing incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization, or other forms of non-asylum based relief, and remain for years in the United States due to the backlog of asylum cases, and (2) disincentivizing illegal entry into the United States by providing that, on or after August 25, 2020, any alien who enters or attempts to enter the United States at a place and time other than lawfully through a U.S. port of entry will be ineligible to receive a (c)(8) EAD, with limited exceptions. DHS is also making administrative reforms that will ease some of the administrative burdens USCIS faces in accepting and adjudicating applications for asylum and related employment authorization.

As explained more fully below, DHS believes these reforms will help mitigate the crisis that our immigration and asylum systems are facing as a consequence of the mass migration of inadmissible aliens across our southern border,<sup>21</sup> and improve the current asylum backlog, helping to clear the way for meritorious asylum applications to be received, processed, and adjudicated more quickly. This will give bona fide asylum seekers the certainty they deserve but are currently deprived of because of the flood of frivolous, fraudulent, or otherwise non-meritorious asylum claims clogging the system. The extensive resources required to process and care for these aliens pulls personnel away from processing bona fide asylum claims and securing our Nation's borders. Additionally, illicit organizations benefit financially by smuggling aliens into the United States and encouraging abuse of our asylum procedures. This strategic exploitation of our Nation's

<sup>20</sup> Proclamation 9844, Declaring a National Emergency Concerning the Southern Border of the United States, 2019 2019 Daily Comp. Pres. Doc. 80 (Feb. 15, 2019).

<sup>21</sup> <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>.

<sup>17</sup> The rule may also provide less incentive for those pursuing unauthorized employment in the United States to use the asylum application process to move into authorized employment status.

<sup>18</sup> Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System, 2019 Daily Comp. Pres. Doc. 251 (Apr. 29, 2019).

<sup>19</sup> *Id.*

humanitarian programs undermines our Nation's security and sovereignty.<sup>22</sup> These interests, when weighed against any reliance interest on behalf of impacted aliens, are greater, particularly because of the large increase in number of those seeking asylum at the border, which is operationally unsustainable for DHS long term.

It is the policy of the Executive Branch to manage humanitarian immigration programs in a safe, orderly manner that provides access to relief or protection from removal from the United States for aliens who qualify for such relief or protection, and that promptly denies benefits to and facilitates the removal of those who do not.<sup>23</sup> This rulemaking is part of a series of reforms DHS is undertaking, in coordination with DOJ–EOIR, to improve and streamline the asylum system, so that those with bona fide asylum claims can have their claims decided quickly and, if granted, extended the protections that the United States has offered for over a century, including employment authorization, to aliens legitimately seeking refuge from persecution.

#### A. Efforts to Reform the Asylum System

The Refugee Act of 1980, Public Law 96–212, 94 Stat. 102, was the first comprehensive legislation to establish the modern refugee and asylum system.<sup>24</sup> Congress passed the Refugee Act mainly to replace the ad hoc process that existed at the time for admitting refugees and to provide a more uniform refugee and asylum process.<sup>25</sup> The focus of the Refugee Act was reforming the overseas refugee program. The Refugee Act did not explicitly address how the United States should reform the asylum process or handle sudden influxes of asylum seekers, such as subsequently occurred with the Mariel boatlift—a mass influx of Cuban citizens and

nationals, many of whom had criminal histories, to the United States in 1980.<sup>26</sup> Congress also provided that any alien who had applied for asylum before November 1, 1979, had not been granted asylum, and did not have a final order of deportation or exclusion, could obtain employment authorization.<sup>27</sup>

In 1980, the then-INS issued an interim regulation implementing the asylum provisions of the Refugee Act.<sup>28</sup> This regulation provided that an INS district director could authorize an applicant for asylum to work, in 6 month increments, if the alien had filed a non-frivolous application for asylum.<sup>29</sup> The regulation did not define what constituted a “frivolous” filing. The regulation also excluded, without explanation, the limitation on the size of the class of aliens who could qualify for employment authorization (in other words, only aliens who had applied for asylum before November 1, 1979, but had not been granted asylum, and did not have a final order of deportation or exclusion). As a result of the regulation, the class of aliens who could seek employment authorization based on an asylum application was interpreted to include past and future asylum seekers.

Congress, however, did not provide adequate resources or enact legislation that would address the “pull” factors that led to significant increases in illegal immigration and in asylum filings following enactment of the Refugee Act.<sup>30</sup> In addition, the publication of two INS regulations—the 1986 implementing regulations for the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603 (Nov. 6, 1986)<sup>31</sup> and the 1990 asylum

regulations—further incentivized illegal immigration and the filing of non-meritorious asylum claims or other forms of relief because of the ease with which aliens could obtain employment authorization, regardless of the basis for the application for employment authorization.<sup>32</sup> In the implementing regulations for IRCA, INS provided that aliens could receive an interim EAD if INS did not adjudicate the application for employment authorization within 60 days (former 8 CFR 274a.12(c) and (d)).<sup>33</sup> The IRCA regulations also required asylum officers to give employment authorization, in 1-year increments, to any alien who had filed a non-frivolous<sup>34</sup> asylum application. In the 1990 asylum regulation, INS also mandated that asylum officers give interim EADs to any alien who had filed a non-frivolous asylum application, and that asylum officers continue to renew employment authorization for the time needed to adjudicate the asylum application (former 8 CFR 208.7(a)).<sup>35</sup>

While IRCA's creation of the employer verification system and employer sanctions was designed to reduce the “pull” factor created by the availability of higher paying jobs in the United States, the ability to get interim employment authorization within 90 days, regardless of the basis for requesting employment authorization in the first instance, had the exact opposite effect.<sup>36</sup> In addition, because the agency already had a backlog for adjudicating asylum applications, it was unlikely any asylum application would be adjudicated within a 90-day timeframe, which virtually guaranteed that most asylum applicants would be eligible for interim employment authorization.<sup>37</sup>

on the Southwest border, to find jobs. The employer verification system and employer sanctions were designed to address this concern by reducing the “pull” factor created by the availability of higher paying jobs in the United States. See, e.g., H.R. Rep. No. 99–682(I) at pp. 5649–5654 (July 16, 1986) (Committee explanation for the need for IRCA to control illegal immigration).

<sup>32</sup> See *Martin*, supra note 27, at p. 734; see also *David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247 (May 1990) at pp. 1267–69, 1288–89, and 1373.

<sup>33</sup> DOJ final rule, *Control of Employment of Aliens*, 52 FR 16216–01 (May 1, 1987). The 60-day period was subsequently extended to 90-days with the publication of the final rule, *Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens*, 56 FR 41767–01 (Aug. 23, 1991).

<sup>34</sup> DOJ INS also for the first time defined “frivolous” to mean “manifestly unfounded or abusive.” See former 8 CFR 208.7(a) (1991).

<sup>35</sup> DOJ INS final rule, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 FR 30674–01 (July 27, 1990).

<sup>36</sup> See *Martin*, supra note 27, at p. 733–36.

<sup>37</sup> In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994

<sup>26</sup> See, e.g., *Immigration Reform and Control Act of 1986: Joint Hearing on H.R. 5872 and S. 2222 Before the Subcommittee on Immigration, Refugees, and International Law, Committee on the Judiciary, House of Representatives, and Subcommittee on Immigration and Refugee Policy, Committee on the Judiciary*, 97th Cong. 2nd Sess. 326–328 (Apr. 1 and 20, 1982) (statement of Attorney General William French).

<sup>27</sup> 94 Stat. 102 at sec. 401(b) and (c).

<sup>28</sup> See *Aliens and Nationality; Refugee and Asylum Procedures*, 45 FR 37392 (June 2, 1980). This interim rule was not finalized until 1983. See also *Aliens and Nationality; Asylum Procedures*, 48 FR 5885–01 (Feb. 9, 1983).

<sup>29</sup> 45 FR at 37394 (former 8 CFR 208.4).

<sup>30</sup> See, e.g., David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 Wash. L. Rev. 725 (July 1995) and David A. Martin, *The 1995 Asylum Reforms*, Ctr. for Immigration Studies (May 1, 2000) for a discussion of the history and consequences of the asylum reforms in 1990s.

<sup>31</sup> IRCA legalized many aliens present in the United States prior to 1986, created new temporary agricultural worker programs, and mandated employment verification and employer sanctions to address the problem of U.S. employers hiring illegal aliens. One of the main reasons Congress passed IRCA was its growing concern over the large influx of aliens crossing our borders illegally, particularly

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Congress added the definition of refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), based on the 1967 United Nations (U.N.) Protocol relating to the Status of Refugees, 19 U.S.T. 6223, TIAS No. 6577, 606 U.N.T.S. 267 (1967), which the United States ratified in November of 1968. The Refugee Act also made withholding of removal mandatory, authorized adjustment of status for asylees and refugees, expanded the funding available for domestic refugee assistance services, and barred eligibility for asylum for aliens who were convicted of a serious crime, firmly resettled, persecutors, or a danger to the security of the United States.

<sup>25</sup> See Public Law 96–212, 94 Stat. 102, § 101(b) and S. Rep. 96–256 (July 23, 1979), at pp. 141–143. Earlier treatment of refugees came from the Displaced Persons Act of 1948, 62 Stat. 1009 (as amended), the Refugee Relief Act of 1953, 67 Stat. 400, and the Refugee-Escapee Act of 1957, 71 Stat. 643.

The combined effect of the statutory employment authorization for asylum applicants, the regulations, and insufficient agency resources resulted in a greater influx of aliens, many of whom were not legitimate asylum seekers, but instead merely sought to work in the United States.<sup>38</sup>

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Public Law 103–322, 108 Stat. 1796 (Sept. 13, 1994), which provided for expedited exclusion proceedings and summary deportation of aliens with failed asylum claims and provided that no applicant for asylum would be entitled to employment authorization unless the Attorney General (now Secretary of Homeland Security) determined, as a matter of discretion, that employment authorization was appropriate.<sup>39</sup> Congress passed these amendments mainly because the asylum system was being overwhelmed with asylum claims, including frivolous and fraudulent claims filed merely to obtain employment authorization.<sup>40</sup> The hope was that the expedited exclusion proceedings would reduce such claims. During consideration of the VCCLEA, DOJ also conducted a review of the asylum process and published regulations designed to reduce the asylum backlogs, eliminate procedural hurdles that lengthened the process, and deter abuses in the system.<sup>41</sup> For the first time, DOJ implemented a waiting period for asylum seekers—150 days—before they could apply for employment authorization, with an additional 30 days for adjudication. DOJ based the timeframe on the 180-day processing goals it had set for asylum officers and IJs to complete asylum cases at a time when the volume of cases was substantially lower than the present day level.

In 1996, Congress again amended section 208 when it passed IIRIRA.<sup>42</sup>

(VCCLEA), Public Law 103–322, 108 Stat. 1796 (Sept. 13, 1994). As part of its findings, Congress stated “. . . in the last decade applications for asylum have greatly exceeded the original 5,000 annual limit provided in the Refugee Act of 1980, with more than 150,000 asylum applications filed in fiscal year 1993, and the backlog of cases growing to 340,000.” VCCLEA, at sec. 130010(1).

<sup>38</sup> See *Martin*, *supra* note 27, at p. 733–37.

<sup>39</sup> See Public Law 103–322, 108 Stat. 1796, at sec. 130005.

<sup>40</sup> See *id.* at sec. 130010(1) (findings of the Senate on the need for reforms to the asylum process, including finding of a backlog of cases up to 340,000); see also H.R. Conf. Rep. 103–711 (Aug. 21, 1994), at pp. 241–245 and 393–394.

<sup>41</sup> DOJ INS final rule, *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 FR 62284–01 (Dec. 5, 1994).

<sup>42</sup> Public Law 104–208, 110 Stat. 3009.

Congress retained the expedited exclusion (now removal) procedures to address the influx of thousands of aliens seeking entry into the United States.<sup>43</sup> Congress also reformed the asylum provisions and codified some of the administrative reforms INS made when it published the 1994 asylum regulation. IIRIRA incorporated language that barred an alien not only from eligibility for asylum, but also from any other immigration benefits (such as when an alien filed a frivolous application),<sup>44</sup> added a 1 year deadline to file for asylum, and codified INS’s regulatory prohibition on asylum seekers being granted discretionary employment authorization before a minimum of 180 days has passed from the date of filing of the asylum application.<sup>45</sup>

### B. Need for Reform

Since IIRIRA, there have been no major statutory changes to the asylum provisions to address the immigration realities faced by the United States today. However, since 2016, the United States has experienced an unprecedented surge<sup>46</sup> in the number of aliens who enter the country unlawfully across the southern border. In Fiscal Year 2019, CBP apprehended over 800,000 aliens attempting to enter the United States illegally.<sup>47</sup> These apprehensions are more than double of those in Fiscal Year 2018.<sup>48</sup> If apprehended, many of these aliens claim asylum and remain in the United States for years while their claims are adjudicated. There is consistent historical evidence that approximately 20 percent or less of such claims will be

<sup>43</sup> See, e.g., H.R. Conf. Rep. 104–828, title III, subtitle A (1996).

<sup>44</sup> 8 U.S.C. 1158(d)(6) provides:

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

<sup>45</sup> DHS published an interim final rule implementing IIRIRA in 1997. See DOJ INS, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR 10312–01 (Mar. 6, 1997). DOJ published a separate final rule December 6, 2000 which finalized the provisions related to the asylum process proposed in the DOJ INS and EOIR joint rule, *New Rules Regarding Proceedings for Asylum and Withholding of Removal*, 63 FR 31945 (June 11, 1998), and in response to comments to the asylum procedures made in response to the IIRIRA interim final rule.

<sup>46</sup> See CBP Southwest Border Total Apprehensions/Inadmissibles at <https://www.cbp.gov/newsroom/stats/sw-border-migration> (last modified Mar. 12, 2020).

<sup>47</sup> *Id.*

<sup>48</sup> See CBP Enforcement Statistics at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

successful.<sup>49</sup> This surge in border crossings and asylum claims has placed a significant strain on the nation’s immigration system. The large influx has consumed an inordinate amount of DHS’s resources, which includes surveilling, apprehending, screening, and processing the aliens who enter the country, detaining many aliens pending further proceedings, and representing the United States in immigration court proceedings. The surge has also consumed substantial resources at DOJ–EOIR, whose IJs adjudicate asylum claims. The strain also extends to the judicial system, which must handle petitions to review denials of asylum claims, many of which can take years to reach final disposition, even when the claims for asylum lack merit.

In order to maintain the very integrity of the asylum system, it is imperative that DHS take all necessary measures to create disincentives to come to the United States for aliens who do not fear persecution based on the five protected grounds of race, religion, nationality, political opinion, or membership in a particular social group, or fear torture.<sup>50</sup> Fleeing poverty and generalized crime in one’s home country does not qualify an alien for asylum in the United States.<sup>51</sup>

Statistics support DHS’s assertion that the vast majority of protection claims are not motivated by persecution under the five protected grounds or by torture. The historic high in affirmative asylum applications and credible fear receipts in FY 2018<sup>52</sup> is matched by a historic low rate of approval of affirmative asylum applications and credible fear claims in FY 2018.<sup>53</sup>

As noted above, it is the policy of the Executive Branch to manage our humanitarian immigration programs in

<sup>49</sup> See Executive Office for Immigration Review Adjudication Statistics “Asylum Decision Rates” (July 2019), <https://www.justice.gov/eoir/page/file/1104861/download>.

<sup>50</sup> See, e.g., <https://www.wbur.org/cognoscenti/2018/08/08/why-do-migrants-flee-central-america-susan-akram>, [https://www.washingtonpost.com/world/national-security/hunger-not-violence-fuels-guatemalan-migration-surge-us-says/2018/09/21/65c6a546-bdb3-11e8-be70-52bd11fe18af\\_story.html?noredirect=on;https://time.com/longform/asylum-seekers-border/](https://www.washingtonpost.com/world/national-security/hunger-not-violence-fuels-guatemalan-migration-surge-us-says/2018/09/21/65c6a546-bdb3-11e8-be70-52bd11fe18af_story.html?noredirect=on;https://time.com/longform/asylum-seekers-border/).

<sup>51</sup> See, e.g., *Hui Zhuang v. Gonzales*, 471 F.3d 884, 890 (8th Cir. 2006) (“Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.”); *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151 (9th Cir. 2010) (“Asylum is not available to victims of indiscriminate violence, unless they are singled out on account of a protected ground,” and “young men in El Salvador resisting gang violence are not a particular social group.”).

<sup>52</sup> See [https://www.uscis.gov/sites/default/files/Affirmative\\_Asylum\\_Decisions\\_FY09-FY18\\_Q2.pdf](https://www.uscis.gov/sites/default/files/Affirmative_Asylum_Decisions_FY09-FY18_Q2.pdf), <https://www.justice.gov/eoir/page/file/1061526/download>.

<sup>53</sup> *Id.*

a safe, orderly manner that provides access to relief or protection from removal from the United States for aliens who qualify, and that promptly denies benefits to and facilitates the removal of those who do not.<sup>54</sup> Many protection applications appear to be coming from applicants escaping poor economic situations and generalized violence rather than persecution based on one or more of the five protected grounds for asylum or a fear of torture if the alien were returned to his or her country of origin. DHS is implementing more stringent requirements for eligibility for employment authorization, in order to disincentivize aliens who are not bona fide asylum seekers from exploiting a humanitarian program to seek economic opportunity in the United States.

DHS believes that this rule stands as an important disincentive for aliens to use asylum as a path to seek employment in the United States. DHS further believes that this rule complements broader interagency efforts to mitigate large-scale migration to the U.S. southern border that preclude some asylum seekers from entering the United States.<sup>55</sup> These programs are strengthened by DHS making important procedural adjustments to how those aliens who enter the United States may gain access to such a significant immigration benefit as employment authorization. Further, while some of these aliens may disregard the law and work unlawfully in contravention to these reforms, the Department does not avoid the establishment of regulatory policies

<sup>54</sup> <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>.

<sup>55</sup> On January 25, 2019, DHS announced certain aliens attempting to enter the United States illegally or without documentation, including those who claim asylum, will no longer be released into the United States, where they often fail to file an asylum application and/or disappear before an IJ can determine the merits of any claim. Instead, these aliens are being returned to Mexico until their hearing dates. See “Policy Guidance for Implementation of the Migrant Protection Protocols” (Jan. 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf). On July 15, 2019, DHS and DOJ announced a bar to eligibility for asylum to any alien who enters or attempts to enter the United States across the southern border, but who did not apply for protection from persecution or torture where it was available in at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States. See “DHS and DOJ Issue Third-Country Asylum Rule” (July 2019), <https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule>.

because certain aliens might violate the law.<sup>56</sup>

Congress gave the Executive Branch the discretion to make employment authorization available by regulation.<sup>57</sup> The current practice of granting employment authorization with a very low eligibility threshold and nearly limitless renewals to aliens before they have been determined to be eligible for asylum is a “pull” factor for the illegal immigration of aliens who are ineligible for any immigration status or benefit in the United States, and there is an urgent need for reform.<sup>58</sup> Employment authorization for aliens seeking asylum is not a right. It is an ancillary benefit which must be carefully implemented in order to benefit those it is meant to assist.

### III. Background

#### A. Legal Authority

The Secretary of Homeland Security’s authority to make the regulatory amendments being implemented by this rule can be found in various provisions of the immigration laws. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107–296, 116 Stat. 2135), 6 U.S.C. 112, and sections 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States. Section 402(4) of the HSA, 6 U.S.C. 202(4), expressly authorizes the Secretary, consistent with section 428 of the HSA (6 U.S.C. 236) (concerning visa issuance and refusal), to establish and administer rules governing the granting of visas or other forms of permission, including parole, to enter the United States to aliens who are not U.S. citizens or lawful permanent residents. See also 6 U.S.C. 271(a)(3), (b) (describing certain USCIS functions and authorities). Section 208

<sup>56</sup> Notably, the former INS remarked on the need for reform, notwithstanding the possibility that aliens may simply disregard the law and work illegally:

“The Department also considered the claim that asylum applicants will disregard the law and work without authorization. While this is possible, it also is true that unlawful employment is a phenomenon not limited to asylum applicants, but is found among many categories of persons who have illegally entered or remained in the United States. The Department does not believe that the solution to this problem is to loosen eligibility standards for employment authorization. This is particularly so because of the evidence that many persons apply for asylum primarily as a means of being authorized to work. These rules will discourage applications filed for such reasons and thus enable the INS to more promptly grant asylum—and provide work authorization—to those who merit relief . . .”

<sup>59</sup> FR 62284–01, 62291.

<sup>57</sup> INA sec. 208(d)(2).

<sup>58</sup> See *Martin*, *supra* note 27.

of the INA, 8 U.S.C. 1158, gives the Secretary the discretionary authority to grant asylum to an alien who meets the definition of refugee under section 101(a)(42), 8 U.S.C. 1101(a)(42).<sup>59</sup> Sections 235, 236, and 241 of the INA, 8 U.S.C. 1225, 1226, and 1231, govern the apprehension, inspection and admission, detention and removal, withholding of removal, and release of aliens encountered in the interior of the United States or at or between the U.S. ports of entry. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed in the United States by statute or in the discretion of the Secretary. The Secretary implements the changes in this rule under these authorities.

#### B. Eligibility for Asylum

Asylum is a discretionary benefit that can be granted by the Secretary or Attorney General if the alien establishes, among other things, that he or she has experienced past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>60</sup> Under the INA, certain aliens are barred from obtaining asylum, including aliens who are persecutors, have been convicted of a particularly serious crime (which includes aggravated felonies as defined under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43)), have committed serious non-political crimes outside of the United States, who are a danger to the security of the United States, have engaged in certain terrorism-related activities or are members of terrorist organizations, or who are firmly resettled in a third country.<sup>61</sup>

Aliens seeking asylum generally must apply for asylum within one year from the date of their last arrival in the United States. An alien who files for

<sup>59</sup> A refugee is defined under INA section 101(a)(42), 8 U.S.C. 1101(a)(42), as:

1. Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

2. in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

<sup>60</sup> INA sec. 208(b), 8 U.S.C. 1158(b).

<sup>61</sup> INA sec. 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A).

asylum after the 1 year deadline is generally not eligible to apply for asylum unless the Secretary of Homeland Security or Attorney General, in his or her discretion, excuses the late filing.<sup>62</sup> For a late filing to be excused, the alien must demonstrate that changed circumstances materially affected the alien's eligibility for asylum, or extraordinary circumstances delayed filing during the 1 year period.<sup>63</sup> Even if an alien meets all the criteria for asylum, including establishing past persecution or a well-founded fear of future persecution based on the five protected grounds and any exceptions to late filing, the Secretary or Attorney General can still deny asylum as a matter of discretion.<sup>64</sup>

Aliens who are granted asylum cannot be deported or removed, are employment authorized incident to their status, and may be permitted to travel outside of the United States with prior consent from the Secretary.<sup>65</sup> Asylum can be terminated if the alien was not eligible for asylum status at the time of the asylum grant or is otherwise no longer eligible for asylum under the law.<sup>66</sup>

### C. Affirmative vs. Defensive Asylum Filings

To request asylum, an alien must file an application with either USCIS or with the immigration court, using Form I-589, Application for Asylum and for Withholding of Removal. If the IJ or the BIA determines that an alien knowingly filed a frivolous application for asylum, the alien is permanently ineligible for asylum and any other immigration benefits or relief under the INA. Withholding and deferral of removal are not considered relief in this regard. INA section 208(d)(6), 8 U.S.C. 1158(d)(6); 8 CFR 208.20, 1208.20.

Asylum applications are characterized by which agency has jurisdiction over the alien's case. If an alien is physically present in the United States, is not detained, and has not been placed in removal proceedings, the alien files the asylum application with USCIS. These applications are known as "affirmative" filings. If DHS places an alien in removal proceedings, the alien files an application for asylum with an IJ.<sup>67</sup>

<sup>62</sup> The one-year filing deadline does not apply to an alien who is an unaccompanied alien child, as defined in 6 U.S.C. 279(g). INA sec. 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E).

<sup>63</sup> INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D).  
<sup>64</sup> See INA sec. 208(b)(1), 240(c)(4)(ii); 8 U.S.C. 1158(b)(1), 1229a(c)(4)(ii).

<sup>65</sup> INA sec. 208(c)(1), 8 U.S.C. 1158(c)(1).

<sup>66</sup> INA sec. 208(c)(2), 8 U.S.C. 1158(c)(2).

<sup>67</sup> Where an asylum application is filed by an unaccompanied alien child, USCIS has initial

jurisdiction over that application, even if the applicant is in removal proceedings. INA sec. 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRRA), Public Law 110-457 (Dec. 23, 2008).

These applications are known as "defensive" filings and include aliens referred to the IJ by a USCIS asylum officer for de novo review of their asylum claims. Aliens who present themselves at a U.S. port of entry (air, sea, or land) are generally deemed applicants for admission.<sup>68</sup> If an immigration officer determines that an alien is inadmissible under section 212(a)(6)(C) or 212(a)(7) of the INA, 8 U.S.C. 1182(a)(6)(C) or (a)(7), for being in possession of false documents, making false statements, or lacking the required travel documentation, the alien may be placed in expedited removal proceedings under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1). Such aliens may indicate an intention to apply for asylum, express a fear of persecution or torture, or a fear of return to their home country and are then interviewed by an asylum officer to determine whether the alien has a credible fear of persecution or torture. INA section 235(b)(1), 8 U.S.C. 1225(b)(1); 8 CFR 235.3(b)(4). If an alien is determined to have a credible fear, "the alien shall be detained for further consideration of application for asylum." INA 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). Asylum applications based initially on a positive credible fear determination are under the jurisdiction of the immigration courts once a Notice to Appear (NTA) is filed with the court and as such are considered "defensively-filed." Similarly, even if an alien in expedited removal proceedings is released from detention by ICE after a positive credible fear determination is made, the alien is still considered to be under the jurisdiction of the immigration court once the NTA is filed and must file the application for asylum with the court.

### D. Employment Authorization for Asylees and Asylum Applicants

Whether an alien is authorized to work in the United States depends on the alien's status in the United States and if employment is specifically authorized by statute or only authorized pursuant to the Secretary's discretion. Employment authorization for aliens granted asylum and for asylum applicants is authorized under INA

<sup>68</sup> INA sec. 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C) provides separate exceptions for when a lawful permanent resident will be considered an applicant for admission (for example, abandoned residence, continuous absence of 180 days, illegal activity after departure from the United States).

sections 208(c)(1)(B) and (d)(2), respectively, 8 U.S.C. 1158(c)(1)(B), (d)(2). Employment authorization for aliens granted asylum is statutorily mandated and incident to their status. Aliens granted asylum (asylees) are not required to apply for an EAD in order to be employment authorized. USCIS issues the EAD under 8 CFR 274a.12(a)(5). Employment authorization for aliens granted withholding of removal or deferral of removal are governed by 8 CFR 274a.12(a)(10) and (c)(18) respectively. This final rule does not change anything regarding the employment eligibility for an alien granted asylum.

An asylum applicant, however, is not entitled to employment authorization by statute. INA section 208(d)(2), 8 U.S.C. 1158(d)(2). The Secretary, through regulations, may authorize employment for asylum seekers while the asylum application is pending adjudication. Even if the Secretary chooses to grant employment authorization to an asylum applicant, under the current statute and regulations, the Secretary cannot grant such authorization until 180 days after the filing of the application for asylum. *Id.* In practice, this 180-day period is commonly called the "180-day Asylum EAD Clock."<sup>69</sup> The goal of the Asylum EAD clock is to deter applicants from delaying their asylum application solely to obtain employment authorization. Therefore, USCIS does not count, for purposes of the time an alien must wait before the alien can apply for a (c)(8) EAD, the days that actions by the applicant have resulted in delays to the adjudication of his or her asylum application. However, applicants, practitioners, and USCIS itself have all cited difficulty with accurate clock calculations.<sup>70</sup> In light of these issues, DHS is eliminating the clock altogether and, instead, extending the mandatory waiting period to file an asylum-based EAD application. USCIS will deny an EAD application if the asylum application is still subject to an unresolved applicant-caused delay at the time the initial (c)(8) EAD application is filed.

While the INA bars certain aliens from being granted asylum, such as persecutors and applicants who engaged

<sup>69</sup> EOIR-USCIS joint notice, *The 180-day Asylum EAD Clock Notice*, [https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum\\_Clock\\_Joint\\_Notice\\_-\\_revised\\_05-10-2017.pdf](https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf) (last updated May 9, 2017).

<sup>70</sup> See Dep't of Homeland Security, Citizenship & Immigration Services Ombudsman Report, *Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication* (Aug. 26, 2011), at p.6.



in terrorist activity,<sup>71</sup> such aliens may still apply for asylum, and subsequently also apply for an EAD once their application has been pending for 150 days. INA sec. 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A). Aliens seeking employment authorization generally must apply for an EAD by filing Form I-765 with USCIS in accordance with the form instructions, along with any prescribed fee. 8 CFR 274a.13. The regulations at 8 CFR 208.7 and 274a.12(c)(8) govern employment authorization for asylum applicants.

#### E. Asylum and EAD Adjudications

Under existing regulations, there are several important stages and timeframes that can affect the adjudication of asylum applications and (c)(8) EADs: (1) The initial filing of an asylum application; (2) the one-year filing deadline; (3) the 150-day period asylum applicants must wait before they are eligible to file an application for employment authorization; and (4) the additional 30-day period (180-days total) before USCIS may grant (c)(8) employment authorization.

Under current 8 CFR 208.3, if USCIS fails to return the incomplete application for asylum to the applicant within 30 days, the application is automatically deemed complete. Once the asylum application has been accepted for processing, USCIS asylum officers review it to determine if all the documents required to make a decision have been submitted. This review also includes a determination of whether the asylum application was filed within the required 1-year period. If the alien failed to file within the 1-year period, USCIS asylum officers and/or IJs then determine whether the alien meets any of the exceptions to the late filing bar. In the case of affirmative asylum filings, if the alien does not meet an exception, the USCIS asylum officer has the authority to deny, dismiss, or refer the case to the immigration court. 8 CFR 208.14. USCIS asylum officers refer cases to the immigration court by issuing a NTA, which places the alien into removal proceedings. If the USCIS asylum officer refers the complete asylum application to the immigration court, the immigration court conducts a de novo review and determines if the alien met the required one-year filing deadline or qualifies for any of the late filing exceptions.

Once the asylum application is accepted, the 150-day waiting period for

filing a (c)(8) EAD application begins. The regulations at 8 CFR 208.7(a) further provide that USCIS will have 30 days from the filing date of the EAD application to grant or deny that application. The 180-day Asylum EAD Clock therefore includes the 150-day waiting period for filing the (c)(8) EAD application, which is the time while the asylum application is pending with USCIS, or an IJ, and the additional 30-day period that USCIS has to grant or deny the EAD application. The 180-day Asylum EAD Clock excludes delays requested or caused by the applicant and does not run again until the applicant cures the delay or until the next scheduled event in a case, such as a postponed interview, or a continued hearing.

USCIS is not permitted to issue an EAD until 180-days after the filing of a complete asylum application (in other words, the date an alien can be issued an EAD). If a USCIS asylum officer recommends that an asylum application be approved before the required waiting period ends, the alien may apply for employment authorization based on the recommended approval.

As noted, there are a number of actions that can delay or toll the running of the 180-day Asylum EAD Clock. For example, if an applicant fails to appear for a required biometrics appointment, the 180-day Asylum EAD clock will stop and not recommence until the alien appears for his or her biometrics appointment. Similarly, if an alien asks to amend or supplement his or her asylum application, fails to appear at an asylum office to receive and acknowledge receipt of the decision, requests an extension after the asylum interview, or reschedules an asylum interview, all of these actions will stop the 180-day Asylum EAD Clock, and the EAD clock will not recommence until the required action is completed.<sup>72</sup> As a result, some aliens may wait longer than 180 calendar days before they can be granted employment authorization.

Once an asylum applicant receives an EAD based on a pending asylum application, his or her employment authorization will terminate either on the date the EAD expires or 60 days after the denial of asylum, whichever is longer (affirmatively-filed cases). If the asylum application is denied by an IJ, the BIA, or a denial of asylum is upheld by a Federal court, the employment authorization terminates upon the

expiration of the EAD, unless the applicant seeks renewal of employment authorization during the pendency of any administrative or judicial review.

#### IV. Discussion of the Final Rule

##### A. 365-Day Waiting Period To Apply for EADs Based on Pending Asylum Applications

DHS is extending the time period an asylum applicant must wait before he or she is eligible to be granted employment authorization based on a pending asylum application from 180 days to 365 calendar days. See 8 CFR 208.7. DHS is changing the time period to a 365-day waiting period to remove the incentives for aliens who are not legitimate asylum seekers to exploit the system and file frivolous, fraudulent, or non-meritorious claims to obtain employment authorization or other immigration benefits such as cancellation of removal. Currently, if an alien files an application for asylum, the alien can obtain an EAD after 180 days, excluding any days not counted due to an applicant-caused delay. Backlogs at USCIS and the years-long wait for hearings in the immigration courts allow aliens to remain in the United States for many years, be authorized for employment, and ultimately gain equities for an immigration benefit, even if their asylum applications ultimately will be denied on the merits.<sup>73</sup> DHS believes that extending the waiting period for filing a (c)(8) EAD application will be a strong deterrent to those who may seek to file frivolous, fraudulent, and non-meritorious asylum applications. Further, in light of DHS's assessment<sup>74</sup> that many asylum seekers are escaping general criminal violence and poor economic situations in their home countries, it is logical that more stringent requirements for EAD eligibility will disincentivize some of these aliens from coming to the United States in search of economic opportunity. DHS also believes that this deterrent, coupled with the last-in, first out (LIFO) asylum-adjudication scheduling discussed below, will lead to

<sup>73</sup> See, e.g., Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward*, Migration Policy Institute (Sept. 2018) at pp. 4 and 9–12, for additional discussion on the impact of backlogs and delays in immigration proceedings.

<sup>74</sup> See "Statement from the Department of Homeland Security following the Acting Secretary's appearance at Georgetown University" (Oct. 2019), <https://www.dhs.gov/news/2019/10/07/statement-department-homeland-security-following-acting-secretary-s-appearance>. DHS has made this assessment based on internal reporting from regional asylum offices, internal country information assessments, and corroborating journalist sources cited prior in this final rule.

<sup>71</sup> See, e.g., INA sec. 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); INA sec. 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I); INA sec. 212(a)(2)(B), 8 U.S.C. 1182(a)(2)(B).

<sup>72</sup> See *id.* EOIR–USCIS joint notice, *The 180-day Asylum EAD Clock Notice*, for additional examples of actions that can affect the 180-day Asylum EAD Clock.

meritorious applications being granted sooner and non-meritorious applications being denied sooner. DHS acknowledges that these reforms will also apply to aliens with meritorious asylum claims, and that these applicants may experience some degree of economic hardship as a result of heightened requirements for an EAD. However, DHS's ultimate goal is to maintain integrity in the asylum process. DHS has determined that sustaining an under-regulated administrative regime is no longer feasible and that it is not unreasonable to impose additional time and security requirements on asylum seekers before they may apply for an EAD.

DHS is implementing this change to complement its LIFO scheduling priority, re-implemented on January 29, 2018.<sup>75</sup> This priority approach, first established during the asylum reforms of 1995 and used for 20 years until 2014, is a deterrent to those who might try to use the existing backlog as a means to obtain employment authorization. Returning to a LIFO interview schedule will allow USCIS to identify frivolous, fraudulent, or otherwise non-meritorious asylum claims earlier and place those aliens into removal proceedings. Under the previous Administration, DHS discontinued LIFO processing, which was followed by a significant increase in asylum applications.

In the last decade, USCIS has seen its backlog of asylum applications skyrocket, with the number of new affirmative asylum filings increasing by a factor of 2.5 between FY 2014 and FY 2017.<sup>76</sup> The skyrocketing number of affirmative asylum applications has not corresponded with an increased asylum grant rate compared to historical averages. As of March 31, 2019, USCIS faced an affirmative asylum backlog of 327,984 cases. By the end of FY 2019 (September 30, 2019), USCIS faced an affirmative asylum backlog of 339,836 cases.<sup>77</sup> The high volume of cases stems in part from the recent surges in illegal immigration and organized caravans of thousands of aliens, primarily from the Northern Triangle countries (El Salvador, Honduras, and Guatemala), creating a humanitarian and national security crisis at the southern border. USCIS also has had to divert resources and asylum officers from processing

affirmative-asylum backlog cases to address the continuing high volume of credible fear and reasonable fear cases that require nearly immediate interviews. This diversion of resources to credible fear screenings has prevented USCIS from making progress to reduce or eliminate the affirmative asylum backlog.

DHS is eliminating the 180-day Asylum EAD Clock and instead will deny EAD applications where there are unresolved, applicant-caused delays in the adjudication of the Form I-589 existing on the date the initial EAD application is filed. The elimination of the 180-day EAD clock will resolve some of the difficulties adjudicators face in processing asylum EAD applications. Calculating the current 180-day EAD Clock is one of the most complex and time-consuming aspects of EAD adjudications.<sup>78</sup> It requires multipart calculations and the tracking of the start and stop dates for each individual applicant's case. It also requires coordination with DOJ-EOIR for defensively-filed cases that are not under USCIS' jurisdiction.<sup>79</sup> In light of these issues, DHS is eliminating the Asylum EAD Clock altogether and instead extending the mandatory waiting period to file for an EAD. DHS also is notifying applicants that their EAD application will be denied if their asylum case is subject to an applicant-caused delay at the time the applicant files the Form I-765 (c)(8) application. DHS believes eliminating the 180-day Asylum EAD Clock will significantly streamline the determination of the date of the applicant's employment authorization eligibility, while continuing to disincentivize applicants from prolonging the adjudication of their asylum applications. USCIS EAD adjudicators will no longer have to calculate the number of days that must be excluded to account for applicant-caused delays or coordinate with DOJ-EOIR to do so, and will instead simply rely on 365 calendar days from the asylum application receipt date to determine when an alien can request employment authorization. DHS has

<sup>78</sup> DHS acknowledges that many processes have been automated by the Person Centric Query System (PCQS) Asylum EAD Clock Calculator. However, the Asylum EAD Clock Calculator is not fully automated and there are still calculations that are not captured in the Clock Calculator. Additionally, USCIS did not create business rules to address all possible scenarios and, as a result, USCIS officers have had to do manual calculations in many scenarios. The elimination of the 180-day Asylum EAD Clock will create overall efficiencies for USCIS given these limitations with the Clock Calculator.

<sup>79</sup> See, e.g., Citizenship & Immigration Services Ombudsman, *Employment Authorization For Asylum Applicants*, at p.6.

promulgated a separate rulemaking eliminating the requirement to adjudicate the EAD application within 30 days. See *Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications*, DHS Docket No. USCIS-2018-0001, 84 FR 47148 (Sept. 9, 2019).

DHS recognizes that a number of aliens who are legitimate asylum seekers may experience potential economic hardship because of the extended waiting period. However, the asylum system in the United States is completely overwhelmed and has been for years.<sup>80</sup> DHS is committed to enforcing our immigration laws so that we can secure our borders and keep the American people safe. DHS and its inter-agency partners are taking action to disrupt drug trafficking organizations, cartels, human smuggling rings, and other nefarious actors operating on the United States' southern border.<sup>81</sup> These actions include referring and prosecuting illegal border crossers and those who smuggle them into the United States, building the first new sections of border wall in a decade, and deploying the National Guard to the border. But DHS must also take steps to address the pull factors bringing economic migrants to the United States.<sup>82</sup> The urgency to maintain the efficacy and integrity of the U.S. asylum and immigration system outweighs the hardship that may be imposed by the additional 6-month waiting period. The integrity and preservation of the U.S. asylum system takes precedence over any potential economic hardship faced by aliens who arrive in the United States without a legal status, whether or not those aliens may later be found to have meritorious claims.

### B. One-Year Filing Deadline

As part of the reforms to the asylum process, DHS also is emphasizing the

<sup>80</sup> See, e.g., Joel Rose and John Burnett, *Migrant Families Arrive in Busloads as Border Crossings Hit 10-Year High*, Nat'l Pub. Radio (March 5, 2019) for observations about the recent surges in illegal immigration on the southern border.

<sup>81</sup> See, e.g., Zapotosky, Matt, U.S. Arrests Hundreds in Show of Force Against Mexico's Jalisco New Generation Cartel, *The Washington Post* (March 11, 2020), available at [https://www.washingtonpost.com/national-security/jalisco-new-generation-mexico-cartel-dea-arrests/2020/03/11/jfd8ce0a-639a-11ea-acc4-80c22bbee96f\\_story.html](https://www.washingtonpost.com/national-security/jalisco-new-generation-mexico-cartel-dea-arrests/2020/03/11/jfd8ce0a-639a-11ea-acc4-80c22bbee96f_story.html); Rendon-Alvarez, Karla, 15 Arrested in Mission Bay Human Smuggling Attempt, *NBC San Diego* (Feb. 19, 2020), available at <https://www.nbcsandiego.com/news/local/15-arrested-in-mission-bay-human-smuggling-attempt/2266932/>.

<sup>82</sup> See, e.g., de Córdoba, Jose, *The Guatemalan City Fueling the Migrant Exodus to America*, *The Wall Street Journal* (July 21, 2019), available at [www.wsj.com/articles/the-guatemalan-city-fueling-the-migrant-exodus-to-america-11563738141](http://www.wsj.com/articles/the-guatemalan-city-fueling-the-migrant-exodus-to-america-11563738141).

<sup>75</sup> USCIS News Release, *USCIS To Take Action to Address Asylum Backlog* (Jan. 31, 2018).

<sup>76</sup> See *infra* Table 8.

<sup>77</sup> See Asylum Office Workload September 2019, available at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PEDAffirmativeAsylumStatisticsFY2019.pdf>.

importance of the statutory one-year filing deadline for asylum applications. Both DHS and DOJ–EOIR adjudicate asylum applications filed by aliens who reside in the United States for years before applying for asylum. Many aliens filing for asylum now are aliens who were inspected and admitted or paroled but failed to depart at the end of their authorized period of stay (visa overstay), or who entered without inspection and admission or parole and remained, not because of a fear of persecution in their home country, but for economic reasons.<sup>83</sup> In addition, the Asylum Division reports that a contributing factor to the asylum backlog is an increase in the number of applicants who file skeletal or fraudulent asylum applications affirmatively to trigger removal proceedings before the immigration court where they can apply for cancellation of removal—a statutory defense against removal and pathway to lawful permanent resident status available to those who have at least 10 years of physical presence in the United States and meet additional eligibility criteria.<sup>84</sup> DHS seeks to address this practice, to incentivize bona fide asylum applicants to file sooner, and to reduce the asylum backlog by making aliens ineligible for (c)(8) employment authorization if they fail to file their asylum application within 1 year of their last arrival in the United States as required by statute. Based on statute and relevant case law, DHS is also implementing exceptions to the one-year-filing deadline as it relates to eligibility for a (c)(8) EAD, namely for those who have met, as determined by an asylum officer or IJ, an exception under INA section 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). The statutory one-year filing deadline does not apply if the applicant was an unaccompanied alien child on the date the asylum application was first filed, and therefore neither does the one-year filing bar under this

<sup>83</sup> Congress found that the asylum system was being overwhelmed with asylum claims, including frivolous and fraudulent claims filed merely to obtain employment authorization. *See, e.g.*, Public Law 103–322, 108 Stat. 1796, at sec. 130010(3) (findings of the Senate on the need for reforms to the asylum process, including finding that the asylum system was being abused “by fraudulent applicants whose primary interest is obtaining work authority in the United States while their claim languishes in the backlogged asylum processing system.”). *See also* H.R. Rep. No. 99–682(I) at pp. 5649–5654 (discussion of the impact of economic migrants on the U.S. economy during consideration of IRCA in 1986). *See also* More Than 44 Percent of Americans Pay No Federal Income Tax (September 16, 2018), available at: <https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16>.

<sup>84</sup> *See* CIS Ombudsman, *Annual Report*, at p.44.

provision. DHS believes that, absent changed or extraordinary circumstances, the statutory 1-year filing period is a sufficient period of time for bona fide asylum applicants to submit their application to USCIS or an IJ. DHS is applying this provision to any alien who filed his or her asylum application on or after the effective date of this final rule, and filed the application after the one-year filing deadline.

### C. Criminal Bars to Eligibility

DHS is aligning the bars to eligibility for a (c)(8) EAD to the criminal bars for asylum under section 208(b)(2)(A)(ii) and (iii), 8 U.S.C. 1158(b)(2)(A)(ii), (iii). Any alien who at any time has been convicted of an aggravated felony under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), or has been convicted on or after the effective date of this final rule of a particularly serious crime or committed a serious non-political crime outside of the United States, will be ineligible for a (c)(8) EAD. In addition, any alien who fails to establish that he or she is not subject to a mandatory denial of asylum due to any regulatory criminal grounds under 8 CFR 208.13(c) will be ineligible for a (c)(8) EAD.<sup>85</sup>

DHS will require (c)(8) EAD applicants who file their Form I–765 on or after the effective date of this final rule to appear at an ASC to provide their biometrics for their initial and renewal applications. The biometrics collection will allow DHS to: (1) Conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, (2) vet the applicant’s biometrics against government databases (for example, FBI databases) to determine if he or she matched any criminal activity on file, (3) verify the applicant’s identity and compare it to that of the asylum applicant, and (4) facilitate card production with updated, digital photographs.

### D. Procedural Reforms

DHS is clarifying that USCIS has jurisdiction over all applications for employment authorization based on a pending or approved asylum application, regardless of whether USCIS or DOJ–EOIR has jurisdiction over the asylum case. DHS is also implementing several procedural changes to streamline the asylum adjudication process. Currently, most applications, petitions, and requests for

<sup>85</sup> *See Procedures for Asylum and Bars to Asylum Eligibility*, 84 FR 69640 (Dec. 19, 2019). By reference to 8 CFR 208.13(c), DHS does not intend that these criminal bars incorporate INA 208(b)(2)(A)(1)(i), (iv), or (v) (as referenced via 8 CFR 208.13(c)(1), or 8 CFR 208.13(c)(2)(C), (E), or (F).

immigration benefits have specific minimum requirements that must be met before the forms can be accepted for filing. DHS is amending the regulations at 8 CFR 208.3 to remove the language providing that a Form I–589, Application for Asylum and for Withholding of Removal, will be deemed a complete, properly filed application if USCIS fails to return the incomplete Form I–589 to the alien within a 30-day period. *See* 8 CFR 208.3. This procedural change will require asylum applicants to file the asylum application in accordance with the requirements outlined in the regulations at 8 CFR 103.2 and form instructions and is consistent with the general principle that applicants and petitioners bear the burden of filing complete applications and petitions. Applications not properly filed will be rejected and returned to the applicant with the reason(s) for the rejection, consistent with other form types. DHS also is removing the language referring to “recommended approvals” of asylum applications and the effect such notices have on the ability of some asylum applicants to seek employment authorization earlier than others. *See* 8 CFR 208.3 and 274a.12(c)(8). Recipients of recommended approvals have not fully completed the asylum adjudication process. Previously, USCIS issued recommended approvals even when all required background and security check results had not been received, and recipients of such notices were eligible for employment authorization. However, because Congress has mandated that DHS not approve any applications until DHS has received and reviewed all the results of the required background and security checks, DHS has determined that continuing to issue recommended approval notices is contrary to this mandate.<sup>86</sup> In addition, DHS believes it is an inefficient use of resources for USCIS to manage a separate processing regime which requires USCIS to review the asylum application twice: First to determine if it is initially approvable as a

<sup>86</sup> *See, e.g., Consolidated Appropriations Act, 2019*, Public Law 116–6, 113 Stat. 33, Div. A, tit. IV, sec. 402 (2019) (“None of the funds made available in this Act may be used by U.S. Citizenship and Immigration Services to grant an immigration benefit unless the results of background checks required by law to be completed prior to the granting of the benefit have been received by U.S. Citizenship and Immigration Services, and the results do not preclude the granting of the benefit.”); *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998*, Public Law 105–119, 111 Stat. 2440, 2447–48 (1997)(directing the former INS to collect fingerprints and not accept fingerprint cards from outside entities and permitted INS to charge a fee).

“recommended approval,” and then again (after a recommended approval notice has been issued to the applicant) to ensure that the applicant remains eligible for asylum based on the results of the background and security checks. This change will enhance efficiency by removing duplicative case processing tasks. It will also enhance the integrity of the overall asylum process because all information, including the results of background and security checks, will be considered before issuance of the asylum decision.

Further, any documentary evidence submitted fewer than 14 calendar days before the asylum interview (with allowance for a brief extension to submit additional evidence as a matter of discretion) may be considered an applicant-caused delay for purposes of EAD eligibility if it delays the adjudication of the asylum application. The purpose of this provision is to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the asylum interview. Additionally, DHS is including this provision to address the common practice of aliens or their representatives submitting hundreds of pages of documentary evidence shortly before or on the day of the interview, preventing meaningful examination of that evidence and delaying the adjudication. Submission of smaller quantities of evidence, such as photographs or a short police or medical report, within the 14 calendar day period would not be counted as an applicant-caused delay if it does not prevent the meaningful examination of the evidence or delay the adjudication.

#### *E. Termination of Employment Authorization*

DHS is revising the rule governing when employment authorization terminates to provide that when USCIS or DOJ–EOIR denies an asylum application, the alien’s employment authorization associated with the asylum application will terminate automatically, effective on the date of denial of the asylum application. The current practice of allowing an alien to work on a (c)(8) EAD after he or she has been determined ineligible for asylum is inconsistent with the Department’s enforcement priorities and mission.

##### 1. Denial of Asylum Application by USCIS Asylum Officer

Previously, the regulations at 8 CFR 208.7(b)(1) provided that an asylum applicant’s employment authorization terminates 60 days after a USCIS asylum officer denies the application or on the

date the EAD expires, whichever is longer. DHS does not believe it was Congress’ intent to allow aliens with denied asylum applications to continue to be employment authorized once their asylum claims are denied. Therefore, when a USCIS asylum officer denies an alien’s request for asylum, any employment authorization associated with the pending asylum application will be automatically terminated effective on the date the asylum application is denied. Further, consistent with the previous regulations, DHS will deny employment authorization to any alien whose asylum application is denied by an asylum officer either during the 365-day waiting period or before USCIS adjudicates the initial request for employment authorization.

When a USCIS asylum officer refers an affirmative asylum application to DOJ–EOIR, the asylum application remains pending, and the associated employment authorization remains valid while the IJ adjudicates the application, unless terminated or revoked pursuant to 8 CFR 274a.14. Once an alien is granted asylum by USCIS or an IJ, the alien is immediately employed authorized. USCIS issues the EAD under 8 CFR 274a.12(a)(5).

##### 2. Termination After Denial By IJ

Previously, the regulations at 8 CFR 208.7(b)(2) provided that when an IJ denies an asylum application, the employment authorization terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review. After this Final Rule takes effect, if an IJ denies the alien’s asylum application, employment authorization will terminate 30 days after denial to allow time for appeal to the BIA. If a timely appeal is filed, employment authorization will be available to the alien during the BIA appeal process, but prohibited during the Federal court appeal process unless the case is remanded to DOJ–EOIR for a new decision. DHS believes that restricting access to (c)(8) employment authorization during the judicial review process is necessary to ensure that aliens who have failed to establish eligibility for asylum during two or three levels of administrative review do not abuse the appeals processes in order to remain employment authorized. For the same reason and consistent with the previous regulations, DHS will deny employment authorization to aliens whose asylum applications have been denied by an IJ either during the 365-day waiting period or before USCIS adjudicates the initial application for employment authorization.

##### 3. Automatic Extensions of Employment Authorization and Terminations

To conform the automatic extension and termination provisions under 8 CFR 208.7(b) to the amendments made in this Final Rule, DHS is amending the current regulations at 8 CFR 274a.13(d), which govern automatic extensions of employment authorization and termination of such extensions. If an asylum applicant’s employment authorization will expire before the asylum officer, IJ, or the BIA renders a decision on the asylum application, under current regulations, the alien may file an application to renew the employment authorization. If the renewal employment authorization application is filed timely, the alien’s employment authorization is extended automatically for up to 180 days or to the date of the decision on the application for employment authorization, whichever comes first. As previously discussed, under this Final Rule, when a USCIS asylum officer, IJ, or the BIA denies the asylum application, DHS will terminate any employment authorization on the date of the denial, except for the 30-day appeal window for an alien to file an appeal with the BIA following the IJ’s denial of an asylum application. The rule at 8 CFR 208.7(b)(2) makes clear that employment authorization automatically terminates regardless of whether it is in a period of automatic extension. Therefore, this final rule makes conforming amendments at 8 CFR 274a.13(d)(3), to specify that automatic extensions will automatically terminate upon a denial of the asylum application, or on the date the automatic extension expires (which is up to 180 days), whichever is earlier. *See* 8 CFR 274a.13(d)(3).

DHS also is implementing a technical change that adds a new paragraph at 8 CFR 274a.14(a)(1) to generally reference any automatic termination provision elsewhere in DHS regulations, including the automatic EAD termination provision being implemented by this rule.<sup>87</sup> As 8 CFR 274a.14(a)(1) is a general termination provision, DHS feels that incorporation of a general reference to other termination provisions will help avoid possible confusion regarding the applicability of such other provisions in relation to 8 CFR 274a.14(a)(1).

<sup>87</sup> *See* 8 CFR 208.7(b)(2); *see also* 8 CFR 214.2(f)(9)(ii)(F)(2) (automatic termination of F–1 student-based employment authorization based on economic necessity where the student fails to maintain status).

#### 4. Adjudication and Termination of EADs Filed by UACs

Based on comments received, DHS is clarifying how I-765 applications filed by UACs are adjudicated. A UAC who has a pending asylum application before USCIS may apply for, and be granted, an EAD provided that the eligibility criteria in this rule are met, excluding the one-year filing deadline. *See* 8 CFR 208.7(a)(1)(iii)(F) of this rule. UACs are generally placed in removal proceedings shortly after they are encountered on arrival and determined to be UACs. By the time they file asylum applications, therefore, most UACs are in removal proceedings. Regulations that govern jurisdiction over asylum applications generally prohibit USCIS from accepting asylum filings from aliens who are in removal proceedings before DOJ–EOIR and provide that, once an alien is in such removal proceedings, the IJ has exclusive jurisdiction over any asylum application that an alien may file. 8 CFR 1003.14(b), 1208.2(b). Generally, USCIS asylum officers only have jurisdiction over asylum applications of aliens who are not in removal proceedings before an IJ. 8 CFR 208.2(a), 1208.2(a) and 1240.1 (a)(1)(ii). The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”) however, provides a statutory exception to this general rule. *See* Public Law 110–457, 122 Stat. 5044 (2008). Under section 235(d)(7)(B) of the TVPRA, codified at 8 U.S.C. 1158(b)(3)(C), and section 208(b)(3)(C) of the INA, 8 U.S.C. 1158(b)(3)(C), “[a]n asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.” 8 U.S.C. 1158(b)(3)(C) (emphasis added). Thus, USCIS takes initial jurisdiction over asylum applications filed by UACs, even as they remain in ongoing removal proceedings. Where USCIS exercises this initial jurisdiction and does not grant an asylum application of a UAC, USCIS returns the case to the immigration court with jurisdiction over the removal proceedings. This is not a referral, because the applicant is already in proceedings and already has an NTA. However, for purposes of adjudicating employment authorization, USCIS will treat the return of a UAC’s asylum application to an IJ where removal proceedings were initiated either prior to or during the time in which USCIS adjudicated the asylum application in the same way as a referral under 8 CFR 208.7(b)(1)(i) of this rule. As such, a UAC’s EAD will not automatically terminate upon the asylum officer’s decision not to grant asylum; rather, it will terminate after a denial of the

UAC’s asylum application by an IJ unless timely appealed, or after the BIA affirms or upholds a denial, as described by 8 CFR 208.7(b)(2) of this rule.

The HSA, 6 U.S.C. 279(g), defines UAC as “a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” In some cases, however, an asylum application may have been filed by a UAC who later obtains lawful status. In such cases, USCIS would generally issue a denial of the asylum application if the applicant fails to establish eligibility for asylum but is in lawful status at the time of the adjudication of the asylum application, in accordance with 8 CFR 208.14(c)(2). Accordingly, the EAD of a UAC who is denied asylum by an asylum officer but who is in lawful status will automatically terminate as described under 8 CFR 208.7(b)(2) of this rule.

In cases where removal proceedings have not been initiated and the UAC is not in lawful status at the time of the asylum adjudication, USCIS will refer the UAC to an IJ if the UAC is not eligible for asylum, in accordance with 8 CFR 208.14(c)(1). In these cases, the UAC’s EAD will not terminate upon referral and the UAC may be granted renewals of the EAD, as provided by 8 CFR 208.7(b)(1)(i) of this rule.

#### *F. Aliens Who Have Established a Credible Fear or a Reasonable Fear of Persecution or Torture and Who Have Been Paroled Into the United States*

DHS is clarifying the rule governing employment eligibility for certain aliens who have been paroled into the United States after establishing a credible fear or reasonable fear of persecution or torture. *See* 8 CFR 208.30.

In 2017, DHS issued a memo, “Implementing the President’s Border Security and Immigration Enforcement Improvement Policies,” which stated that CBP or ICE will only consider the release of aliens from detention based on the parole authority under INA section 212(d)(5), 8 U.S.C. 1182(d)(5), on a case-by-case basis.<sup>88</sup> One such case is when an arriving alien, who is subject to expedited removal, establishes a

credible fear of persecution or torture or eligibility for withholding of removal, adequately establishes his or her identity, does not pose a flight risk or danger to the community, and otherwise warrants parole as a matter of discretion. Currently, when DHS exercises its discretion to parole such aliens, CBP or ICE officers are instructed to endorse the Form I-94 parole authorization with an express condition that employment authorization not be provided under 8 CFR 274a.12(c)(11) on the basis of the parole. This final rule conforms the regulations to this important policy. DHS continues to believe that it is an inconsistent policy to allow supposed asylum seekers who are released from custody on parole to obtain employment authorization almost immediately, without being subject to the same statutory requirements and waiting period as non-paroled asylum seekers, or even a requirement to file an asylum application. Therefore, this rule clarifies, consistent with section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), and existing DHS policy, that employment authorization for this category of parolee is not immediately available under the (c)(11) parole-based EAD category. Such aliens may still be eligible to apply for a (c)(8) employment authorization if they file an application for asylum and seek employment authorization, subject to eligibility requirements under this rule.

#### *G. Illegal Entry*

DHS is excluding aliens from receiving a (c)(8) EAD if they, on or after the effective date of this rule, enter or attempt to enter the United States illegally without good cause. Good cause is defined as a reasonable justification for entering the United States illegally as determined by the adjudicator on a case-by-case basis. Since what may be a reasonable justification for one applicant may not be reasonable when looking at the circumstances of another applicant, DHS believes a case-by-case determination of good cause in a (c)(8) adjudication will incentivize aliens to comply with the law to the extent possible and avoid injury and death associated with illegal entries. DHS believes these provisions also will reduce government expenditures related to detecting, apprehending, processing, housing, and transporting escalating numbers of illegal entrants. To the extent that this change is alleged to be a “penalty” within the meaning of Article 31(1) of the 1951 Convention relating to the Status of Refugees, which is binding on the United States by

<sup>88</sup> *See* Secretary of Homeland Security John Kelly, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies,” Section K (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

incorporation in the 1967 Protocol relating to the Status of Refugees, DHS believes that the good cause exception is consistent with U.S. obligations under the 1967 Protocol because it exempts aliens from the bar to eligibility for employment authorization if they establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry.

The amendments to this section make any alien who enter or attempt to enter the United States at a place and time other than lawfully through a U.S. port of entry ineligible to receive a (c)(8) EAD, with the limited exception of when an alien demonstrates that he or she: (1) Presented himself or herself without delay but no later than 48 hours after the entry or attempted entry to the Secretary of Homeland Security (or his or her delegate); (2) indicated to the Secretary of Homeland Security or his or her delegate an intention to apply for asylum or expressed a fear of persecution or torture; and (3) otherwise had good cause for the illegal entry or attempted entry. The Secretary's delegates include Border Patrol Agents, CBP Officers, ICE Enforcement and Removal Officers, ICE Homeland Security Investigations Special Agents, or members of the U.S. Coast Guard. Examples of reasonable justifications for the illegal entry or attempted entry include, but are not limited to, requiring immediate medical attention or fleeing imminent serious harm, but do not include the evasion of U.S. immigration officers, or entering solely to circumvent the orderly processing of asylum seekers at a U.S. port of entry, or for convenience. Asylum is a discretionary benefit reserved for those who establish that they are genuinely in need of the protection of the United States. It follows that employment authorization associated with a pending asylum application should be similarly reserved. DHS believes that illegally entering the United States without good cause should be strongly deterred, and is therefore grounds to deny this discretionary benefit. In order to deter future illegal entries, DHS will apply this provision to any alien who enters or attempts to enter the United States unlawfully on or after the effective date of this final rule.

#### H. Effective Date of the Final Rule

The rules in effect on the date of filing Form I-765 will govern all initial and renewal applications for (c)(8) and (c)(11) employment authorization. To ensure consistency with a separate rulemaking entitled "*Removal of 30-Day Processing Provision for Asylum*

*Applicant-Related Form I-765 Employment Authorization Applications*," DHS Docket No. USCIS-2018-0001, 84 FR 47148 (Sept. 9, 2019), this Final Rule will not apply to initial (c)(8) EAD applications filed before the effective date of this rule by members of the *Rosario* class if the *Rosario* injunction remains in effect as of the effective date of this Final Rule.

Under this rule, DHS will allow aliens with pending asylum applications that have not yet been adjudicated and who already have employment authorization before the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless the card is terminated or revoked on the grounds specified in prior regulations. This rule will not have any impact on applications to replace lost, stolen, or damaged (c)(8) EADs. All (c)(11) EAD applications filed on or after the effective date of this Final Rule by aliens who have established credible fear and are paroled into the United States on that basis will be denied.

DOJ-EOIR has similar but separate asylum-related rules under 8 CFR part 1208 as a result of transferring the functions of the former INS and dividing them between DHS and DOJ-EOIR.<sup>89</sup> This rulemaking did not propose to and does not amend any of the regulations at 8 CFR part 1208. DOJ-EOIR may amend its regulations at a later date, but it is not doing so in conjunction with this rulemaking. USCIS maintains sole jurisdiction over aliens' requests for employment authorization.

### V. Public Comments on the Proposed Rule

#### A. Summary of Public Comments

On November 14, 2019, DHS published a proposed rule in docket USCIS-2019-0011. The comment period for the proposed rule closed on January 13, 2020. DHS received a total of 1,074 comment submissions in response to the proposed rule. The majority of the comment submissions were from individual commenters. Other commenters included anonymous commenters; advocacy groups; religious organizations; organizations providing direct legal, social, and medical services to aliens; attorneys; state and local governments; law firms; federal, state, and local elected officials; professional associations; research institutions and

<sup>89</sup> See generally *Matter of R-S-H-*, 23 I. & N. Dec. 629, 630 n.5 (BIA 2003) ("As a result of the transfer of the functions of the Immigration and Naturalization Service to the Department of Homeland Security, the regulations in chapter I of the Code of Federal Regulations were transferred or duplicated to a new chapter V.")

organizations; unions; and professional associations. While some commenters expressed general support for the rule, the majority opposed the rule.

#### B. Requests To Extend Comment Period

*Comment:* One commenter requested a 30-day extension of the comment period for this rule in light of the holidays and the fact that another USCIS NPRM had a comment period during the same timeframe. Another commenter argued that DHS had deprived the public of an adequate opportunity to comment on this rule and several other NPRMs—namely, the proposed rule addressing bars to asylum eligibility, the USCIS fee rule, and the rule to eliminate the 30-day processing timeframe for asylum-based EADs<sup>90</sup>—by publishing them separately. The commenter argued that the public should have been given sufficient time to review and consider all of the rules together so that the public could comment on the combined impact of the rules on overall asylum policy and procedure. One commenter stated that the proposal presented a "moving target" for public participation, as it was at the time the third of four recent DHS notices that affect asylum. The commenter argued that treating the four proposals separately has made it impossible for commenters and DHS to evaluate the rules' cumulative impacts. The commenter stated that the elimination of the 30-day processing requirement for EADs would be impacted by the proposals in this rule, but that neither rule accounted for the other.

*Response:* DHS believes that the 60-day comment period for this rule and the 60-day comment periods provided for the other rules referenced by the commenter provided more than an adequate opportunity for public input, and declines to extend the comment period. The Administrative Procedure Act (APA) is silent regarding the duration of the public comment period, and does not establish a minimum duration.<sup>91</sup> However, the 60-day comment period is in line with E.O. 12866, which encourages, but does not require, agencies to provide at least 60

<sup>90</sup> DHS NPRM, *Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications*, 84 FR 47148 (Sept. 9, 2019); DHS NPRM, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 84 FR 62280 (Nov. 14, 2019); and DHS and DOJ-EOIR Joint NPRM, *Procedures for Asylum and Bars to Asylum Eligibility*, 84 FR 69640 (Dec. 19, 2019).

<sup>91</sup> See 5 U.S.C. 553(c).

days for the public to comment on significant rules.

The sufficiency of the 60-day comment period for this rule is supported by the over 1,000 public comments received. The public, including attorneys, advocacy groups, religious, community, and social organizations, law firms, federal, state, local, and tribal entities, and elected officials provided a great number of detailed and informative comments. In addition, DHS notes that the proposed rule has been listed in the publicly available Unified Agenda of Federal Regulatory and Deregulatory Actions since the Fall 2018 publication, so the public has been made aware of DHS's intent to publish a rule of this nature. Further, in the proposed rule, DHS specifically referenced the 30-day asylum-EAD processing NPRM, indicating that it had been published separately and that this rule and the 30-day asylum-EAD processing NPRM contained distinct proposals. DHS directed commenters to comment on each rule separately and to send comments to the correct docket for each rule.

Given the quantity and quality of the comments received in response to the proposed rule, and other publicly available information regarding the rule, DHS believes that the 60-day comment period has been more than sufficient.

#### C. Severability Clause

One commenter noted that the proposed rule contained a severability clause which would allow DHS to implement portions of the proposed rule if other portions were found to be unlawful by a court. The commenter asked DHS to withdraw the rule in its entirety because the commenter believed that the whole rule was based on an unsubstantiated premise that it will deter frivolous and fraudulent asylum applications, and that sections of this rule were unnecessary and duplicative of USCIS processes that were already in place. The commenter also stated that the rule violated the APA but did not provide a rationale for the statement.

*Response:* DHS disagrees with the commenters and will not withdraw the rule. By engaging in the current rulemaking, DHS has satisfied its obligations under the APA and given the public ample opportunity to comment on the proposals within the rule. DHS also articulated specific and individualized rationales for the numerous changes proposed in the rule that are supported by data and that are in keeping with the immigration priorities and policies of the Executive

branch as they relate to the management of discretionary EADs based on pending asylum applications.

DHS also will not remove the severability clause. A severability clause is a standard legal provision. It allows Congress and the Executive Branch to sever certain provisions of a law or rule, if a court finds that they are unconstitutional or unlawful, without nullifying the entire law or rule. Those provisions that are unaffected by a legal ruling can be implemented by an agency without requiring a new round of rulemaking simply to promulgate provisions that are not subject to a court ruling.

#### D. Comments Expressing General Support for the NPRM

*Comment:* A minority of the commenters expressed overall support for the rule. Several commenters agreed that the asylum system needed to be reformed because of fraud and abuse. Many commenters believed that the asylum system was being exploited by aliens who do not qualify for asylum. The commenters stated that the asylum system needed to change because real asylum seekers were being deprived of the protection and services in the United States. Many commenters stated that aliens who enter the United States illegally should not be allowed to obtain immigration benefits or work, especially if it created additional burdens and costs for U.S. taxpayers. Several commenters supported the rule and agreed that DHS should not authorize asylum seekers to work until DHS or the courts have determined that the alien actually meets the requirements for asylum. The commenters also agreed that criminal aliens should not be allowed to work in the United States and that any alien who commits a crime while in the United States should have his or her employment authorization revoked.

Several commenters supported DHS taking action to eliminate the "pull" factors that cause illegal migration and to remove the incentives for aliens to file frivolous or fraudulent asylum claims. Several commenters expressed concern with the amount of resources and taxpayer dollars that DHS was expending to deal with the recent surges in aliens crossings the border illegally. One commenter noted that asylum is not a right but a privilege and another commenter noted that Congress gave the Secretary of Homeland Security authority to bar employment authorization for asylum applicants altogether. One commenter supported the rule, stating that illegal aliens have no right to establish a residence or

obtain employment in the United States. Several commenters also supported the rule and believed that, without changes, the agency backlogs would continue to grow, and true asylum seekers would continue to live in limbo and fear of being returned to their home countries. Another individual supported the proposed rule as a good "workaround [because of] our legislators' inability to limit mass immigration."

*Response:* DHS agrees that the current asylum process needs to be substantially reformed. DHS believes that the reforms being implemented in this Final Rule will help return integrity to the asylum system and help ensure that aliens who are genuinely fleeing persecution based on their race, religion, nationality, political opinion, or membership in a particular social group, can have their claims heard expeditiously. The asylum system was never meant to be an avenue for economic migrants to reside and work in the United States. DHS is implementing this rule to remove the incentives for aliens to come to the United States solely for economic reasons and to eliminate meritless asylum filings solely to obtain work authorization. As some commenters noted, our immigration system already provides multiple legal pathways for those who wish to work legally in the United States. In addition, Congress expressly gave the Secretary of Homeland Security the discretion to grant employment authorization to asylum seekers. Asylum is a discretionary benefit that is reserved for those who meet the requirements. Asylum seekers are not entitled to work in the United States until the Secretary or Attorney General determines that they actually qualify for and should be granted asylum.

This rule is being implemented to ensure the asylum process is managed in a safe, humane, and orderly manner, to provide access to protection in the United States for aliens who qualify, and to ensure that those who do not qualify are not incentivized to prolong proceedings or delay removal for economic purposes. This rulemaking also is part of a series of reforms DHS is undertaking to improve and streamline the asylum system so that those with bona fide asylum claims can be prioritized and extended the protections that the United States has to offer.

#### E. Comments Expressing General Opposition to the NPRM

*Comment:* A majority of the commenters opposed the rule. Many commenters were concerned that the rule would place an "inordinate

burden” on asylum seekers, many of whom are impoverished and “will not have the ability to work immediately upon their arrival into the United States.” Many commenters argued that asylum seekers should be allowed to work and support their families while they are in the United States. The commenters believed that allowing asylum seekers to work would promote self-sufficiency, alleviate the need for them to rely on government benefits, save U.S. taxpayer dollars, and reduce the incentives to work illegally. The commenters also believed that asylum seekers should be able to contribute to the U.S. economy, realize the American dream, and integrate into American society.

Several commenters felt that the rule was immoral, cruel, and inhumane, because many asylum seekers who had already fled persecution in their home countries and were already poor and destitute would have to wait even longer before they could start a new life in America and support themselves and their families. Some commenters argued that denying work to asylum seekers was not in keeping with Christian and American values. Other commenters believed that the motives behind the promulgation of the rule were not deterrence but based on xenophobia and racism.

Several commenters expressed concern that prohibiting employment authorization until their cases are decided would: (1) Increase asylum seekers’ vulnerability to being exploited by unscrupulous people and bad actors, (2) “force” them to work illegally, commit crimes, and “remain in the shadows,” (3) limit their access to legal counsel, and (4) allegedly further victimize them because of the “detrimental effect lack of employment would have on their physical well-being and mental health.” Some commenters also believed that denying asylum seekers the ability to work would potentially force them to return to their home countries and the dangerous situations from which they had fled. Other commenters were concerned that asylum seekers who are currently employed would lose their jobs and that the businesses or companies who had hired them would be disrupted because of the loss of their workforce. Several other commenters argued that the rule illegally “infringes” on an alien’s right to apply for asylum and dissuades asylum seekers from applying for protection in the United States.

Finally, a few commenters suggested that DHS should “grandfather” asylum seekers who were already in the United States and apply the previous

regulations to their requests for employment authorization. The commenters also suggested that DHS should make an exception for asylum applicants who have been in the United States for more than 10 years, paid taxes, and have no felony convictions.

*Response:* Obtaining employment authorization in the United States has been, and continues to be, a significant incentive for aliens to migrate, legally and illegally, to the United States.<sup>92</sup> While DHS supports the ability of aliens who have established eligibility for employment in the United States, including asylees and refugees, to participate in the U.S. economy, DHS believes that employment authorization must be carefully regulated, not only to protect U.S. workers, but also to maintain the integrity of the U.S. immigration system. DHS has identified (c)(8) employment authorization, with its low eligibility threshold and nearly limitless renewals, coupled with the lengthy adjudication and judicial processes, as a driver for economic migrants who are ineligible for lawful status in the United States to file frivolous, fraudulent, and otherwise non-meritorious asylum applications.<sup>93</sup>

Notwithstanding claims by some commenters, by statute, asylum seekers are not immediately eligible to work upon arrival in the United States. They are required to wait for at least 6 months, and often wait longer, before they can receive employment authorization. This waiting period is temporary and not a bar to employment authorization. With this rulemaking and other streamlining measures, DHS believes that those who would abuse the asylum system solely to gain work authorization will be disincentivized to make the dangerous journey to the United States to file asylum claims for employment authorization. This in turn will decrease existing backlogs, allow legitimate asylum seekers to have their cases processed in a timely fashion, and allow them to obtain employment authorization immediately after DHS or DOJ–EOIR determines they are asylees.

DHS fully appreciates the values embodied in our humanitarian programs, and continues to uphold those values while adhering to the statutory obligations that underpin this rule. DHS strongly disagrees with comments asserting that this rule is based on racial animus. This rulemaking applies equally to all asylum seekers,

and does not create disparate treatment or have discriminatory effect on applicants. The demographics of asylum seekers are as vast and varied as the number of countries around the globe and DHS did not promulgate this rule to affect any particular race, religion, nationality, or category of aliens who may seek asylum. Further, the overall impact of the rule will not make aliens less likely to qualify for asylum, more vulnerable to persecution, force them to return to their home countries, or force them to work illegally in the United States. This final rule will help mitigate the humanitarian crisis at our southern border by encouraging only legitimate asylum seekers who are fleeing persecution to seek asylum. DHS also disagrees that this rule illegally “infringes” on the right to obtain asylum. Unlike statutory withholding of removal and protections under the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment (CAT), asylum is a discretionary benefit. No one has the right to be granted asylum in the United States. In addition, this rule does not alter the eligibility requirements for asylum—establishing persecution or a well-founded fear of persecution on the five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion). Employment authorization for asylum seekers is discretionary. No asylum seeker is entitled to employment authorization unless specifically authorized pursuant to statute or granted by the Secretary as a matter of discretion. Employment authorization for asylum seekers is not an entitlement but an ancillary benefit that Congress authorized and entrusted to the Secretary to decide if employment authorization should be granted, and if so under what terms and conditions. Through this rule DHS seeks to separate the asylum application process from employment authorization as a deterrent to aliens who are not bona fide asylum seekers, but are simply abusing the asylum process solely to remain and work in the United States.<sup>94</sup> See INS final rule, *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 FR 62284–01, 62291 (Dec. 5, 1994).

<sup>92</sup> In the 1994 Final Rule implementing the 180-day employment authorization waiting period, the agency stated that it “strongly believes that the asylum process must be separated from the employment authorization process,” and intended that “the rule will discourage applicants from filing meritless claims solely as a means to obtain employment authorization.” *Id.* at 62290.

<sup>92</sup> See *supra* fns. 32 and 84.

<sup>93</sup> See *Martin, supra* note 27, at p. 734; see also *David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247 (May 1990) at pp. 1267–69, 1288–89, and 1373.



DHS has carefully considered the suggestions for modifications of the rule. While DHS will not “grandfather” any classes of aliens or create the exceptions proposed by the commenters, it has determined to apply many provisions of the rule to actions that occur on or after the effective date of this Final Rule, such as the illegal entry, one-year filing, and most of the criminal bars. To “grandfather” in a class of aliens would create an unworkable parallel adjudicatory framework and there is no legal or policy reason to establish such a framework, especially since (c)(8) employment authorization is a discretionary, temporary benefit that is subject to expiration and a new analysis of whether an alien warrants employment authorization as a matter of discretion upon the filing of each new request for renewal of an EAD.

DHS also considered the claim that asylum applicants will disregard this rule and work without authorization. Commenters raised similar concerns when the former INS implemented the 180-day waiting period. DHS rejects the premise of these claims and agrees with the responses stated by the former INS and adopts the response stated in the 1994 final rule.<sup>95</sup>

#### *F. Comments Regarding Legal Authority and Statutory Provisions*

##### 1. Relevant Statutes

###### a. Refugee Act of 1980

*Comment:* Several commenters argued that the rule contravenes the Refugee Act of 1980 (hereinafter Refugee Act) Public Law 96–212, 94 Stat. 102. One advocacy group argued that asylum seekers fit within the definition of a refugee and that through the passage of the Refugee Act, DHS became “legally bound” to provide sanctuary to such aliens. Another commenter argued that the Refugee Act specifically requires that asylum seekers be supported with job training and employment assistance. Several commenters argued that DHS was “changing the grant of employment authorization into a discretionary

decision.” Some commenters argued that making EADs subject to agency discretion, without clearly expressed criteria, would be contrary to the Refugee Act and its provision for refugees’ self-reliance. One commenter argued that the Refugee Act was intended to promote the effective resettlement and absorption of refugees into the United States, which means helping refugees to become economically self-sufficient as soon as possible. Another commenter noted that the Refugee Act requires the President to adjust the number of refugees admitted each year based on humanitarian concerns but, because only a small percent have been designated refugees, the United States is severely limiting the number of aliens eligible for employment in the United States under the Refugee Act.

*Response:* While DHS agrees that the Refugee Act is intended to promote the effective resettlement of refugees, it disagrees with the commenter’s presumption that an asylum applicant is, by default, a refugee. U.S. law states that the burden of proof is on the asylum applicant to establish that he or she is a refugee, within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. 1101(a)(42). To be considered a refugee, an applicant must establish that he or she has experienced persecution or has a well-founded fear of future persecution on account of one of the five protected grounds. The applicant must show that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the applicant’s persecution or fear of persecution.

An alien admitted as a refugee has already been determined by the U.S. government through an adjudication overseas to meet the statutory definition of a refugee and is therefore entitled to the benefits and protections of the Refugee Act upon arrival to the United States. No similar determination is made for an asylum applicant until an asylum officer or an IJ adjudicates the asylum application. Significantly, only a small fraction of asylum applicants are determined to meet the definition of a refugee and are granted asylum. In FY 2019, the DOJ–EOIR asylum grant rate for affirmative and defensive asylum applications was 20.60 percent.<sup>96</sup> From FY 2015 to FY 2019, the average asylum grant rate was 19.08 percent, and the grant rate for the first quarter of FY 2020

was 19.79 percent.<sup>97</sup> Therefore, equating an asylum applicant with a refugee and insisting all asylum applicants are entitled to the same benefits and protections under the Refugee Act is premature and inaccurate. DHS is promulgating this rule in order to focus its attention and resources on bona fide asylum applicants, rather than continuing to provide a discretionary benefit with virtually no eligibility criteria and nearly limitless renewal opportunity to approximately 80 percent of the current (c)(8) EAD population who cannot establish eligibility for asylum or to remain in the United States as an asylee.

DHS also notes that when Congress passed the Refugee Act in 1980, its main purpose was to replace the ad hoc process that existed at the time for admitting refugees and to provide a more uniform refugee process.<sup>98</sup> The Refugee Act did not explicitly address how the United States should reform the asylum process or handle the sudden influx of asylum seekers. The commenters are correct that the Refugee Act established programs for providing assistance and job training to refugees who are admitted into the United States. However, those programs only apply to aliens who had already been granted refugee status, not to asylum applicants. Finally, as noted above, Congress requires the Secretary to provide employment authorization to those who are granted asylum. See INA section 208(c)(1)(B), 8 U.S.C. 1158(c)(1)(B). Nothing in this final rule changes that treatment of work authorization for asylees. However, Congress left it to the discretion of the Secretary to decide whether an asylum applicant should be provided employment authorization. See INA section 208(d)(2), 8 U.S.C. 1158(d)(2) (“An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the [Secretary].”). Therefore, this rule is within the Secretary’s discretionary statutory authority and is consistent with the Refugee Act.

###### b. INA and Homeland Security Act

*Comment:* Some commenters argued that the proposed rule was inconsistent with the provisions of the INA governing withholding of removal,

<sup>95</sup> *Id.* at 62291. The INS stated that—

“While [it] is possible [that asylum applicants may choose to work without authorization], it also is true that unlawful employment is a phenomenon not limited to asylum applicants, but is found among many categories of persons who have illegally entered or remained in the United States. The Department does not believe that the solution to this problem is to loosen eligibility standards for employment authorization. This is particularly so because of the evidence that many persons apply for asylum primarily as a means of being authorized to work. These rules will discourage applications filed for such reasons and thus enable the INS to more promptly grant asylum—and provide work authorization—to those who merit relief . . .”

<sup>96</sup> See Executive Office for Immigration Review Adjudication Statistics, Asylum Decision Rates (Jan. 23, 2020) available at <https://www.justice.gov/eoir/page/file/1248491/download>.

<sup>97</sup> *Id.* This average equals the sum of the grant rates from FY15 through FY19 divided by five.

<sup>98</sup> See Public Law 96–212, 94 Stat. 102, § 101(b) and S. Rep. 96–256 (July 23, 1979), at pp. 141–143. Earlier treatment of refugees came from the Displaced Persons Act of 1948, 62 Stat. 1009, as amended, the Refugee Relief Act of 1953, 67 Stat. 400, and the Refugee-Escapee Act of 1957, 71 Stat. 643.

section 241(b)(3)(A) of the INA (8 U.S.C. 1231(b)(3)(A)), and asylum, section 208(a)(1) of the INA (8 U.S.C. 1158(a)(1)). One commenter argued that these laws were meant to safeguard those who fled danger and that this rule essentially denies asylum seekers the ability to provide for themselves while physically present in the United States. One commenter also opposed the rule arguing that it not only is inconsistent with the following provisions of the INA, 8 U.S.C. 1103(a)(1), (3), 1158, 1225, 1226, 1231, and 1324(a), but also several provisions of the HSA, 6 U.S.C. 112, 202(4), 271(a)(3), 271(b) (relating to the authorities and adjudicatory functions of the Secretary and Director of USCIS) and existing regulations.

*Response:* DHS disagrees with the commenters. This rule is consistent with the Secretary's authority under the INA, the HSA, and DHS regulations as they relate to the discretionary authority of the Secretary to grant employment authorization to an asylum applicant. Congress has clearly indicated when employment authorization is mandatory and when it is discretionary. In the context of asylum, Congress specifically mandates the Secretary to give employment authorization to those who are granted asylum. See INA section 208(c)(1)(B), 8 U.S.C. 1158(c)(1)(B). However, Congress left it to the discretion of the Secretary to decide whether an alien who is seeking asylum should be provided employment authorization. See INA 208(d)(2) ("An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the [Secretary].")

The Secretary has the statutory authority to provide, limit, or bar asylum seekers completely from obtaining employment authorization based on the pending asylum application and this authority exists regardless of an alien's manner of entry, when the alien applied for asylum, and whether the alien may or may not be barred from asylum under the statute or regulations. However, the Acting Secretary has chosen through this final rule to exercise his discretionary authority narrowly and to prescribe the limited conditions under which certain asylum seekers may obtain employment authorization while they are in the United States and before they have established eligibility for asylum in the first instance. DHS, therefore, believes that this final rule is consistent with the Secretary's statutory authorities under the INA and HSA and is necessary to achieve the stated purposes of this rule.

2. Acting Secretary of Homeland Security's Legal Authority

*Comment:* Two commenters argued that the proposed rule was invalid because Acting Secretary Chad Wolf did not have a "valid legal claim to the office of the DHS Secretary." Both organizations cited the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3348, the HSA (6 U.S.C. 113(g)(1)),<sup>99</sup> and the E.O. 13753, *Amending the Order of Succession in the Department of Homeland Security*, 81 FR 90667 (Dec. 9, 2016), to support their assertions, the commenters stated that because the rules of succession following the resignation of former DHS Secretary Kirstjen Nielsen were not followed, any rules promulgated by the current Acting Secretary were essentially null and void.

*Response:* DHS disagrees with the comments. Under section 103(a)(1) of the INA, 8 U.S.C. 1103(a)(1), the Secretary of Homeland Security is charged with the administration and enforcement of the INA and all other immigration laws (except for the powers, functions, and duties of the Secretary of State and Attorney General). The Secretary is also authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary. See 8 U.S.C. 103 and 6 U.S.C. 113(g)(2). The HSA further provides that every officer of the Department "shall perform the functions specified by law for the official's office or prescribed by the Secretary." 6 U.S.C. 113(f).

On April 9, 2019, then-Secretary Nielsen, who was Senate confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security. This change to the order of succession applied to any vacancy. Exercising the authority to establish an order of succession for the Department pursuant to 6 U.S.C. 113(g)(2), superseded the FVRA and the order of succession found in E.O. 13753.

As a result of this change and pursuant to 6 U.S.C. 113(g)(2), Mr.

<sup>99</sup> Section 103(g) of the HSA (6 U.S.C. 113(g)(1)) states:

(g) Vacancies

(1) *Absence, disability, or vacancy of Secretary or Deputy Secretary.*—Notwithstanding chapter 33 of title 5, the Under Secretary for Management shall serve as the Acting Secretary if by reason of absence, disability, or vacancy in office, neither the Secretary nor Deputy Secretary is available to exercise the duties of the Office of the Secretary.

(2) *Further order of succession.*—Notwithstanding chapter 33 of title 5, the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary.

McAleenan, who was Senate confirmed as the commissioner of CBP, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan was the signing official of the proposed rule. Acting Secretary McAleenan subsequently amended the Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession below the positions of the Deputy Secretary and Under Secretary for Management. Because these positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

3. Litigation

Several commenters mentioned recent litigation and court decisions which they believed affected the Secretary's authority to promulgate this final rule. DHS addresses each case in turn below.

*a. East Bay Sanctuary Covenant v. Trump*

*Comment:* Several commenters cited the injunction in *East Bay Sanctuary Covenant v. Trump*, 354 F.Supp.3d 1094 (N.D. Cal. 2018) ("*East Bay I*"), issued by the U.S. District Court for the Northern District of California as a reason why DHS could not publish this rule. In *East Bay I*, plaintiffs challenged an interim rule jointly published by DHS and DOJ, "*Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protections of Claims*, 83 FR 55934 (Nov. 9, 2018), which essentially barred asylum to any alien who entered the United States outside of a U.S. port of entry. The *East Bay I* court issued a temporary restraining order (TRO) on November 19, 2018, and a preliminary injunction in December 2018 that enjoined DHS from denying asylum to aliens who failed to present themselves at a U.S. port of entry.<sup>100</sup> On February 28, 2020, the Ninth Circuit affirmed the district court's decision granting preliminary injunctive relief. *East Bay Sanctuary Covenant v. Trump*, No. 18–

<sup>100</sup> Several commenters also cited to district court decisions in two cases which have subsequently been consolidated—*O.A. v. Trump*, Civ. No. 18–2718/S.M.S.R. v. Trump, Civ. No. 18–2838 (hereinafter "*O.A. v. Trump*"), 404 F.Supp.3d 109 (D.D.C 2019). The commenters citing these cases made similar arguments that this rule was inconsistent with the courts' decisions finding that the interim final rule was consistent with INA section 208(a), 8 U.S.C. 1158(a), which allows any alien to apply for asylum regardless of manner of entry.

17274, 2020 WL 962336 (9th Cir. Feb. 28, 2020).

Several commenters stated that this rule was the government's attempt to "end run" the TRO in *East Bay I* and punish people who were trying to seek asylum. Another commenter stated that this rule was an attempt to deter the same group of aliens that the court enjoined DHS from denying asylum because of their manner of entry by creating an absolute bar to employment authorization. One commenter argued that people are entitled by law to seek asylum and as such, after a reasonable time, should be permitted to work while they pursue their claims. Another commenter, citing the interim rule and *East Bay I*, claimed that the INA and the courts have made clear that aliens who enter the United States illegally are "truly in need of protection" and that they have a right to claim asylum, regardless of their manner of entry. The commenter argued that based on this fundamental principle, the court struck down DHS's attempt to block aliens who entered illegally from applying for asylum and found that the rule was arbitrary and capricious.

*Response:* DHS disagrees with the commenters' assertions. The district court's decision in *East Bay I* only addressed who is eligible to apply for asylum. It did not address employment authorization for asylum seekers. This final rule does not conflict with *East Bay I* and is consistent with section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), the statute governing the Secretary's discretion to grant employment authorization to asylum seekers. DHS also disagrees with the commenters' characterization of its purpose in promulgating the rule. DHS does not intend to bypass the court's decisions in *East Bay I*. DHS has a strong interest in prioritizing bona fide asylum seekers over those who abuse the asylum system for economic reasons. In addition, DHS is not prohibiting all asylum seekers who enter the United States illegally from obtaining employment authorization. An asylum seeker who enters illegally may still qualify for employment authorization if he or she presents to DHS within 48 hours of entry and expresses a fear of persecution or an intent to seek asylum, and establishes good cause for the illegal entry. Further, this rule does not deter legitimate asylum seekers who are fleeing persecution from entering the United States, nor does it bar them from obtaining employment authorization once they are granted asylum or if they qualify for discretionary employment authorization pursuant to the provisions

of this rule. Bona fide asylum-seekers urgently needing protection from persecution for whom the U.S. is the first country available in which to seek refuge will apply for asylum regardless of when they would receive work authorization.

Finally, the commenters misstate DHS' justification for barring illegal entrants from employment authorization. DHS has a strong interest in ensuring a safe and orderly immigration system and securing its borders. DHS has provided exceptions to the illegal entry provision, which reflects DHS's understanding that some asylum seekers may have good cause to enter the United States illegally. However, DHS seeks to incentivize aliens to comply with the law to the extent possible, to avoid injury and death associated with illegal entries, and to reduce government expenditures related to detecting, apprehending, processing, housing, and transporting escalating numbers of illegal entrants.

#### b. *Mendez Rojas v. Johnson*

*Comment:* Several commenters argued that the final rule does not make an exception for those aliens who are protected by the interim joint settlement agreement in *Mendez Rojas v. Johnson*, 2018 WL 1532715 (W.D. Wash. Mar. 29, 2018). In *Mendez Rojas*, the court held that DHS failed to adequately advise asylum applicants of the requirement to file an asylum application within one year of entry into the United States. The commenters argued that the rule would undermine the interim joint settlement agreement and unlawfully penalize the class members of the *Mendez Rojas* decision.

*Response:* With respect to the claim that this rulemaking would affect *Mendez-Rojas* class members, DHS does not comment on ongoing litigation.

#### c. *Rosario v. USCIS*

*Comment:* Several commenters argued that the rule contravenes the holding of *Rosario v. USCIS*, 365 F. Supp. 3d 1156 (W.D. Wash. 2018). In *Rosario*, plaintiffs brought a class action to compel USCIS to comply with the 30-day processing timeframe for adjudicating EAD applications. The court enjoined USCIS for failing to adhere to that timeframe. Two commenters referenced the court's opinion in *Rosario* and discussed the potential negative impact any delay in granting employment authorization would have on asylum seekers. One commenter stated that the rule intentionally delays the ability of asylum seekers to obtain work authorization and that the change was a drastic departure from longstanding

policy and the recent court order in *Rosario*. Another commenter stated that the changes made by this rule to extend the waiting period, plus the elimination of the 30-day EAD processing requirement in the NPRM "*Removal of 30-day Processing Provision for asylum Applicant-Related Form I-765 Employment Authorization Applications*," DHS Docket No. USCIS-2018-0001, would make employment authorization for asylum seekers "virtually unattainable." The commenter argued that since the *Rosario* decision, even with higher workloads, USCIS has been able to adjudicate EADs within the 30-day timeframe. Two commenters also discussed the history of the 30-day EAD processing regulation and noted that the Court stated that the government had already considered the possibility of unsuccessful asylum claims but chose to expedite processing of such claims above the merits of the underlying asylum claim. *Rosario*, 365 F. Supp. at 1160-61.

*Response:* DHS does not believe this rule contravenes the *Rosario* decision. The decision in *Rosario* was predicated on a regulatory scheme requiring USCIS to process initial (c)(8) EAD requests within 30 days, provided that the application was filed after the asylum application had been pending for a minimum of 150 days. The *Rosario* court order simply enforced the self-imposed 30-day processing requirement.

As noted in the separate rule eliminating the 30-day processing timeframe, DHS Docket No. USCIS-2018-0001, DHS has determined that changing conditions, including increased vetting requirements and rising application volumes, render the former regulatory scheme outdated and too onerous for USCIS to continue administering. Further, USCIS has only been able to comply with the *Rosario* order by temporarily shifting resources from other product lines to comply with the court injunction. DHS strives to ensure that all applicants seeking an immigration benefit have their cases adjudicated fairly and in a timely manner. However, where DHS is required to adjudicate a form type pursuant to an outdated requirement that is unreasonable under current circumstances, it can often delay other applicants seeking immigration benefits. Finally, DHS specified in the NPRM that USCIS would not apply the provisions of this final rule to any *Rosario* class member whose initial application for an EAD is pending with USCIS on the effective date of the final rule so long as the *Rosario* injunction remains in effect.

d. *Ramos v. Thornburgh*

One commenter cited the district court's decision in *Ramos v. Thornburgh*, 732 F. Supp. 696 (E.D. Tex. 1989), and argued that any impediment to an asylum seeker's right to work threatens their ability to survive and that the survival of asylum seekers outweighs any prospective benefit from such an impediment.

*Response:* While the court in *Ramos v. Thornburgh* notes potential considerations for asylum seekers applying for work authorization, DHS maintains that for legitimate asylees, an asylum grant leads to immediate employment authorization and certainty of status and humanitarian protections. Further, the section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), states that “[a]n applicant for asylum is not entitled to employment authorization.” This Final Rule is not eliminating EADs but extending the waiting period to apply for employment authorization and revising the requirements an alien must meet to obtain a discretionary EAD.

4. U.S. Obligations Under International Law

*Comment:* Many commenters stated that the rule violates the United States' obligations under international law and the 1951 Convention relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137 (Jul. 28, 1951) (hereinafter referred to as “Refugee Convention”), articles 2 through 34 of which are binding on the United States by incorporation in the 1967 Protocol relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Oct. 4, 1967). See *INS v. Stevic*, 467 U.S. 407, 416 (1984). One commenter argued that the rule discourages and criminalizes asylum seekers and goes beyond the principles expressed in the Refugee Convention. Several commenters believed that the rule violated the Refugee Convention because it impermissibly limited refugees' access to employment and created categorical bars to protection. The commenters also stated that the rule created more obstacles to employment and increased the chances that a bona fide refugee would not be accorded “favorable” treatment. Several commenters argued that the rule contravened the Refugee Convention and 1967 Protocol because it was far more restrictive in terms of access to work than what was provided by other State Parties, such as Canada, with whom the United States has a Safe Third Country Agreement. The commenters argued that the rule was contrary to the international right to work recognized in Article 6 of the

International Covenant on Economic, Social and Cultural Rights, Article 45 of the Organization of the American States, Article XIV of the American Declaration on the Rights and Duties of Man, and Article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights. Another commenter argued that the proposal improperly relies on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), arguing that the protections provided by CAT are insufficient to support affected asylum seekers harmed by their limited ability to apply for employment authorization.

Several other commenters referred to Articles 17 and 31 of the Refugee Convention, arguing that the rule violates the “language and spirit” of the convention. One commenter argued that that Article 17 gives refugees the right to engage in employment. Another commenter, citing the United Nations High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status, and UNHCR's interpretation of Article 31, argued that since an alien is considered a refugee as soon as he or she meets the refugee definition and not when a state recognizes his or her status as a refugee, an asylum seeker should similarly be considered lawfully in the United States with the consent of the government and thus eligible to work even if his or her asylum case has not been decided. The commenter also argued that Article 17 of the Convention provides refugees “lawfully staying” in a territory “the right to engage in wage-earning employment,” noting that UNHCR interpreted the term “stay” to “embrace both permanent and temporary residence” and that the term “lawful” includes circumstances when “the stay in question is known and not prohibited.” The commenter further argued that, because international refugee law makes clear that an individual is a refugee as soon as he or she meets the refugee definition, as opposed to when a state recognizes his or her status as such, an asylum seeker should be considered as “lawfully staying” when he or she initiates his or her asylum application, and that the filing of the asylum application while present in the United States reflects the consent of the U.S. government.

Several other commenters argued that Article 31 of the Refugee Convention specifically prohibits States from imposing penalties on refugees on account of their illegal entry or presence and to deny employment authorization to asylum seekers essentially was a

“penalty.” Another commenter argued that Articles 17 and 18 of the Convention explicitly protects the rights of refugees and asylum seekers to obtain work and self-employment in host countries. Another commenter also argued that the extended waiting period is inconsistent with the Refugee Convention and the INA. That commenter said that under the modern asylum system created by the 1980 Refugee Act, the government anticipated that asylum applications would be processed quickly, and created a 180-day processing deadline to ensure that employment authorization could be issued expeditiously. A commenter argued that DHS is obligated under domestic and international law to accept asylum seekers and ensure that they are eligible for employment authorization as soon as possible. Another commenter added that the extended waiting period undermines asylum seekers' rights to pursue claims under domestic and international law.

Finally, one commenter argued that without the right to work legally, some asylum seekers would be “forced” back to countries where their lives and freedom could be in danger, thereby violating the U.S. obligations of *non-refoulement* under international law.

*Response:* DHS disagrees that this rule violates or is inconsistent with U.S. obligations under international laws. DHS first notes that, although the United States is a party to the 1967 Protocol, which incorporates Articles 2 to 34 of the 1951 Refugee Convention, this treaty is not self-executing; consequently, it is not directly enforceable in U.S. law. It is the domestic implementing law that governs, and Supreme Court and other case law makes clear that the Protocol serves only as a useful guide in determining congressional intent in enacting the Refugee Act of 1980 because the Act sought to bring U.S. law into conformity with the Protocol. See, e.g., *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984); *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009).

Congress implemented many of the provisions of the Refugee Convention through the passage of the Refugee Act of 1980, which included immigration provisions governing withholding of removal, adjustment of status for asylees and refugees, and the bars to asylum eligibility for aliens who were convicted of a serious crime, were persecutors, or were a danger to the security of the United States. The United States has implemented Article 34 of the 1951 Convention—which provides that State Parties “shall as far as possible facilitate the assimilation and naturalization of

refugees”—through the INA’s asylum provision, section 208, 8 U.S.C. 1158. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). As the Supreme Court has recognized, Article 34 is “precatory” and “does not require [an] implementing authority actually to grant asylum to all” persons determined to be refugees. *Id.* Nor is the United States required to provide work authorization for asylum applicants, but DHS is doing so pursuant to its discretion under the INA. INA section 208(d)(2), 8 U.S.C. 1158(d)(2).

DHS also notes that the INA provisions and DHS regulations applicable to refugees and asylees fully comply with of Articles 17 and 31 of the Refugee Convention. The commenters argue that this rule violates Article 17 because DHS is depriving asylum seekers the right to work in the United States.<sup>101</sup> However, paragraphs (1) and (3) of Article 17 related to wage-earning employment specifically state:

“1. *The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards to engage in wage-earning employment.*

“3. *The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.*” (Emphasis added)

Nothing in Article 17 requires DHS to provide employment authorization to aliens seeking refugee status or asylum before DHS or an IJ has determined that they meet the definition of a refugee under 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), and granted status on that basis. Nor does Article 17 limit DHS’s ability to place restrictions on (c)(8) EADs before an alien is granted asylum. Once DHS or an IJ has determined that an alien meets the definition of a refugee and has been granted status, the alien is immediately authorized to work pursuant to his or her status, consistent with the statute and regulations governing employment authorization for those who have been granted refugee status or asylum. Nothing in the rule changes this treatment of employment authorization for refugees or asylees.

DHS also believes that this rule is compliant with Article 31 of the Refugee Convention as it relates to refugees who

enter the United States illegally. Article 31 specifically states:

“1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without to the authorities and show good cause for their illegal entry or presence.*

“2. *The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*”

DHS views the Article 31(1) restriction on imposition of “penalties” on asylum seekers as not encompassing discretionary ancillary benefits such as employment authorization which the Secretary may grant to aliens in the United States, notwithstanding their immigration status. *Cf. Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017) (denying illegal re-entrants the opportunity to apply for the discretionary relief of asylum does not constitute a penalty, as considered by Art. 31(1) of the Refugee Convention). Even if DHS’s proposed change could be considered a “penalty” within the meaning of Article 31(1), DHS believes that its “good cause” exception is sufficient to address any concerns about an asylum seeker’s ability to seek discretionary employment authorization after illegal entry into the United States. Aliens who establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry and, within 48 hours, express to DHS a fear of persecution or an intent to seek asylum, will not be barred from applying for employment authorization after the required waiting period.

##### 5. Administrative Procedure Act

*Comment:* Several commenters argued that the rulemaking violates the APA, 5 U.S.C. 551 et. seq., and is arbitrary and capricious. Other commenters believed the rule is arbitrary and capricious because, in their view, the rationale for the changes was insufficient, or the explanations provided disregarded relevant facts or prior policies. For example, one commenter cited to a joint interim rule by the former INS and DOJ—EOIR, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR

10312 (Mar. 6, 1997), saying that the rule was meant to ensure that bona fide asylum seekers obtain employment as quickly as possible. The commenter also claimed that the government stated in the interim rule that a period beyond the 150-day for granting an EAD was a period which would not be appropriate to deny work authorization to an alien whose claim has not been adjudicated. One commenter stated that none of the rationales offered in the rule, especially as it relates to the waiting period for an EAD, strike the appropriate balance between the concerns about incentives to file fraudulent or frivolous applications and the hardships on applicants.

Several commenters believed the rule was *ultra vires* and beyond DHS’s authority. One commenter argued that, although the statute gave the agency some discretion regarding employment authorization generally, it did not authorize the agency to impose its own waiting period instead of the one expressly provided by Congress.

Several commenters argued that the rule is arbitrary and capricious under the APA for its inadequate evaluation of its impacts. The impacts listed by the commenters included the deterrence of bona fide applicants, impacts to state workforces, labor- and civil-rights law enforcement, and economic losses from foregone, rather than merely delayed, EADs. The commenters also argued that the rule’s proffered justifications were unreasonable and stated that deterring aliens from exercising a humanitarian “right enshrined in INA and international law” could not justify blocking “poor immigrants.” The commenters further stated that there is no evidence that low-income applicants have less meritorious cases than wealthy applicants, and that the proposal arbitrarily excludes the former.

*Response:* DHS will address the comments relating to the specific provisions in the Final Rule in greater detail below, including impacts of the rule’s provisions. However, as to the general comments, DHS disagrees with the arguments that this rulemaking failed to provide a sufficient rationale to support the amendments, is *ultra vires*, or is generally arbitrary and capricious.

Under the APA, a court may review the Secretary’s exercise of discretion under the deferential “arbitrary and capricious” standard. 5 U.S.C. 706(2)(A). The court’s review is narrow, and the court can only review the Secretary’s exercise of discretion to determine if “the Secretary examined ‘the relevant data’ and articulated ‘a satisfactory explanation’ for his decision, including a rational

<sup>101</sup> Most of the comments related to Article 17 of the Refugee Convention, though one comment referenced Article 18 in conjunction with Article 17. DHS’ response to the comments on Article 17 apply to the reference to Article 18 as well.

connection between the facts found and the choice made.” *Dep’t of Commerce v. New York*, \_\_\_ U.S. \_\_\_, 139 S.Ct. 2551, 2569 (June 27, 2019) (citations omitted). Courts may not substitute their judgment for the Secretary’s “but instead must confine ourselves to ensuring that he remained ‘within the bounds of reasoned decision-making.’” The courts also have noted that agencies are not bound by prior policies or interpretations of their statutory authority. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991) (acknowledging that changed circumstances and policy revision may serve as a valid basis for changes in agency interpretations of statutes); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) (“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (agencies “must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances’” (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))). In addition, an agency need not prove that the new interpretation is the best interpretation but should acknowledge that it is making a change, provide a reasoned explanation for the change, and indicate why it believes the new interpretation of its authority is better. *See generally FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

DHS disagrees that this rulemaking is arbitrary and capricious. Significantly, although DHS is not bound by statements made in prior rulemakings, this rule builds on prior amendments to regulations managing asylum applications, interviews, and employment authorization based on a pending asylum application. For example, previous rulemakings set a mandatory waiting period for (c)(8) EADs, articulated applicant-caused delays that would prolong that wait, and prescribed the effects of failing to appear for an asylum interview. Moreover, the prior amendments were triggered by similar realities, albeit on a smaller scale, that the agency faces today. The rationale and justifications for those amendments are in line with

those expressed here—namely, addressing significant influxes of aliens abusing the asylum system for economic benefit and ballooning asylum adjudication backlogs, and the desire to prioritize bona fide asylum applicants.<sup>102</sup> DHS believes that this rulemaking is necessary to achieve the several purposes expressed herein and that it is consistent, both in rationale and the mechanisms employed, with previous efforts to preserve the integrity of U.S. humanitarian programs.

DHS acknowledges that it is changing longstanding eligibility requirements for (c)(8) employment authorization. While these stricter requirements stand to have a significant impact on those who would have qualified for a (c)(8) EAD under prior regulations, DHS believes that this rule is not *ultra vires* and falls squarely within the Secretary’s authority under sections 103 and 208 of the INA, 8 U.S.C. 1103, 1158, and that it complies with the United States’ obligations under international law. As noted earlier, asylum seekers are not entitled to employment authorization under the INA and the Secretary is under no obligation to provide employment authorization to asylum seekers. Further, it is within the Secretary’s discretion to bar employment authorization to asylum seekers outright. *See* INA section 208(d)(2), 8 U.S.C. 1158(d)(2). Instead of instituting an outright bar to employment authorization, however, the Secretary has chosen to exercise his discretion more narrowly and permit certain asylum seekers to obtain employment authorization if they meet the requirements specified in this rule. In addition, contrary to the assertion of one commenter, the 180-day waiting period specified in section 208(d)(2) of the INA does not in any way limit the Secretary’s authority to impose additional restrictions on applying for employment authorization or to extend the timeframe beyond 180 days.

DHS has explained why it believes the new rule is necessary in light of the country’s overwhelmed asylum system—it seeks to restore integrity to the asylum process, prevent aliens with significant criminal convictions from obtaining a discretionary benefit, reduce the incentives for illegal migration, deter frivolous, fraudulent, and non-

meritorious filings, and ensure that bona fide asylum seekers are able to have their claims decided expeditiously so they can receive the protection and benefits available for refugees and asylees in the United States.

By engaging in this rulemaking, DHS has satisfied its obligations under the APA and given the public ample opportunity to comment on the proposals within this rule. DHS carefully considered the public comments on this rule and made adjustments based on the input it received. DHS has also articulated its rationale for the changes in this rule and it is in keeping with the immigration priorities and policies of the Administration as they relate to the management of humanitarian immigration programs. Accordingly, DHS believes this rule has been issued in compliance with the APA.

## 6. Constitutional Concerns

Several commenters argued that the provisions in the rule were unconstitutional based on a variety of grounds. DHS addresses the various Constitutional claims separately below.

### a. Discrimination and the Equal Protection Clause of the U.S. Constitution

*Comment:* One commenter stated the rule was unconstitutional because it was based on racial animus towards Latin American asylum seekers and was “part of an insidious agenda of discrimination.” The commenter argued that DHS should withdraw the rule since the rule was likely “animated by unconstitutional prejudice and animus.” One commenter argued that the rule violates the 14th amendment because of its disproportionate impact on non-white applicants and its racially discriminatory animus. Another commenter stated that the rule disproportionately impacts black and Latino communities, especially in terms of access to healthcare. One commenter also believed that the rule was racially motivated, pointing to the 30-day and Fee rulemakings, Third Country Transit Bars, and the Migrant Protection Protocols (MPP), and “family separations policy,” to support the commenter’s position. The commenter argued that the administration’s focus on the U.S.-Mexico border exhibited discrimination against Latino immigrants.

*Response:* DHS rejects the comments asserting that this rule is based on racial animus and is discriminatory. Nowhere in the rule does DHS draw distinctions between asylum seekers based on their race, national origin, or religion—

<sup>102</sup> *See, e.g., INS final rule, Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 FR 62284–01 (Dec. 5, 1994) (The rulemaking intended to “discourage applicants from filing meritless claims solely as a means to obtain employment authorization,” so that asylum officers and IJ can “concentrate their efforts on approving meritorious [asylum] claims”).

protected classifications which implicate the Equal Protection Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Korematsu v. U.S.*, 323 U.S. 24. This rule applies equally to all asylum seekers, regardless of their race, nationality, age, gender, or religion, and therefore does not have a discriminatory effect on asylum seekers. The demographics of asylum seekers, a population that has yet to establish eligibility for asylum, shift over time based on country conditions around the globe. Even though the demographics of asylum seekers during any particular era or from any particular part of the world may change, this fact did not influence DHS in this rulemaking. Further, this rule applies equally to all aliens who enter or attempt to enter the United States, whether at the southern border, the northern border, or any of the more than 300 land, air and sea ports of entry.

To the extent that commenters are arguing that DHS is discriminating because it is treating asylum seekers differently than other aliens or immigrants to the United States, or U.S. citizens, DHS notes that the U.S. Supreme Court has long recognized Congress's authority to draw such distinctions. *See, e.g., Demore v. Kim*, 538 U.S. 510, 521–522 (2018) (“[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens. [A]ny policy toward aliens is vitally and intricately interwoven to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”). *See also Mathews v. Diaz*, 426 U.S. 67, 80–83 (1976) (holding that providing an income benefit to one class of aliens and withholding the same benefit from a similar class of aliens did not violate the Due Process Clause, and that the decision to withhold a benefit “may take into account the character of the relationship between the alien and this country”).

This rulemaking addresses DHS' interest in deterring unlawful entry into the United States, the intentional abuse of the U.S. asylum system, and preventing illegal entrants and aliens with significant criminal histories from obtaining a discretionary benefit. As a sovereign nation, we must secure our borders and preserve the rule of law, which is fundamental to the maintenance of our republican form of government. Asylum applicants must establish, *inter alia*, that their government is unable or unwilling to protect them. Asylum applicants commonly allege that they are fleeing rampant crime and that the governments in their home countries fail to protect

them by enforcing the law. It follows that aliens seek to enter the United States *because* it respects and enforces its laws. To stand idly by while more than 850,000 aliens sought to illegally enter the United States in a single year, not accounting for those aliens that CBP did not apprehend, is to forfeit sovereignty and erode the very rule of law that attracts and protects bona fide asylees.<sup>103</sup> To continue to provide an ancillary discretionary benefit with virtually no eligibility criteria and nearly limitless renewal opportunity where approximately 80 percent of the beneficiaries cannot establish eligibility for asylum, serves to further erode the rule of law. Accordingly, DHS is implementing this rule and other rules and programs not to discriminate against any class, but as an act of sovereignty, to provide security, and to preserve the integrity of the asylum system.

#### b. Due Process

*Comment:* Several commenters argued that the changes in the rule violated the Fifth Amendment and Due Process clause of the U.S. Constitution. One commenter argued that the rule would deprive asylum seekers of “life and liberty and the pursuit of happiness.” Another commenter argued that the rule violated the “spirit” of the U.S. Constitution and Congressional intent as it related to asylum seekers. One commenter argued that the rule violated the Suspension Clause and Due Process clause by not allowing asylum seekers to work while their cases are on appeal in the federal courts.

One commenter argued that removing “immigrants’ right to work” undermines their ability to pay for counsel and thus their access to due process under law. Another commenter cited the Constitutional prohibition on bills of attainder and guarantee of due process in arguing against “punishing” all asylum applicants for the fraudulent claims of some. A few commenters stated that denying EADs for unresolved arrests or pending charges is draconian and violates the due process clause of the Constitution.

*Response:* DHS has considered commenters’ concerns about due process in the asylum system and disagrees that this rule violates asylum applicants’ due process rights. Nothing in this rule prevents an alien from seeking asylum, participating in the adjudication process, or from seeking

administrative or judicial review of an adverse asylum decision.

Contrary to the commenter’s assertion, asylum applicants do not have a “right to work.” Throughout the INA, Congress has drawn clear distinctions between different classes of aliens and the benefits to which they are entitled. In the context of this rule, Congress drew distinctions between asylees and asylum applicants. Asylees have a “right to work,” while asylum applicants do not.<sup>104</sup> An asylee has established eligibility to remain in the United States and is conferred a host of benefits, including life-long residence in the United States (absent termination on limited grounds), and a pathway to U.S. citizenship. An asylum applicant has not established eligibility to remain in the United States—where the alien has no lawful status, DHS may not remove the alien to his or her home country while the application is pending. As discussed below, this distinction significantly affects the character of the relationship between the alien and the United States, and the benefits that the United States offers. In this rule, DHS is continuing to provide employment authorization to certain asylum applicants present in the United States, but is extending the waiting period for that benefit and is excluding certain applicants who enter illegally without good cause, who engage in certain significant criminal behavior, and who fail to timely file their applications as required by statute.

The eligibility distinctions drawn by DHS in this rule are analogous to those in *Mathews v. Diaz*, 426 U.S. 67 (1976). There, the Supreme Court found a Social Security Act provision constitutional where it denied an income benefit to all aliens unless they had been admitted for permanent residence and had resided in the United States for at least five years.<sup>105</sup> The Court held that Congress permissibly distinguished LPRs with five years residence from all other aliens, including LPRs with less than five years’ residents, and further, that this

<sup>104</sup> Compare INA 208(c)(1)(B), 8 U.S.C. 1158(c)(1)(B), with INA 208(d)(2), 8 U.S.C. 1158(d)(2).

<sup>105</sup> *See Diaz*, 426 U.S. at 78–79 (“The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.”).

<sup>103</sup> *See* CBP Southwest Border Migration Statistics FY 2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

distinction did not deprive the aliens of liberty or property without due process of law.<sup>106</sup>

Similar to LPRs with five or more years of residence in the United States, the relative permanency of asylees strengthens the ties with this country and therefore they enjoy immediate and secure access to a “bounty” of benefits, including employment authorization and its potential attendant income.<sup>107</sup> In contrast, asylum applicants, a class who have yet to establish eligibility to remain in the country, have weaker ties to the United States and therefore have more limited, temporary access to the same “bounty.”<sup>108</sup> The relationship between an asylum applicant and the United States is made even weaker where the applicant has diminished his or her chances of obtaining asylum by violating U.S. immigration and criminal laws, which is reflected in the narrowed EAD eligibility requirements in this rule.

DHS recognizes that many aliens choose to hire counsel or seek pro bono assistance as they pursue their asylum claims, but disagrees that delaying or barring employment authorization while an asylum application is pending prevents access to due process under law. Aliens in immigration proceedings do not enjoy the same right to free counsel as defendants in criminal proceedings, but can obtain legal counsel and be represented in any immigration proceeding the alien chooses, at no cost to the Government.<sup>109</sup> As provided by

Congress, whether an alien’s asylum application is being reviewed by USCIS, an IJ, the BIA, a Circuit Court of Appeals, or the United States Supreme Court, that alien “is not entitled to employment authorization[.]” INA 208(d)(2), 8 U.S.C. 1158(d)(2). Thus, it is not a violation of an alien’s due process rights if the Secretary chooses to restrict employment authorization during administrative or judicial review of a denied asylum claim. The Secretary may, in his or her discretion, establish regulations to provide employment authorization during any point in the review of the asylum application, or preclude employment authorization during the entire review process.

Precluding employment authorization during all or part of the asylum review process also is consistent with the longstanding statutory and regulatory framework. For example, in the 1994 final rule, as in this rulemaking, INS provided that an alien whose asylum application is denied during the 150-day waiting period would never be eligible for an EAD, even if the alien pursued an administrative appeal or sought judicial review of the denial.<sup>110</sup> Further, in 1996, Congress expressly prohibited DHS from providing employment authorization to an asylum applicant during the 180-day waiting period while simultaneously mandating that initial asylum claims should be adjudicated in 180 days or less, absent exceptional circumstances.<sup>111</sup> When read together, it is apparent that Congress endorsed separating asylum adjudications from employment authorization, and recognized that the alien would not be employed during the adjudication of the asylum application, and very likely during judicial review. As noted in the proposed rule, “the 365-

day period was based on an average of the current processing times for asylum applications which can range anywhere from 6 months to over 2 years, before there is an initial decision, especially in cases that are referred to DOJ–EOIR from an asylum office.” The 1994 rule set a 180-day EAD waiting period anticipating a 180-day or shorter asylum application adjudication period when the volume of cases was significantly lower than the present day levels. The current rule sets a 365-day EAD waiting period based on an average adjudication time that often stretches well beyond two years. DHS anticipates that by reducing the adjudication backlog, this adjudication time will shorten.

DHS believes that restricting access to asylum applicants’ employment authorization during a period of judicial review is necessary to ensure that aliens who have failed to establish eligibility for asylum during multiple levels of administrative review (before the asylum officer and/or the IJ, and the BIA) do not abuse the appeals processes in order to remain employment authorized. As noted above, the relationship between an asylum applicant and the United States is made weaker where the applicant’s chances of receiving asylum are diminished, here by failing to establish eligibility for asylum through two or three levels of administrative review. The termination provision narrows (c)(8) EAD eligibility commensurate with the attenuation from asylum eligibility after multiple, successive asylum denials.

DHS acknowledges that this provision, along with others in this rule, may negatively impact those aliens who succeed in challenging their asylum denials upon judicial review. However, it is necessary to remove the incentive of EAD eligibility during judicial review that existed under the previous regulation, which amounted in most cases to several additional years of employment authorization after multiple asylum denials. Returning to *Diaz*, the Supreme Court held that barring all aliens, including LPRs with less than five years’ residence, from drawing Social Security benefits was permissible under the due process clause despite the potential for harm experienced by those who failed to meet the eligibility threshold drawn by the statute.<sup>112</sup> Although aliens’ due process

<sup>112</sup> See *Diaz*, 426 U.S. at 83 (“We may assume that the five-year line drawn by Congress is longer than necessary to protect the fiscal integrity of the program. We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh

Continued

<sup>106</sup> *Id.*, at 84.

<sup>107</sup> *Id.*, at 80 (“Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien’s tie grows stronger, so does the strength of his claim to an equal share of that munificence.”).

<sup>108</sup> Unlike asylum applicants, LPRs with less than five years of residence in the United States are employment authorized incident to status. However, Social Security benefits are reserved for those who are not receiving income from employment because they are retired, disabled, are dependents of beneficiaries, or are survivors of workers who have died. See *Understanding The Benefits* (Jan. 2020), available at <https://www.ssa.gov/pubs/EN-05-10024.pdf>. Social Security income benefits are therefore analogous to income benefits derived from employment authorization.

<sup>109</sup> INA sec. 292, 8 U.S.C. 1362 (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

<sup>110</sup> See 62 FR 10337 (March 6, 1997) (“An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization. If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied.”) See amended 8 CFR 208.7(a)(iii)(E) (An asylum applicant is not eligible for an EAD if “[a]n asylum officer or an Immigration Judge has denied the applicant’s asylum application within the 365-day period or before the adjudication of the initial request for employment authorization.”).

<sup>111</sup> See Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009, INA 208(d)(2), 8 U.S.C. 1158(d)(2) states, “[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.” INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii) states, “in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.”



rights are protected in the United States, this does not require DHS to provide access to income via an employment authorization document during any point in the asylum adjudication process.<sup>113</sup>

With regard to the commenter's claim that the rule violates the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2, and constitutes a bill of attainder under the U.S. Constitution, Art. I, § 9, cl. 3, DHS respectfully disagrees. This rule does not in any way implicate or address habeas petitions and it does not unlawfully suspend the writ of habeas corpus. This rule also does not address the detention of aliens or the release of aliens from custody. The rule does not "punish" asylum seekers by delaying their ability to obtain employment authorization until their asylum claim is decided. This rule simply provides the conditions under which employment may be authorized, pursuant to the Secretary's discretionary statutory authority to provide (or not provide) employment authorization to asylum seekers.

With regard to bills of attainder, the Supreme Court has stated that the Bill of Attainder Clause applies only to Congress, noting that "[t]he distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt." *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (citation omitted). A bill of attainder has been described as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (citing prior Supreme Court precedent). Accordingly, the Bill of Attainder Clause does not apply "to regulations promulgated by an executive agency." *Paradissiotis v. Rubin*, 171 F.3d 983, 988–89 (5th Cir. 1999) (citing *Walmer v. U.S. Dep't of Defense*, 52 F.3d 851, 855 (10th Cir. 1995) ("The bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies.")); *see also Korte v. Office of Personnel Mgmt.*, 797 F.2d 967, 972

and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not.").

<sup>113</sup> *Id.*, at 78 ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.").

(Fed. Cir. 1986); *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966).

Finally, DHS respectfully disagrees with commenters' statements that this rule violates aliens' due process rights in seeking employment authorization. As noted, there is no statutory or constitutional right to employment authorization for asylum applicants. Although aliens present in the United States are protected by the due process clause, federal immigration laws and their implementing regulations generally enjoy a highly deferential standard of review. Nonetheless, nothing in this rule prevents an alien from requesting employment authorization or obtaining employment authorization if they meet the requirements specified in the INA and this rule, and DHS believes this rule provides adequate notice of the eligibility criteria for employment authorization.

#### G. Comments on Specific Rule Provisions

##### 1. 365-Day Waiting Period

###### a. INA 208(d)(2) and 180-Day Period

*Comment:* A few commenters supported extending the (c)(8) EAD wait period to 365 days. One commenter believed this change along with other measures would discourage people from entering the United States illegally and hurting American jobs. One commenter supported the change citing the incentives for the filing of asylum applications by unqualified aliens due to the extended time periods for asylum adjudications versus the relatively short period for obtaining employment authorization. The commenter stated that the increased processing times that resulted from more unqualified applications unfairly increased the burden on bona fide asylum seekers. The commenter also agreed with DHS that extending the waiting period to better approximate the actual average adjudication completion periods, combined with the LIFO policy, was the most effective remedial approach.

Many commenters, however, including several advocacy groups from the State of Maine, government officials from the State of New York, and representatives from several cities around the United States, opposed DHS extending the waiting period for asylum seekers to obtain an EAD from 180 days to 365 days. One commenter representing the State of New York argued that the rule "interferes" with the State's ability to enforce its labor and civil rights laws. Another commenter argued that the rule would "impede or delay" the State's ability to

provide services under the Workforce Innovation and Opportunity Act (WIOA), Public Law 113–128, 128 Stat. 1425 (2014).

Several commenters argued that the proposal to extend the waiting period was contrary to 5 U.S.C. 706(1). Another commenter argued that DHS was effectively amending the statute, section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), by treating the 180-day provision as the "floor." Several commenters also argued that DHS was disregarding the context and history behind Congress's enactment of the provision and should not extend the employment authorization waiting period because Congress "adopted" an approach that was based on the "careful balance that the INA had struck between 'discourag[ing] applicants from filing meritless claims solely as a mean to obtain employment authorization' and 'providing legitimate refugees with lawful employment authorization.'" <sup>114</sup>

A few commenters opposed extending the period to 365 days and suggested the DHS adopt a different timeframe. Several commenters suggested the waiting period should be eliminated altogether or significantly shortened, such as for a period of 30–60 days or not more than 90 days. One commenter suggested that the 150-day period was a sufficient deterrent for fraudulent asylum applications. Another commenter opposed lengthening of the waiting period but indicated that if DHS had to extend, it should not exceed more than 240 days, and that DHS should consider the impact on legitimate asylum seekers. One commenter suggested that DHS make the waiting period 180 days, plus one day for each day after the alien's lawful entry into the United States, and that DHS bar asylum seekers who entered illegally from qualifying for employment authorization. Another commenter argued that the 365-day waiting period was simply a delay tactic and that DHS could simply count 180 calendar days from the receipt of the asylum application. One commenter stated that DHS's issues with calculating days and the Asylum EAD Clock could be eliminated by simply allowing concurrent filing.

Several commenters argued that extending the period to 365 days was punitive, immoral, cruel and not consistent with American values. One commenter argued that extending the waiting period was inhumane and would make it harder for aliens to get asylum protection in the United States. Another commenter believed that,

<sup>114</sup> See fn. 88.

though DHS's intent is to reduce frivolous, fraudulent, and non-meritorious claims, it will actually discourage and reduce legitimate claims for asylum. One commenter noted that there are aliens in the backlog who have been waiting for years for a decision on their cases and with the reintroduction of LIFO and current backlogs, aliens basically will have to wait an indefinite amount of time to work. Another commenter argued that asylum seekers cannot be deprived of employment authorization because of government delays. Several commenters argued that extended waiting period would incentivize immigrants to work illegally. Several state government agencies said that during the lengthened waiting period, asylum applicants are more likely to "work off the books" to earn income, which puts them at risk of abuse and wage theft.

*Response:* DHS disagrees that the proposal to extend the time frame for eligibility for employment authorization from 180 to 365 days is contrary to 5 U.S.C. 706(1). Section 706 of the APA describes the scope of judicial review of agency rulemaking under the APA and does not relate to the Secretary's authority over asylum or asylum-related employment authorization. DHS also disagrees that it is "amending" the statute that authorizes employment authorization by unlawfully treating the 180-day period as a "floor" as opposed to a "ceiling" for the amount of time an asylum seeker must wait until he or she is eligible for employment authorization.

Under section 208(d)(2) of the INA, 8 U.S.C. 1182(d)(2), Congress gave the Secretary authority to give asylum seekers employment authorization on a discretionary basis and created a minimum period an asylum application must be pending before the discretionary authority to grant employment authorization is permitted. As noted above, the Secretary is not obligated to provide employment authorization to asylum seekers during any period of review of the asylum application, and it is within the Secretary's authority to bar employment authorization to asylum seekers outright. In addition, contrary to the commenters' assertions, the 180-day waiting period specified in INA section 208(d)(2), 8 U.S.C. 1158(d)(2), represents a minimum waiting period and does not in any way limit the Secretary's discretion to impose additional restrictions on applying for employment authorization, including extending the timeframe beyond 180 days.

In response to comments suggesting that DHS should either eliminate or significantly shorten the time an asylum seeker must wait, DHS believes it would contravene the purpose of this rule to do so, and notes that it is constrained by the statute and cannot shorten the period of time to less than 180 days. DHS could only make such a change if authorized by Congress. DHS also notes that there was a period in the 1990s when asylum seekers were able to obtain employment authorization immediately, and as a result, numerous fraudulent asylum claims were filed simply to obtain an EAD.<sup>115</sup> Since the 1990s, both Congress and the Executive Branch have witnessed the incentives for aliens to file false claims for asylum simply to be able to work in the United States and not because they qualify for asylum based on any of the grounds specified in section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42). DHS recognizes that when Congress enacted INA section 208(d), 8 U.S.C. 1158(d), Congress adopted the agency's 180-day minimum waiting period for employment authorization as the statutory standard. Congress also made clear that asylum applicants are *not entitled* to employment authorization. Nothing in the statute prevents DHS from extending the waiting period beyond 180 days.

#### b. Impact on Asylum Seekers and Their Ability To Be Self-Sufficient

*Comment:* Many commenters opposed the change arguing that it is overly burdensome, would inhibit asylum seekers' ability to become economically self-sufficient, and ability to become productive members of society. Similarly, many commenters argued that the extended waiting period would cause significant economic hardship for asylum applicants who are unable to work and financially support themselves. One commenter argued that extending the waiting period could impact a parent's ability to support his or her child and would reduce critical financial resources for children by reducing child support collections. Several commenters said denying asylum applicants the opportunity to work and become self-sufficient will require them to depend on government welfare and community services. A few commenters argued that DHS did not adequately address how applicants are expected to be able to provide for themselves as they are not eligible for federal welfare benefits. Similarly, a few commenters wrote that the extended

waiting period is inconsistent with U.S. policy to reduce the number of public charges. Several commenters said that without employment and financial stability, applicants will have difficulty obtaining access to services, such as healthcare, banking, education, and would not be able to obtain driver's licenses or hire legal counsel. A commenter also stated that work permits are the only form of photo identification for many asylum seekers and that without photo identification, they will have difficulty accessing community support programs like shelters, food banks, and medical clinics. Other commenters argued that the extended waiting period would cause significant harm to asylum applicants' physical and mental health, including causing anxiety and depression.

One commenter stated that if applicants are granted asylum, it will be more challenging to find employment because they would need to explain a longer period of unemployment than they would under the 180-day rule. Multiple commenters argued that the proposed rule would increase the risk of labor trafficking, coercive employment practices, and violations of state labor laws because asylum seekers would not be legally authorized to work. Several commenters said asylum applicants are more likely to become or remain homeless while waiting for their EAD because they cannot afford stable housing. Another commenter said the consequences of housing instability are especially acute for children, including harm to their physical and mental health, behavioral problems, and educational achievement. Several commenters said that women, HIV-positive, and lesbian, gay, bisexual, transgender, queer (LGBTQ) asylum seekers are especially vulnerable to homelessness, abusive living situations, exploitative labor practices, and hunger. One commenter stated that employment opportunities and economic resources are necessary for survivors of domestic violence, sexual assault, and human trafficking. The commenter said the extended wait times undermine federal and state policies to support victims and may trap victims in exploitative situations.

*Response:* DHS recognizes that this rule may have a substantial impact on asylum applicants, but does not agree that a 365-day waiting period for employment authorization is overly burdensome, cruel, or precludes aliens from becoming self-sufficient. For at least 24 years, the statutory and regulatory scheme set the expectation that asylum applicants must wait a

<sup>115</sup> See discussion *supra* in section II, part A regarding efforts to reform the asylum system.

minimum of 6 months, often much longer due to applicant-caused delays, before asylum applicants may apply for employment authorization. Therefore, it is not reasonable for asylum applicants to come to the United States with the expectation that they will be employment authorized immediately upon their arrival.

While DHS supports the ability of aliens who have established eligibility for an immigration benefit in the United States, including asylees and refugees, to participate in and contribute to the U.S. economy, DHS believes that employment authorization must be carefully regulated, not only to protect U.S. workers, but also to maintain the integrity of the U.S. immigration system. DHS has identified (c)(8) employment authorization, with its low eligibility threshold and nearly limitless renewals, coupled with the lengthy adjudication and judicial processes, as a driver for economic migrants who are ineligible for lawful status in the United States to file frivolous, fraudulent, and otherwise non-meritorious asylum applications. Asylum seekers are not immediately eligible to work as soon as they arrive in the United States. They are required to wait for at least 6 months, often longer, before they can receive work authorization. This waiting period is temporary and not a bar to employment authorization. DHS acknowledges that the extended period for which aliens will not be employment authorized may impact their access to other services, but this is a temporary period. In the interim, access to some services can be mitigated by organizations that provide these services without charge. There is no cost, for example, to attend public school. All children living in the United States have the right to a free public education.<sup>116</sup> Several states have implemented community health outreach programs specifically to provide access to preventive care services for aliens, and federally funded health care centers, which are required to treat anyone, charge on a sliding scale and do not ask for citizenship documentation.<sup>117</sup> DOJ–EOIR and USCIS maintain lists of legal providers who provide services at low or no cost.<sup>118</sup>

<sup>116</sup> <https://www2.ed.gov/policy/rights/guid/unaccompanied-children.html> (last accessed 2/19/2020).

<sup>117</sup> <https://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx> (last accessed 02/19/2020).

<sup>118</sup> <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers> (last accessed 3/24/2020); <https://www.uscis.gov/avoid-scams/find-legal-services> (last accessed 3/24/2020).

Regarding explaining a longer period of employment authorization to an employer, DHS believes that compliance with the law constitutes a reasonable explanation for any potential employer who may ask about an alien's period of unemployment. Regarding reliance on public benefits, while state programs may differ, in general, asylum seekers are not eligible for federally funded benefits until they receive asylum. Individuals cannot be compelled to rely on public benefits for which they are not eligible. Nothing in this rule modifies that eligibility. Further, as a point of clarity, asylum seekers are not subject to the public charge inadmissibility ground under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), in the adjudication of their asylum applications.<sup>119</sup> Nor is the public charge inadmissibility ground applicable to asylees seeking adjustment of status to lawful permanent residence in the United States.

DHS also disagrees that this rule would “force” asylum seekers to work illegally to survive. Currently, asylum seekers have to wait a minimum of 180 days, often longer, before their employment authorization request is adjudicated. There is no mechanism for an asylum seeker to gain immediate employment authorization upon arrival to the United States. It is precisely because of the loopholes in the current asylum process that many economic migrants have been incentivized to migrate illegally to the United States. Transnational criminal organizations and human smugglers have long been aware of DHS's limited resources, insufficient detention capacity, and prior policies related to “catch and release,” as well as asylum adjudication backlogs and prolonged immigration court proceedings. These criminal organizations and smugglers have marketed these loopholes to economic migrants as an avenue to enter the United States, be automatically released, and be allowed to remain and work for extended periods of time.<sup>120</sup>

Finally, DHS believes that the reforms made by this rule and recent procedural

<sup>119</sup> <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet> (last accessed 02/19/2020).

<sup>120</sup> See, e.g., United Nations, Office on Drugs and Crime, *Global Study on Smuggling of Migrants*, 2018, [https://reliefweb.int/sites/reliefweb.int/files/resources/GLOSOM\\_2018\\_web\\_small.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/GLOSOM_2018_web_small.pdf). As courts also have recognized, smugglers encourage aliens to enter the United States based on changes in U.S. immigration policy. *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1115 (N.D. Cal. 2018) (noting a Washington Post article stating smugglers told potential asylum seekers that “the Americans do not jail parents who bring children—and to hurry up before they might start doing so again.”).

changes, like LIFO, will significantly reduce the number of filings solely for economic reasons, which in turn will ensure that bona fide asylum seekers have their claims decided in an expeditious manner. Since USCIS returned to scheduling asylum interviews based on LIFO, newer filings are being prioritized for interview scheduling and, upon a positive grant of asylum, those bona fide applicants are immediately employment authorized. Therefore, many legitimate asylum applicants likely will not have to wait the full 365-day period before they can work lawfully in the United States.

DHS strives to process all benefit requests as fairly and expeditiously as possible, while also conducting necessary vetting to identify national security and public safety concerns and detect fraud. From 2017 to 2020, over 80 percent of (c)(8) EADs were processed within 60 days. Processing times for individual applications vary based on the particular facts of a case and broader processing times can vary due to outside factors. As for the commenters who are concerned about asylum seekers who are currently in the backlog and their ability to continue to work, DHS addresses the impact of this final rule on those aliens whose asylum claims are still pending as of the effective date of this final rule, in Section V, ¶ 7, Effective Date and Retroactive Application below.

#### c. Vulnerability to Human Trafficking, Poverty, and Homelessness

*Response:* DHS strongly condemns human trafficking in all its forms, including labor trafficking and coercive labor practices. DHS expects all noncitizens, including asylum applicants, to refrain from working in the United States unless they are employment authorized. Working while not employment authorized increases the risk of labor trafficking and other coercive employment practices, abuse, and wage theft. In order to mitigate these risks and for their own safety, aliens should not accept employment in the United States unless they are employment authorized. Moreover, DHS expects asylum seekers to obey the law while in the United States, and will not assume otherwise in promulgating its employment authorization policies.

Nothing in this rule changes access for asylum seekers to housing. It continues to be incumbent upon every asylum seeker to have a plan for where they intend to live during the pendency of their asylum claim and, in particular, while they are not employment authorized. Many asylum seekers stay with friends or relatives or avail

themselves of services offered by community organizations such as charities and places of worship. There are no federal housing programs for asylum seekers. The Department of Health and Human Services maintains resources about housing in each state in the United States. Asylum seekers who are concerned about homelessness during the pendency of their employment authorization waiting period should become familiar with the homelessness resources provided by the state where they intend to reside.<sup>121</sup>

#### d. Interference With State's Rights

*Response:* DHS disagrees that this rule interferes with the rights of individual States to enforce WOIA or State labor and civil rights laws. While many States have laws that permit certain noncitizen residents of the State to access services or avail themselves of the protections under States' laws, those laws are subordinate to and preempted by the DHS's authority to administer and enforce the immigration laws as directed by Congress. As the Supreme Court recently noted in *Arizona v. United States*, 567 U.S. 367, 383, 132 S.Ct. 2492 (2012), "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens . . . This authority rests, in part, on the National Government's constitutional power to 'establish a uniform Rule of Naturalization,' Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations . . ." (citations omitted). While laws like WOIA allow aliens to access services or to participate in programs if they are authorized to work,<sup>122</sup> it is solely within the province of the Secretary to grant employment authorization to aliens, based either on a specific statutory mandate requiring a class of aliens to be provided employment authorization or on the Secretary's discretion. Through this rule, DHS is providing discretionary employment authorization to asylum seekers if they meet certain eligibility requirements. DHS is not directing or compelling the States to enforce immigration laws. See *Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct.

<sup>121</sup> <https://www.hud.gov/states> (last accessed 2/6/2020).

<sup>122</sup> For example, WOIA provides that—  
“(5) Prohibition on Discrimination against Certain Noncitizens.—Participation in programs and activities or receiving funds under this title shall be available to citizens and nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, and other immigrants authorized by the Attorney General to work in the United States.”

See Public Law 113–128, at sec. 188.

2365, 138 L.Ed.2d 914 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”). Nor is DHS precluding States' from authorizing aliens to access certain services under State law or pursuing any rights that may have been afforded by the States to noncitizens residing in their State.

#### 2. One-Year Filing Deadline

*Comment:* One commenter supported barring late-filers from obtaining employment authorization and believed that this rule closed an important loophole. Citing asylum statistics and the USCIS Asylum Division's comments during quarterly stakeholder meetings in 2017 and 2018, the commenter stated that the asylum backlog contained tens of thousands of backlogged asylum applications that had been filed more than ten years after the alien's first entry into the United States. The commenter noted that long-time unlawfully present aliens often file frivolous affirmative asylum applications knowing they will be denied and then referred to the immigration courts, where the aliens can then seek cancellation of removal under section 240A of the INA, 8 U.S.C. 1229b. The commenter believed that closing this loophole that allows for late-filing asylum applicants to receive employment authorization would create a “significant disincentive for several abusive application practices.” Another commenter said that there was no good reason for aliens with legitimate asylum claims to delay applying for asylum. The commenter believed that those who fail to apply prior to the one-year filing deadline are very likely doing so only as a delay tactic to keep from being removed.

Many commenters opposed denying asylum seekers employment authorization if they failed to file within the one-year deadline specified under section 208(a)(2)(B) of the INA, 8 U.S.C. 1158(a)(2)(B). The commenters noted that the one-year filing deadline has statutory exceptions, such as for changed circumstances, and also specifically exempts UACs. See INA section 208(a)(2)(D) and (E), 8 U.S.C. 1158(a)(2)(D), (E). The commenters stated that the rule ignored these exceptions and failed to clarify how those exceptions applied in this rule. Several commenters expressed concern that the rule would render exceptions to the one-year deadline meaningless because IJs and asylum officers typically adjudicate the exceptions at the same time as the asylum adjudication. Other

commenters believed that asylum officers and/or IJs were better suited to make decisions related to the asylum exceptions rather than USCIS officers who adjudicate EADs. One commenter felt that it was the responsibility of asylum officers or IJs to determine the outcome in a case and whether an exception was met, and that it was “inappropriate” for USCIS officers to prejudge the merits of a case where an asylum seeker filed after the one-year filing deadline by denying employment authorization.

Several commenters noted that many applicants file past the one year deadline because they were previously in a lawful nonimmigrant status. One commenter stated that being in a lawful nonimmigrant status was not listed as one of the exceptions to the EAD bar and, as a result, the rule puts a whole class of aliens at risk—not because they do not have a legitimate fear of persecution or harm, but solely because they chose to immigrate to the United States through a legal channel other than asylum. Another commenter stated that DHS should specifically exempt those who maintained a lawful status prior to filing for asylum from the bar and allow them to obtain an EAD without waiting for an asylum officer or IJ to approve their asylum application. Several commenters said circumstances that can lead to a failure to file by the one-year filing deadline are often legitimate and out of the control of the applicants. One commenter believed that the rule would punish legitimate asylum seekers, many of whom in their view had good reason to apply late, such as based on the advice of counsel or because they were in a lawful immigration status. The commenter noted that many applicants have to wait years for their cases to be heard in the immigration courts and many of them are ultimately found to have met one of the exceptions to the one-year filing deadline. The commenter also argued that it had been a longstanding policy of the former INS and now DHS not to force aliens who are in a lawful status in the United States to apply for asylum early because it would be premature, citing the regulations at 8 CFR 208.4(a)(5)(iv) and the rationale in the preamble of a former INS final rule.<sup>123</sup>

<sup>123</sup> In its final rule, *Asylum Procedures*, 65 FR 76121, 76123–24 (Dec. 6, 2000), the former INS, in response to comments regarding exceptions for those maintaining a lawful status, stated—

“Several commenters recommended that the list of extraordinary circumstances be expanded to include maintaining valid immigrant or nonimmigrant status, in addition to maintaining Temporary Protected Status. The Department has

One commenter noted that the one-year filing deadline is not an absolute bar, like other provisions that require a mandatory denial, and that it can be overcome by an asylum seeker submitting evidence to establish that they either timely filed or meet one of the exceptions to late filing. The commenter argued that the rule creates a presumption against allowing an asylum seeker to apply for an EAD until the asylum officer or IJ determines that the alien meets an exception and that this essentially means the bar to employment authorization remains in place until the asylum claim is decided on its merits. The commenter stated that the rule does not have any provisions addressing how EAD adjudicators will make a fact-based analysis as to whether an exception has been met for purposes of obtaining an EAD. Similarly, some commenters were concerned that the rule lacked procedures to allow for an early ruling on whether an asylum seeker has met one of the exceptions prior to a final determination on the merits. The commenters argued that, as a result, many asylum applicants who had meritorious claims would have no way to support themselves until there was a final hearing on the merits of their case.

One commenter argued that the one-year filing deadline would not address fraudulent filings in order to trigger removal proceedings. The commenter argued that many asylum applicants have been in the United States unlawfully for less than 10 years, so they wouldn't be seeking relief through cancellation. One commenter stated it was wrong to penalize aliens with legitimate asylum claims for the

accepted the recommendation because there are sound policy reasons to permit persons who were in a valid immigrant or nonimmigrant status, or were given parole, to apply for asylum within a reasonable time after termination of parole or immigration status. The Department does not wish to force a premature application for asylum in cases in which an individual believes circumstances in his country may improve, thus permitting him to return to his country. For example, an individual admitted as a student who expects that the political situation in her country may soon change for the better as a result of recent elections may wish to refrain from applying for asylum until absolutely necessary. The Department would expect a person in that situation to apply for asylum, should conditions not improve, within a very short period of time after the expiration of her status. Failure to apply within a reasonable time after expiration of the status would foreclose the person from meeting the statutory filing requirements. Generally, the Department expects an asylum-seeker to apply as soon as possible after expiration of his or her valid status, and failure to do so will result in rejection of the asylum application. Clearly, waiting 6 months or longer after expiration or termination of status would not be considered reasonable. Shorter periods of time would be considered on a case-by-case basis, with the decision-maker taking into account the totality of the circumstances."

"transgressions of others." Another commenter argued that barring late-filers from obtaining employment authorization was not necessary because USCIS already had robust fraud prevention and protection procedures in place to determine when there are frivolous filings.

Finally, many commenters said that the application of the one-year filing deadline to EAD adjudications was punitive and would harm vulnerable asylum seekers. One commenter argued that this proposal would punish asylum seekers with valid asylum claims who will ultimately be found to meet an exception to the one-year filing deadline. Another commenter argued that this would cause asylum seekers with clear exceptions to the one-year filing deadline to suffer "increased hardship and poverty unnecessarily." One commenter stated that it was "sympathetic" to one of DHS's justifications for barring late-filers from qualifying for employment authorization (in other words, deterring aliens from filing frivolous asylum claims solely to trigger removal proceedings to allow them to apply for cancellation of removal under section 240A of the INA, 8 U.S.C. 1229b), and understood that frivolous filings solely to obtain cancellation have contributed to the asylum case backlog. However, the commenter did not believe that DHS's proposed solution to the problem was a reasonable solution, especially since there were asylum seekers who had legitimate claims and reasons for why they were delayed in filing. The commenter noted, for example, that women and members of the LGBTQ community may fail to file within the one-year filing deadline for many legitimate reasons, such as suffering from Post-Traumatic Stress Disorder (PTSD) caused by their past persecution, fear of being stigmatized even within their own community, or lack of knowledge surrounding the asylum process. Several commenters said that people who experienced violence or trauma are often reluctant to reveal personal details, are unable to express their fear of return, or gain access to information about the asylum process—all reasons for why they may file beyond the one-year filing deadline.

*Response:* DHS acknowledges that there are statutory and regulatory exceptions to the one-year filing deadline under section 208(a)(2)(B), (D) and (E) of the INA, 8 U.S.C. 1158(a)(2)(B), (D) and (E), and under 8 CFR 208.4(a). These exceptions, however, apply to eligibility to apply for asylum *and not* eligibility for a (c)(8) EAD. DHS is not amending any

statutory or regulatory exceptions, and USCIS and DOJ-EOIR will continue to render decisions on asylum applications that are late filed in accordance with current law and procedures. During the asylum process, asylum applicants will still have the opportunity to establish any changed circumstances that may have materially affected the alien's eligibility for asylum, or extraordinary circumstances that may have impacted the alien's ability to file during the 1-year period.<sup>124</sup> Asylum officers and IJs will still be adjudicating the merits of an asylum case and determining whether exceptions to the one-year filing deadline apply. USCIS Immigration Services Officers (ISOs) will still adjudicate requests for (c)(8) EADs, which are separate and apart from asylum adjudications.

Analyzing exceptions to the one-year filing deadline often requires factual determinations related to allegations made in the underlying asylum claim, elicited testimony during the asylum interview, legal analyses, and knowledge of country conditions. For this reason and as proposed, where the alien failed to file the asylum application within one year, he or she is ineligible to receive a (c)(8) EAD unless and until an asylum officer or IJ determines that an exception applies and that the alien filed within a reasonable period of time given the circumstances.

The fact that an applicant was a UAC at the time of filing does not create an exception to the one-year filing deadline. Rather, where the applicant was a UAC at the time of filing, the one-year filing deadline does not apply in the first place. When apparent UACs in removal proceedings appear to be filing asylum applications with USCIS, they are scheduled for an asylum interview and then, following the interview,

<sup>124</sup> INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). The alien bears the burden to establish that he or she filed an asylum application within one year of entry or attempted entry to the United States, and the alien is ineligible for asylum unless he or she meets that burden. INA sec. 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) ("Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States."). If an alien fails to file the asylum application within one year, the alien bears the burden to establish that he or she qualifies for an exception to the one-year-filing deadline. INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D) ("An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).").

USCIS makes a determination as to whether the application was filed by a UAC. If the alien was a UAC, USCIS will have initial jurisdiction over the application. Prior to confirming through the interview that an application was in fact filed by a UAC for jurisdictional purposes, however, USCIS examines the information available at the time it received the asylum application, and where appropriate, treats it as an apparent UAC filing. Accordingly, although the Asylum Division will make the jurisdictional determination at the interview stage, it is within the purview of an ISO at the time of an EAD adjudication to determine whether the asylum application was accepted by an apparent UAC on the date it was filed, and therefore if the applicant qualifies for employment authorization during the pendency of their asylum application. Notably, in these cases a grant of a (c)(8) EAD has no bearing on the asylum adjudication. If, during the course of adjudicating the asylum application, an asylum officer or an IJ later determines the alien was not a UAC at the time of filing the asylum application, a previous (c)(8) EAD issuance would not impact the UAC determination.

DHS disagrees with commenters that it failed to provide an exception for UACs. The rule states at 208.7(a)(1)(iii)(F) that the one-year filing requirement will not apply to any “applicant [who] was an unaccompanied alien child on the date the asylum application was first filed.” Congress did not place any restrictions on how the Secretary should exercise his discretion to grant EADs to asylum seekers except that employment authorization cannot be granted earlier than 180 days after the alien filed for asylum. Employment authorization is mandatory for those granted asylum (see INA section 208(c)(1)(B), 8 U.S.C. 1158(c)(1)(B)), and discretionary for asylum seekers (see INA section 208(d)(2), 8 U.S.C. 1158(d)(2)). The Secretary has discretion to set any conditions or restrictions on employment authorization for asylum seekers, including restricting eligibility for those who fail to file their asylum applications within the time specified by Congress. The Secretary also may amend its regulations or rescind employment authorization for asylum seekers altogether.

As part of the Secretary’s reforms to the asylum process, DHS is emphasizing the importance of the statutory one-year filing deadline for asylum applications. Both DHS and DOJ–EOIR adjudicate asylum applications filed by aliens who reside in the United States for years

before applying for asylum. Many aliens filing for asylum now are aliens who: (1) Were inspected and admitted or paroled, but failed to depart the United States at the end of their authorized period of stay (visa overstay), or (2) entered without inspection and admission or parole and remained in the United States, not because of a fear of persecution in their home country, but for economic reasons. Many aliens, overstay and illegal entrants alike, actively avoid detection for as long as possible and, once apprehended and facing removal from the United States, submit meritless asylum applications to delay or avoid removal. Due to the asylum application backlog, an asylum applicant could delay removal for several years while the applicant continues to enjoy government-sanctioned employment authorization during the adjudication process. As one commenter correctly noted, the asylum backlog has significantly increased in part because of aliens who overstayed their authorized period of stay in the United States, and subsequently decide to late-file an asylum application, either to continue employment authorization that expired at the end of their lawful nonimmigrant period or so that they can be placed into removal proceedings to apply for cancellation of removal.

DHS recognizes that the one-year filing deadline exception is determined at the time of the asylum adjudication, and that this provision may preclude from EAD eligibility many asylum applicants who fail to file their I–589 within one year as required by statute. This provision is necessary nonetheless. Abuse of the asylum system is rampant, and the current system is stretched to its breaking point. Bona fide applicants are forced to wait in limbo for years while DHS and the courts wade through hundreds of thousands of asylum applications, the majority of which are being referred or denied and for which DHS or DOJ–EOIR are only approving a small fraction. These symptoms, left unchecked, would stand to incentivize hundreds of thousands more to take advantage of the system each year.

DHS believes that one year is ample time for a bona fide asylum applicant to submit his or her application. This rule is necessary to disincentivize abusive behavior, and failing to take this significant action will invite more of the same behavior that has brought the asylum system to its current crisis.

If an asylum applicant who files past the one-year deadline qualifies for an exception to the one-year-filing-deadline as defined in at INA section 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D), and is granted asylum, the asylum applicant

is immediately employment authorized incident to status. If an asylum officer or an IJ determines the applicant meets an exception and the asylum application remains pending, this provision will not apply. This rule does not establish a mechanism for determining the exception under INA section 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). DHS could not bind DOJ–EOIR to such a mechanism, and it would add further delay to an already backlogged asylum system.

DHS carefully considered the suggestion that it exempt aliens from the one-year filing deadline provision where they allege they failed to timely file because they were in lawful status. DHS has determined it will not create such an exemption because it would contravene the purpose of this rule. Exempting such a class would incentivize nonimmigrants to delay filing their asylum applications until the end of their lawful stay in order to delay departure and obtain employment authorization. DHS has a strong interest in deterring aliens from residing in the United States unlawfully, including visa overstay. Aliens with bona fide asylum claims should file their asylum applications at their earliest opportunity and not delay. In doing so, the alien will have his or her claim adjudicated more quickly, and will consequently avoid being subject to this provision regarding discretionary employment eligibility on the basis of a pending asylum application.

One commenter noted a 2000 rulemaking in which the legacy agency created an exception for nonimmigrants to the one-year filing deadline for asylum applications. In that rulemaking, the former INS indicated, “[t]he Department does not wish to force a premature application for asylum in cases in which an individual believes circumstances in his country may improve, thus permitting him to return to his country.” DHS is not bound by that prior statement and takes a different position today. Namely, it believes that the agency should not encourage a bona fide asylum applicant to delay filing for the reasons stated above. Carving out an exception from this provision would encourage such a delay. Further, the two rulemakings differ in subject matter—the 2000 rulemaking addressing asylum and this rulemaking addressing EAD eligibility. A favorable asylum adjudication provides protection from persecution and leads to lawful permanent residence and a pathway to citizenship. The (c)(8) EAD is a temporary, ancillary benefit providing for a short period of authorized employment because the agency has yet

to adjudicate the merits of the asylum application. Additionally, the two rulemakings are separated by twenty years. During that time the asylum backlog has grown significantly. Therefore, this rulemaking is addressing a different subject matter and a different problem altogether.

DHS notes further that it declines to exempt nonimmigrants from this provision because a nonimmigrant is either permitted to work while in the United States and therefore does not need a (c)(8) EAD, such as an alien in H-1B status, or, the nonimmigrant is forbidden from working while in the United States and therefore should be excluded from any EAD, such as a B-1 visitor or an F-1 student not participating in optional practical training. As noted above, if the alien does not delay filing the asylum application, he or she would not be subject to this provision in the first place and would not need an exception. Further, if the alien's asylum claim is granted, he or she would be immediately employment authorized incident to status.

As for concerns about the procedures for EAD adjudications and how USCIS officers will be able to determine if an exception has been met, DHS does not believe it needs to articulate any new procedures in this rule for EAD adjudications. USCIS officers adjudicating employment authorization are well trained and will continue to follow the guidelines and rules governing eligibility for employment authorization. USCIS officers have access to a variety of DHS and DOJ-EOIR systems which they can review to determine if and when a decision is made on any asylum application and if an asylum officer or IJ determines that the asylum seeker failed to meet one of the exceptions to the one-year filing deadline. DHS will not create a separate adjudicative process outside of the current asylum and EAD processes solely to determine if an asylum seeker met an exception to the one-year deadline so that the alien can obtain employment authorization shortly after the 365-waiting period, rather than having to wait until an asylum officer or IJ determines that the alien meets one of the exceptions to late filing.

With regard to potential harm to asylum seekers who have legitimate claims, DHS does not intend to cause hardship to bona fide asylum seekers. The goal of this rule is to remove the incentives for aliens who do not have valid claims to file frivolous applications to obtain employment authorization. DHS disagrees that this rule will not deter fraudulent

affirmative asylum applications. DHS recognizes that many asylum seekers have been in the country less than 10 years, however, based on a DHS assessment,<sup>125</sup> many asylum applications appear to be filed by aliens escaping generalized violence and poor economic conditions in their home countries. Since some of these asylum seekers are fleeing for reasons other than persecution which would qualify them for a grant of asylum or withholding of removal, DHS believes it is logical and prudent to impose more stringent requirements for employment eligibility based on a pending asylum application.

Finally, with regard to those asylum seekers who may file after one year of entering in the United States because they are women who suffered domestic violence or have PTSD, are aliens who are LGBTQ and may be stigmatized in their communities, or because they are individuals who are unfamiliar with the asylum process, DHS recognizes that there are legitimate reasons that an alien may be delayed from seeking asylum within the one-year filing deadline, which is why the current regulations at 8 CFR 208.4(a)(4) and (5) allow for an alien to establish either that there are changed circumstances that materially affect the alien's eligibility for asylum or that there are extraordinary circumstances related to the delay in filing. Under 8 CFR 208.4(a)(4) and (5), the alien's failure to file an asylum application within one year may be excused if they can establish changed or extraordinary circumstances and if they file the asylum application within a reasonable period after the changed or extraordinary circumstances occur.

The commenters did not provide, and DHS is not aware of data establishing how many aliens successfully overcome the one-year filing deadline based on extraordinary circumstances related to domestic violence, LGBTQ status, community stigmatization, or PTSD. DHS believes that the percentage of qualifying aliens affected by this rule will be relatively low when weighed against the increasing strain the asylum system would face were the government to take no responsive action. DHS believes exceptions to the one-year filing deadline should be exceptionally rare, and therefore the exceptions' limited application does not outweigh the government's interest in addressing the pervasive abuse of the asylum system by those flouting the one-year filing deadline in order to delay or prevent removal or to obtain cancellation of removal. Moreover, these issues relate directly to the alien's

underlying asylum claim and are therefore better suited for determination by an asylum officer or IJ than a USCIS ISO. Finally, unfamiliarity with asylum procedure does not rise to the level of an extraordinary circumstance sufficient to excuse the failure to file within one year.<sup>126</sup>

### 3. Criminal Bars

DHS received numerous comments on the addition of criminal bars to eligibility for employment authorization. A few commenters supported the inclusion of the criminal bars to eligibility for employment authorization, especially for those who had committed or were convicted of felonies and misdemeanors. One commenter not only supported the criminal bars but also proposed that DHS consider the list of disqualifying crimes that bar eligibility under the Violence Against Women Act (VAWA), Public Law 103-322, 108 Stat. 1902, as criminal offenses that would be "particularly serious crimes" that bar eligibility for an EAD, and recommended that DHS wait for 6 months to 1 year to assess the effects of the rule before further expanding the list of disqualifying criminal activity.

Most commenters, however, opposed inclusion of the criminal bars to employment authorization. DHS has categorized the comments and incorporated responses to those comments below.

#### a. Statutory, Constitutional, and APA Concerns

*Comment:* Several commenters argued that the addition of the criminal bars was contrary to Congress's intent, violated international law, and violated the Due Process and Equal Protection Clause of the U.S. Constitution. One commenter argued that the rule violates the due process rights of asylum seekers by failing to provide a mechanism for applicants to refute or explain their criminal history. Several commenters argued that the rule was arbitrary and capricious because the terms were poorly defined and failed to give applicants proper notice of disqualifying conduct. The commenters

<sup>126</sup> Ignorance of legal requirements does not excuse noncompliance. See e.g. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003)(applying the general rule that "ignorance of the law is no excuse" to the asylum context); *Kay v. Ashcroft*, 387 F.3d 664, 671 (7th Cir. 2004)(other circumstances, ignorance of the law did not establish exceptional circumstances). But see *Mendez Rojas v. Johnson*, 2018 WL 1532715 (W.D. Wash. Mar. 29, 2018) (excusing the one-year filing deadline where DHS failed to provide adequate notice of the requirement) (case on appeal *Mendez Rojas, et al. v. Kirstjen Nielsen, et al.*, 18-35443).

<sup>125</sup> See *supra* fn. 71.

also argued that the rule was arbitrary and capricious because it failed to provide a clear rationale for how adding the criminal bars supported the stated purpose for the rule (to deter frivolous, fraudulent, or nonmeritorious filings). Other commenters argued that DHS was violating the APA by creating a “confusing framework” and parallel, duplicative proceedings for employment authorization cases to decide the same issues that will be decided by asylum officers and IJs when they consider the merits of an asylum application.

Several commenters argued that the proposed criminal bars were “void for vagueness” because the types of disqualifying crimes, like public safety offenses and felonies, were ill-defined. The commenters argued that the rule failed to provide any guidance or specify which factors USCIS adjudicators would consider when assessing unresolved arrests, pending charges, or foreign offenses. One commenter argued that the rule would undermine asylum seekers’ ability to counter the negative impact of an arrest or conviction with favorable lawful work history and demonstrated ability to support themselves and their families, as they would be able to do before an IJ. Several commenters also pointed out that there are numerous state criminal offenses that may or may not be disqualifying for immigration purposes and argued that creating categorical bars would potentially result in disparate treatment.

One commenter asserted that a categorical bar to people with “public safety offenses” departs from the criteria for analyzing such offenses as set forth by the BIA in *Matter of N-A-M*, 24 I&N Dec. 336 (BIA 2007), which requires that adjudicators consider all reliable evidence on a case-by-case basis. Some commenters argued that the criminal EAD bars were vague and failed to provide asylum seekers with a criminal history fair notice of their rights. The commenters noted that the rule failed to specify when and how asylum seekers could challenge a decision based on disqualifying criminal activity, or to provide a mechanism for aliens to resolve inaccuracies in their criminal records. Multiple commenters argued that allowing unresolved arrests and pending charges to be considered in EAD adjudications violates the “presumption of innocence” and basically would allow USCIS adjudicators to determine guilt even before the court or a jury had rendered a decision on the charges.

Many commenters argued that the criminal bars were overbroad and went far beyond the existing criminal bars to

asylum. The commenters believed that the criminal bars to employment authorization should be consistent with the criminal bars to asylum<sup>127</sup> and that asylum seekers should not be barred from obtaining employment authorization if the arrests or convictions would not ultimately bar them from asylum. Some commenters argued that the rule would essentially prevent all asylum seekers who have had “virtually any contact” with the criminal justice system from ever qualifying for employment authorization. One commenter warned that denying an EAD based on a criminal charge that does not create a bar to asylum itself could prejudice an applicant during the asylum process and negatively impact a final decision on the applicant’s asylum claim. Several commenters also were concerned about the impact criminal assessments in EAD adjudications might have on applicants who had pending charges and were considering plea deals. One commenter said that the proposal is problematic because it does not make exceptions for convictions or guilty pleas that are influenced by mental illnesses, including trauma from past persecution. Another commenter believed that the provision would make plea deals unacceptable for applicants facing charges, and thus would increase the number of cases going to trial in already overstretched court systems. Similarly, a commenter stated that the proposal would force asylum seekers to choose between a plea deal that would render them ineligible for employment authorization or going to trial where a conviction might ultimately cause them to lose eligibility for asylum.

Several commenters argued that criminal convictions, especially those for nonviolent acts, should not bar asylum applicants from receiving employment authorization. Some commenters argued that DHS should make exceptions for juveniles and aliens charged or convicted of minor offenses. Some commenters believed that the rule would discourage asylum seekers with potentially valid claims from applying or would bar them from employment authorization based on minor offenses that are not crimes under state law. A few commenters suggested that the rule could harm victims of domestic violence because their abusers could file false claims against them as retaliation

<sup>127</sup> An alien is barred from asylum if the alien has been convicted of an aggravated felony under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), convicted of a particularly serious crime, or has committed a serious nonpolitical crime outside of the United States. See INA section 208(b)(2)(A)(i) and (iii) of the INA, 8 U.S.C. 1158(b)(2)(A)(ii), (iii).

for reporting abuse or to affect their employment authorization. One commenter cited several studies in arguing that the rule would harm asylum seekers with meritorious claims because many individuals who are accused of committing domestic violence are often survivors of family or societal violence, which may form the basis for a valid asylum claim. Another commenter stated that the proposal violated international law because asylum seekers may be seeking asylum because of unfounded criminal accusations in their home countries. Several commenters argued that failing to account for corruption in countries outside of the United States may harm applicants from countries that use criminal prosecution to suppress dissidence or for other political reasons.

*Response:* DHS disagrees that the addition of criminal bars violates the U.S. Constitution and the due process rights of asylum seekers, and is arbitrary and capricious under the APA. Nothing in this rule disturbs the due process protections built into the criminal proceedings that precede a conviction. DHS also disagrees that there is no rationale for adding the criminal bars or that these bars do not support the stated purposes for the rule. DHS has a strong interest in ensuring public safety and preventing aliens with significant criminal histories from obtaining a discretionary benefit.

This rule is not arbitrary and capricious. DHS is authorized to amend its regulations managing employment authorization based on a pending asylum application. Further, DHS has satisfied its obligations under the APA, given the public ample opportunity to comment on the proposals within this rule, and has adopted some amendments to the final rule based on public comments received. DHS is promulgating this rule not only to deter illegal entry, but also to address the crisis at the southern border, reduce abuse of the asylum system, especially by those who have engaged in significant criminal conduct, and restore integrity to the asylum process overall. Barring aliens convicted of certain crimes from obtaining the discretionary benefit of employment authorization is consistent with these stated purposes. The rule also is not arbitrary and capricious because it gives notice to aliens of the types of crimes DHS will consider when determining if an asylum seeker warrants employment authorization as a matter of discretion.

DHS disagrees that this rule has any impact on the ability of aliens in criminal proceedings to assess whether they should accept plea deals. Any time



an alien is convicted of a crime in the United States, whether at a Federal or state level, the alien should be aware that such a conviction may have consequences for immigration purposes, and that such consequences are not limited solely to obtaining a discretionary benefit such as employment authorization. DHS also disagrees that the provisions of this rule create a “confusing framework” or parallel and duplicative scheme for determining eligibility for employment authorization based on criminal history, but notes that aligning criminal bars to a (c)(8) EAD with asylum bars under 8 CFR 208.13(c) addresses these concerns. DHS will continue adjudicating asylum applications separate and apart from employment authorization applications, and asylum decisions will still be made in accordance with our laws and policies under section 208 of the INA, 8 U.S.C. 1158, and 8 CFR 208.

DHS appreciates and acknowledges many of the concerns raised by commenters about the types of crimes that would be considered categorical bars to employment authorization. DHS carefully considered the public comments on this issue and is making a few adjustments based on the input DHS received. DHS is modifying 8 CFR 208.7(a)(1)(iii) to provide that aliens who are subject to the criminal bars for asylum under section 208(c) of the INA and subject to mandatory denial of asylum based on certain criminal grounds under 8 CFR 208.13(c) will be ineligible for (c)(8) EADs.

Finally, even though DHS has chosen to amend the provisions of the rule to align the categorical bars to discretionary EAD eligibility with the criminal bars to asylum under section 208(c) of the INA, 8 U.S.C. 1158(c), and corresponding regulations, DHS does not view this alignment as creating a mandate or legally obligating DHS to adopt the interpretations or procedures used by asylum officers and IJ to determine when and if an alien’s conduct bars his or her eligibility for asylum. If an asylum seeker is denied a discretionary EAD based on a categorical bar under this rule, that determination does not alter whether the alien will be barred from asylum based on a bar under section 208(c) of the INA, 8 U.S.C. 1158(c). Similarly, the grant or denial of a discretionary EAD does not affect the asylum officer’s or IJ’s determination on criminal bars to asylum.

Nothing in this final rule precludes an alien with a criminal history from ultimately qualifying for asylum and becoming employment authorized pursuant to a grant of asylum. DHS is

sensitive to the concerns about victims of domestic violence and to the concerns that some aliens may have pending criminal charges that will ultimately be resolved in their favor. The criminal bars in the separately proposed 8 CFR 208.13(c)(6), which will also be bars to a (c)(8) EAD if finalized, provide exemptions for certain victims,<sup>128</sup> and addresses the concerns about unresolved criminal charges.<sup>129</sup> All of these concerns will be taken into consideration when a USCIS ISO determines whether to grant employment authorization as a matter of discretion.

#### b. Criminal Convictions Prior to the Effective Date

*Comment:* Some commenters expressed concern that the rule would apply to convictions that occurred prior to the final rule’s effective date.

*Response:* DHS addresses the impact of this final rule on asylum seekers who have criminal convictions prior to the effective date of this final rule, in ¶ 7, Effective Date and Retroactive Application below.

#### 4. Illegal Entry and the Good Cause Exception

##### a. Illegal Entry

*Comment:* Several commenters supported barring asylum seekers who entered illegally from obtaining employment authorization. One commenter believed that this was a necessary process to help the government weed out threats. Another commenter supported the rule and recommended that DHS deny EADs to any alien who appeared to have been “coached” in how to make an asylum claim.

Most commenters, however, opposed barring asylum seekers who entered illegally from obtaining employment authorization. Many commenters stated

<sup>128</sup> The asylum bars proposed at 8 CFR 208.13(c)(6) (under the separate aforementioned proposed rule) would exempt aliens who are generally described in section 237(a)(7)(A) of the INA, 8 U.S.C. 1227(a)(7)(A), which provides a waiver of the domestic violence and stalking removability ground when it is determined that the alien (1) was acting in self-defense; (2) was found to have violated a protection order intended to protect the alien; or (3) committed, was arrested for, was convicted of, or pled guilty to committing a crime that did not result in serious bodily injury and where there was a connection between the crime and the alien’s having been battered or subjected to extreme cruelty.

<sup>129</sup> Each of the proposed bars at 8 CFR 208.13(c)(6) would require a conviction except for paragraph (vii), which would bar asylum where “[t]here are serious reasons for believing the alien has engaged . . . in acts of battery or extreme cruelty as defined in 8 CFR 204.2(c)(1)(vi) . . .” Paragraph (vii) would not require a conviction, arrest or pending charges.

that creating a categorical bar to EAD eligibility for aliens who entered the United States illegally violated the Constitution, the INA, the APA, and international law. The commenters argued that section 208(a) of the INA, 8 U.S.C. 1158(a), specifically allows aliens to file for asylum regardless of the manner of their entry and as such DHS could not bar aliens from obtaining EADs because of the manner of their entry. One commenter stated that the illegal entry bar would essentially prohibit an entire class of eligible asylum seekers from obtaining EADs—UACs. The commenter noted that UACs usually enter without inspection and argued the rule would essentially punish all UACs, who are some of the most vulnerable and traumatized asylum seekers, by barring them from obtaining EADs because of their illegal entry, even though illegal entry is not a bar to asylum. Several commenters stated that the illegal entry bar would be harmful to asylum seekers because they are often fleeing mortal danger, traumatized, and do not have the “luxury” of planning to enter the United States at an official port of entry.

Several commenters argued that barring EADs to asylum seekers who entered illegally contravened the United States’ obligations to protect people fleeing persecution. The commenters also argued that DHS erroneously interpreted the Refugee Convention and that DHS was not meeting its obligations under the Refugee Conventions regarding the good cause exception. One commenter stated that Congress’s inclusion of the parenthetical in section 208(a) of the INA (“whether or not at a designated port of arrival”) demonstrated Congress’s intent to conform the U.S. asylum law with international laws and require the United States to comply with its obligations under such laws. Another commenter argued that DHS’s position also conflicts with the expedited removal provisions under section 235 of the INA, 8 U.S.C. 1225, and improperly places the burden on applicants to express credible fear. One commenter claimed that in some instances CBP officers were not asking applicants if they had a credible fear or not properly recording that the applicants had expressed fear of persecution. Another commenter argued that CBP was required to ask asylum seekers four fear-related questions, and believed that this rule would result in EAD denials in cases where aliens fail to affirmatively state that they are seeking asylum or to express a fear of persecution or torture. The commenter also believed that DHS’s

interpretation of good cause was overly restrictive and cited the Refugee Convention and a U.N. General Assembly document as evidence that the United States had agreed not to penalize asylum seekers for illegal entry.

Some commenters argued that placing limitations on EAD eligibility for asylum seekers based on the manner of entry into the United States was arbitrary and capricious and inconsistent with the court's decision in *Diaz v. INS*, 648 F. Supp. 638 (E.D. CA. 1986), where a court recognized "that since political asylum may be granted to an alien irrespective of the manner of entry, it is inconsistent to provide that the manner of entry is relevant to a determination relative to work authorization." *Id.* at 654 (E.D. Cal. 1986).

*Response:* DHS disagrees that the provisions of this rule barring aliens who enter illegally and fail to establish good cause for their illegal entry violates the U.S. Constitution, the INA, the APA, or international law. The commenters are conflating eligibility for asylum with eligibility for employment authorization, a discretionary, ancillary benefit, and are attempting to graft the requirements in INA 208(a)(1), 8 U.S.C. 1158(a)(1), into INA 208(d)(2), 8 U.S.C. 1158(d)(2), which Congress could have, but did not, do. Determining eligibility for asylum and eligibility for employment authorization are separate and distinct processes.

DHS also disagrees with commenters who argue that it is not possible for aliens to present themselves lawfully at a U.S. port of entry. DHS rejects the assertion that UACs or any other class of alien should be exempt from lawful entry requirements absent good cause. Returning U.S. citizens, no matter their age or sophistication level, are required to present themselves at a U.S. port of entry for inspection by an immigration official and no class of citizen is exempt. Congress has not exempted any class of aliens from lawful entry requirements, and DHS will not exempt any class in this provision except where the alien can establish good cause, such as fleeing imminent harm.

In many cases, aliens travel thousands of miles over several days, weeks, or months, and cross continents or oceans to enter the United States. It is unreasonable to assume that these same individuals cannot present themselves for inspection at a port of entry as required by law. If the alleged persecution or harm is attenuated by significant distance and time, it is reasonable to expect aliens to comply with U.S. laws requiring lawful entry. In

the event an alien cannot enter the United States at a port of entry, the rule creates narrow exceptions for aliens who present themselves to DHS within 48 hours of unlawful entry, expresses intent to apply for asylum or fear of persecution, and demonstrates good cause for the manner of entry.

As a sovereign nation, we must secure our borders. With the illegal entry provision in this rule, DHS seeks to regain control of our southern border while preserving employment authorization for those who are genuinely fleeing imminent harm. According to CBP, its officers encountered approximately 126,001 inadmissible aliens who presented themselves at land ports of entry in fiscal year 2019.<sup>130</sup> In fiscal year 2019, CBP reported over 850,000 apprehensions of illegal entrants at the southern border.<sup>131</sup> Clearly, a vast majority of aliens are electing to enter the United States illegally rather than lawfully. Many aliens entering the United States have travelled for thousands of miles from countries all across the globe and from every continent, sometimes flying to South America to then travel locally to try and enter the United States by land. It is well documented that there are smuggling corridors around the world that are controlled by transnational criminal organizations, human smuggling rings, and criminal gangs. Many people pay hundreds, even thousands of dollars to these entities and organizations solely to try and enter the United States, not because they are fleeing persecution, but because they want to establish a life in a country that offers better security, a functional government, and economic opportunities that may not be available in their own countries.<sup>132</sup>

<sup>130</sup> See CBP Southwest Border Migration Statistics FY 2019, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019>.

<sup>131</sup> *Id.*

<sup>132</sup> See United Nations, Office on Drugs and Crime, *Global Study on Smuggling of Migrants*, 2018, [https://reliefweb.int/sites/reliefweb.int/files/resources/GLOSOM\\_2018\\_web\\_small.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/GLOSOM_2018_web_small.pdf). See also Letter from the former Chairman of United States Senate Judiciary Committee to former DHS Secretary (Dec. 22, 2015): ("[I]n July of 2015, a woman gave Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) information regarding her entrance to the United States with her 'child.' According to the whistleblower, the woman allegedly paid a smuggling organization in Brazil \$13,000 in fees to smuggle her to the United States. She flew from Rio de Janeiro, Brazil to Mexico City, Mexico where she was 'paired' with a minor child to accompany across the border. The woman stated that the smuggling organization instructed her to claim the child as her own upon arrival to the United States. This woman and the child that she accompanied were subsequently released on an order of

DHS appreciates that there are aliens seeking to cross our borders who are legitimate asylum seekers who are fleeing persecution based on the five protected grounds and DHS agrees that those aliens should have their cases heard expeditiously and be granted asylum so that they can have the protections offered by the United States and build a new life. DHS also recognizes that there are cases where aliens are facing imminent harm or exigent circumstances that warrant an exception to the illegal entry bar. For this reason, DHS has provided that where an alien enters illegally because he or she needs immediate medical attention because of a life or death situation or because the alien is fleeing imminent harm, DHS will consider such cases under the good cause exception.

DHS is not penalizing aliens because of their manner of entry. Instead, DHS, through this rule and other Administration policies and procedures, is ensuring that the asylum process is better regulated, more orderly, and designed to ensure that bona fide asylum seekers who follow the designated legal procedures can present their claims and have them heard as expeditiously as possible.

Finally, while the amendment to the rule makes any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry ineligible to receive a (c)(8) EAD, the limited good cause exception does not affect how an alien gives an indication that he or she has a fear of persecution or torture, or an intent to apply for asylum. An alien's "indication" of fear of persecution or torture or intent to apply for asylum also does not require an affirmative expression or a volunteering of that fear or intention—such an expression can be in response to a question. DHS notes that the language in the regulations governing expedited removal and inspection of aliens at section 235(b) of the INA, 8 U.S.C. 1225(b), also references an alien's indication of "either an intention to apply for asylum . . . or a fear of persecution," thus prompting the DHS officer or agent to refer the alien for a credible fear interview with an asylum officer. DHS reads this "indication" of fear or persecution or an intent to apply for asylum as one that can be elicited affirmatively through CBP questioning or independently expressed by the alien. The language of this Final Rule

recognizance in the United States. One week later, the woman was granted voluntary departure by an Immigration Judge. The whereabouts of the child are unknown.").

related to the good cause exception mirrors the statute and does not require that the alien affirmatively express a fear of persecution or torture and it also does not alter CBP's existing inspection and examination processes.

#### b. Good Cause Exception

*Comment:* Several commenters stated that even though DHS provided a limited exception based on good cause, DHS's interpretation of good cause was too narrow and thus violated Article 31 of the Refugee Convention. The commenters argued that barring asylum seekers from eligibility for employment authorization because of their manner of entry was a "penalty" within the meaning of Article 31 of the Refugee Convention, and impermissibly differentiated between those who presented at ports of entry and those who entered illegally. One commenter cited various scholarly articles discussing Article 31 and argued that DHS's definition of good cause was inconsistent, especially since UNHCR defined "good cause" to include "fear of summary rejection at the border." Another commenter cited the "travaux préparatoires"—the negotiations leading up to the 1951 Convention—in arguing that simply fleeing persecution alone suffices for "good cause" for entering illegally. The commenter also cited the Vienna Convention on the Law of Treaties, arguing that "travaux préparatoires" should be used when construing the meaning of the treaty's language.

Some commenters argued that the highly restrictive examples of what constitutes good cause made the illegal entry bar a "penalty." One commenter argued good cause should be interpreted to include attempts to reach safety in the United States, especially when entering without inspection is a response to what the commenter viewed as U.S. violations of international and domestic law, through the practice of metering, the MPP, the third country transit ban, and the asylum cooperative agreements established with Guatemala, Honduras and El Salvador, as well as any additional countries in the future. One commenter said that USCIS adjudicators should be given guidance that the asylum seeker's good faith belief that someone in the family requires immediate medical attention or is facing imminent serious harm should be considered a reasonable justification. Another commenter requested that DHS expand the definition of good cause beyond medical emergencies to include victims of human trafficking, smugglers, and notarios.

Several commenters argued that DHS's definition of good cause was impermissibly vague and ill-defined and thus violated due process and was void for vagueness. The commenters noted that while the rule specifically defined those grounds that would not constitute good cause, DHS failed to list those grounds that would constitute good cause. One commenter, citing a law review article, stated that having a well-founded fear of persecution is considered good cause and traveling through a country where there is not protection also constitutes good cause. The commenters argued that DHS was creating different standards for good cause that would depend on the circumstances or the alien's ability to establish good cause.

*Response:* Congress did not place any restrictions on how the Secretary should exercise his discretion to grant EADs to asylum seekers except that employment authorization cannot be granted earlier than 180 days after the alien filed for asylum. Congress also did not incorporate or reference the exceptions or bars to asylum under sections 208(a) or (c) in section 208(d) of the INA or require the Secretary to adhere to limitations in those provisions when making a decision on whether to grant discretionary employment authorization to asylum seekers. Where language is included in one section of the statute but not another, it is presumed that Congress intentionally legislated the text in that manner. *See Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 135 S. Ct. 913, 919 (2015) (" . . . Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.") (*citing Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296 (1983)).

Congress clearly left it to the Secretary's discretion to interpret the statute and set the parameters on how the statute governing discretionary employment authorization for asylum seekers should be applied. Nothing precludes an agency from changing its policy position as long as there is a rational explanation for the change and the agency describes how the change advances the interests of the agency. DHS has explained why the changes in this rule governing the issuance of discretionary EADs to asylum seekers is needed and DHS believes this rule will accomplish the stated goals. As discussed above, DHS believes that this rule is consistent with U.S. obligations under international law.

DHS intentionally did not provide circumstances or cases that may constitute good cause, and will not

include blanket exceptions for any circumstances, including for human trafficking, human smuggling and notarios, as one commenter suggested. To create a list of good cause exceptions would be overly restrictive and result in a narrow application of the term to the exclusion of many scenarios which, when considered in their totality, would result in a finding that the good cause exception has been met. DHS strongly condemns human trafficking in all its forms and believes victims of human trafficking may be able to qualify for the good cause exception where the trafficking caused the alien to enter the United States illegally. Where it can be determined that an alien is not trafficked and elects to hire a human smuggler or a notario to assist in entering the United States illegally, that alien should not qualify for the benefit of employment authorization absent an element of fleeing imminent harm.<sup>133</sup> For every case where an alien claims the good cause exception for illegal entry, the alien bears the burden of establishing that he or she meets the exception. DHS will evaluate each request on a case-by-case basis.

DHS disagrees that it has narrowly interpreted the provisions of the Refugee Convention and disagrees that the bar to illegal entry and the good cause exception are "penalties." DHS views the Article 31(1) restriction on imposition of "penalties" on asylum seekers as not encompassing discretionary ancillary benefits such as employment authorization which the Secretary may grant to aliens in the United States, notwithstanding their immigration status *C.f. Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017) (finding that denying illegal re-entrants the opportunity to apply for the discretionary relief of asylum does not constitute a penalty, as considered by Art. 31(1) of the Refugee Convention). Further, DHS is in compliance with the authority given to the Secretary under section 208(d) of the INA, 8 U.S.C. 1158(d), and this rule is within the parameters of the INA, which constitutes the United States' implementation of its treaty obligations.

<sup>133</sup> See "Myths and Misconceptions," available at <https://www.dhs.gov/blue-campaign/myths-and-misconceptions> ("Human trafficking is not the same as smuggling. 'Trafficking' is based on exploitation and does not require movement across borders. 'Smuggling' is based on movement and involves moving a person across a country's border with that person's consent in violation of immigration laws. Although human smuggling is very different from human trafficking, human smuggling can turn into trafficking if the smuggler uses force, fraud, or coercion to hold people against their will for the purposes of labor or sexual exploitation. Under federal law, every minor induced to engage in commercial sex is a victim of human trafficking.").

Even if DHS's proposed change could be considered a "penalty" within the meaning of Article 31(1), DHS believes that its "good cause" exception, which parallels the exception in Art. 31(1), is sufficient to address any concerns about an asylum seeker's ability to seek discretionary employment authorization after illegal entry into the United States. Aliens who establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry, and within 48 hours, express to DHS a fear of persecution or an intent to seek asylum, will not be barred from applying for employment authorization after the required waiting period.

DHS also does not agree that "good cause" is vague, ill-defined, or unconstitutionally void for vagueness. However, DHS has concluded it will slightly modify the provision requiring that an applicant who enters illegally present himself or herself "without delay" to the Secretary of Homeland Security (or his or her delegate), to read "no later than 48 hours after the alien's entry or attempted entry." DHS initially provided the "without delay" general standard in the regulatory text but only explained the 48-hour requirement in the proposed form revisions and instructions for Form I-765. DHS is making a conforming change to the regulatory text to ensure that asylum seekers who apply for an EAD understand and have better notice of what DHS will require when determining whether an asylum seeker has met his or her burden to establish good cause for the illegal entry for EAD purposes.

#### c. Migrant Protection Protocols and Metering

*Comment:* Many commenters opposed MPP, arguing that it violates the due process rights of aliens because they would not be able to file an asylum application or application for employment authorization while they were outside of the United States. Several commenters argued that DHS was intentionally limiting access to asylum and making it impossible for aliens to file for asylum because most were not able reach the ports of entry or because DHS has closed some ports of entry. Many commenters also opposed DHS' use of metering at ports of entry, arguing that it severely limited aliens' ability to apply for asylum. The commenters also argued that MPP combined with metering only incentivized aliens to cross illegally.

*Response:* DHS will not address comments about whether recent Executive Orders, Administration

policies or procedures, or other regulatory amendments outside this rule violate the INA, APA, or international law, as they are outside the scope of this rule. These include comments on MPP, the Safe Third Country interim final rule, metering at the U.S. ports of entry, changes in the credible or reasonable fear process, or the application of the expedited removal provisions to asylum seekers.

#### 5. Procedural Reforms

There were several requests by commenters for clarification of certain aspects of the procedural reforms in this rule. Several commenters also asked how USCIS adjudicators will use discretion to grant or deny employment authorization. DHS addresses these requests and concerns below and has made some clarifying edits to the rule as described below.

##### a. Biometrics Requirement

*Comment:* A few commenters supported requiring biometric collection as part of the (c)(8) EAD process. One commenter indicated that requiring biometrics would increase DHS' ability to screen for disqualifying criminal conduct.

Many commenters, however, opposed making asylum seekers pay a biometric services fee and requiring them to travel to an ASC for biometrics capture. The commenters argued that most asylum seekers do not have any money once they reach the United States, and that requiring them to pay a fee would be especially burdensome if they are not allowed to work for a long period of time. One commenter stated that asylum seekers should not be required to submit to biometrics because it violated the principles and heritage of the United States. Another commenter argued that biometrics collection would discourage legitimate asylum seekers from filing because of their distrust of the government and how it might use their biometric information. Several commenters felt that requiring asylum seekers to appear for biometric services appointments was akin to treating them like criminals. Others believed that requiring biometrics was an invasion of privacy.

Many commenters felt that imposing a biometrics fee would burden an already vulnerable population. One commenter stated that the \$85 biometrics combined with the proposed fee increase for employment authorization in a separate rulemaking, would put asylum out of the reach to many who are already relying on limited savings to survive. The commenter also noted that requiring

applicants to appear at ASCs for biometric collection will impose additional costs on the asylum seeker such as for transportation and lodging.

Multiple commenters believed that adding the biometric requirement and requiring aliens to pay a biometric services fee was duplicative, a waste of government resources, and would extend the wait times for EADs. The commenters stated that additional biometrics were not needed because DHS already collects biometrics as part of the initial asylum application and those results are usually valid for 15 months. One commenter said that it would be impossible for asylum seekers to apply for asylum or pay for the cost of travel to a biometrics appointment especially since they were being kept in Mexico.

Some commenters noted that DHS was already increasing fees for applications for employment authorization and imposing a new fee for filing of asylum applications. Referring to the proposed fee rule,<sup>134</sup> the commenters noted that DHS said it was incorporating the biometric services fee into the costs for the underlying applications or petitions that would be filed with the agency. The commenters stated that pursuant to the fee rule, asylum seekers would have to pay \$490 plus an additional \$85 biometric services fee, plus the proposed \$50 fee for asylum applications. Commenters asked DHS to clarify whether the \$85 biometric services fee in this rule would be incorporated into the overall fee for the Form I-765.

A few commenters argued that DHS had not sufficiently justified the need for an additional biometric appointment or the biometric services fee especially since biometrics are always captured with the initial asylum application. The commenters stated that DHS had not provided any evidence that identity fraud was a significant problem among asylum seekers. One commenter questioned why DHS even needed to collect biometrics a second time and asked why DHS could not confirm an asylum seeker's identity with certainty the first time biometrics were collected in connection with the asylum application. Some commenters stated that DHS had not shown that the biometrics requirement would reduce the incentives for aliens to file frivolous, fraudulent, or non-meritorious asylum applications. Another commenter argued that DHS has not provided data

<sup>134</sup> *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 85 FR 4243 (proposed Jan. 24, 2020).

to support why additional vetting was required “to ensure that [DHS] appropriately vetted asylum seekers who are seeking employment authorization.”

One commenter recommended that DHS only collect biometrics on initial EAD applications, and not renewals. The commenter believed that DHS only needed to verify the applicant’s identity one time and, to the extent criminal history checks were necessary for renewal applications, there was no reason for DHS to re-take an applicant’s fingerprints in order to submit the applicant’s information to the FBI. Another commenter believed that making asylum seekers return to provide biometrics a second time was inefficient, duplicative, and a waste of resources.

Finally, several commenters argued that retroactively applying the biometrics provision to initial or renewal (c)(8) EAD applications pending on the effective date of this rule was impermissible under the APA. The commenters disagreed with DHS’s rationale that the new biometrics requirement was needed to implement the criminal ineligibility provisions. The commenters argued that applying the new requirement to asylum seekers who had already received employment authorization is unjustified and that DHS should already know if anything has changed since the initial biometrics capture in connection with the filing of the asylum application.

*Response:* The biometrics requirements for immigration benefits is not a new requirement. DHS has general and specific authority to collect or require the submission of biometrics from applicants, co-applicants, petitioners, requesters, derivatives, beneficiaries, and others directly associated with a request for an immigration benefit. Section 103 of the INA, 8 U.S.C. 1103, provides the general authority for the Secretary to issue forms and regulations that the Secretary deems necessary to administer and enforce the immigration laws and implement the provisions of the INA. Several other statutes also authorize the collection of biometrics and bar DHS from approving any immigration benefit until the results of background and security checks have been received.<sup>135</sup> In addition, in the context of asylum applications, section 208(d)(5)(A) of the INA specifically bars DHS from approving an asylum application until—

*“the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney*

*General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;”*

DHS collects the biometrics of asylum seekers to verify their identity and to determine if they have any disqualifying criminal history that would make them inadmissible to or subject to removal from the United States. In addition, under 8 CFR 103.15, DHS has the authority to require and collect biometrics from any applicant, petitioner, sponsor, beneficiary, or other individual residing in the United States for any immigration or naturalization benefit. DHS has been collecting biometrics for immigration benefits for years and uses biometrics to establish an alien’s identity, determine if the applicant has a criminal record, and if yes, whether the alien’s criminal history disqualifies the alien from receiving the immigration benefit. DHS does not believe it is burdensome, an invasion of privacy, or unreasonable to ask an alien who is seeking an immigration benefit to pay a biometric fee or to appear at a biometric services appointment.

While the commenters are correct that DHS collects biometrics when an alien first files for asylum, DHS does not view the collection of biometrics at the time an alien files an application for employment authorization as duplicative or wasteful. The results of criminal history check generally only last 15 months. In addition, when DHS collects biometrics, the collection is tied to the form and is not person centric. Biometrics collected for the asylum application remain with the asylum application. Biometrics collected for employment authorization remain with the EAD application. Asylum applications and EAD applications are processed and adjudicated at separate locations and by separate USCIS business units. USCIS is not able to refresh or reuse biometrics that were collected for one benefit type for another benefit type.

In addition, DHS will in many cases recapture biometrics to verify that the person who filed the application and appeared for biometrics capture when the application was filed is the same person who appears at the interview. Collecting biometrics for asylum EAD applicants enables DHS to know with greater certainty the identity of aliens seeking employment authorization by comparing EAD biometrics with those collected from the asylum applicant, to more easily vet those aliens for benefit eligibility, and to combat human trafficking and other types of

exploitation. Requiring an applicant for an EAD to appear for biometrics does not affect or delay the processing of an asylum application because they are separate and distinct processes. The above stated benefits of capturing biometrics apply equally to both the initial and the renewal (c)(8) EAD application.

Finally, DHS proposed an \$85 biometrics services fee, but now anticipates that the fee required for initial and renewal Form I–765 (c)(8) applicants will be less after adjustment via the USCIS fee rule.<sup>136</sup> DHS did not propose to recover the cost of collecting biometrics for (c)(8) EAD applicants into the fee for Form I–765 in its fee rule NPRM because this rule was not final at the time it developed the fee schedule. Therefore, USCIS did not incorporate the cost of such biometrics services into the budget projections used in the proposed fee rule. To recover the cost of (c)(8) biometrics services, DHS must assess a standalone biometrics fee on (c)(8) EAD applicants. DHS estimates that the cost to USCIS of providing biometrics services for an alien seeking a (c)(8) EAD is approximately \$30; thus, DHS anticipates that the biometrics fee that (c)(8) EAD applicants will pay beginning on the effective date of the fee rule will be at least \$30 and no more than \$85. Until the effective date of the fee rule, all (c)(8) EAD applicants remain subject to the \$85 biometrics fee.

#### b. Use of Discretion in EAD Adjudications

*Comment:* Several commenters argued that making EAD adjudications for asylum seekers discretionary was contrary to the law. One commenter opposed the rule because it changed the policy for granting EADs from a mandatory policy to a discretionary one. Another commenter asserted that DHS failed to detail the evidentiary standards the agency will consider when applying discretion, and suggested that if the rule is implemented, USCIS should institute mandatory training for USCIS adjudicators to ensure survivors are not punished. One commenter argued that DHS should exercise its discretion to grant employment authorization in all but limited, justified circumstances, and that the rule should codify these circumstances. Another commenter argued that the non-discretionary nature of (c)(8) EADs was intended to protect asylum seekers and reflect U.S. international obligations, and that the exception of (c)(8) EADs to discretionary determinations should not be reversed simply for the sake of “consistency.”

<sup>135</sup> See *supra* fn. 88.

<sup>136</sup> See 84 FR 62280–62371 (Nov. 14, 2019).

The commenter also argued that DHS has discretion to promulgate regulations for asylum employment authorization, but that the INA does not provide a “blank check” of absolute discretion. Finally, the commenter added that the proposed expansion of discretion would lead to inconsistent, arbitrary, and capricious outcomes, as well as complicate the asylum process.

Several commenters stated that the rule did not contain any guidance for use of discretion or explain how USCIS adjudicators would make discretionary EAD determinations. The commenters stated that adding discretion into the EAD process, without guidance, would allow USCIS officers to deny a case without explanation and without giving applicants any recourse to challenge the decision. Another commenter believed that introducing discretion into the asylum EAD adjudication would create an “inordinate” amount of arbitrariness and introduce uncertainty into the asylum EAD process.

Multiple commenters suggested that USCIS officers who adjudicate EADs do not have the requisite expertise to make decisions that involve criminal assessments or to determine if a crime is disqualifying for immigration purposes. Some commenters argued that assessing whether a crime is disqualifying requires a complex review of the legal framework for analyzing Federal and state criminal laws and referred to the categorical and modified categorical approach applied by the courts when analyzing whether a crime is an aggravated felony. The commenters believed that asylum officers or IJs who regularly make decisions on asylum applications would be better equipped to determine if an asylum seeker should be barred from employment authorization as a matter of discretion based on criminal history. Another commenter argued that an applicant would be better able to discuss the nuances of their non-political crimes in their home countries before an IJ rather than a USCIS EAD adjudicator.

*Response:* DHS disagrees that changing the issuance of asylum EADs from mandatory to discretionary violates the law. The plain language of INA section 208(d)(2), 8 U.S.C. 1158(d)(2), confers authority to the Secretary to provide, amend, or rescind employment authorization for asylum applicants. With this amendment, the Secretary is returning discretion to the (c)(8) EAD adjudication. It is not clear from prior rulemakings why the agency determined to eliminate its discretion in this adjudication. It is clear, however, that the crisis at our southern border

and in our asylum system necessitates that the regulation at 8 CFR 274a.13(a)(1) be revised to reinstate the Secretary’s discretion and to narrowing the application of the Secretary’s discretion in (c)(8) EAD adjudications. DHS cannot continue to provide EADs with virtually no eligibility criteria and nearly limitless renewal opportunities to a population of aliens where approximately 80 percent of those aliens are not eligible for asylum. A mandatory and limitless (c)(8) EAD is too strong a draw for economic migrants from around the world to enter and remain in the United States with no avenue for obtaining lawful status.

Also, there are many immigration benefits throughout the INA that have a discretionary component and USCIS adjudicators receive extensive training over multiple weeks to prepare them to adjudicate numerous applications, petitions, and other immigration benefits. USCIS adjudicators are trained on making discretionary determinations and given an introduction to asylum and refugee adjudications. The training also includes a module on how to make discretionary determinations and USCIS ISOs receive procedural guidance for making discretionary decisions for specific immigration benefit types. USCIS adjudicator training also covers topics like how to identify and interview victims of domestic violence and human trafficking.

Discretionary decisions are made on a case-by-case basis, taking into account all factors and considering the totality of the circumstances in each case. When making a discretionary EAD determination, USCIS adjudicators consider any statutory exceptions or exemptions that may affect the alien’s eligibility and all relevant information contained in each application and submitted by the alien, including criminal history or other serious adverse factors that might weigh against a favorable exercise of discretion. EAD decisions are not appealable and Congress did not authorize judicial review of denials of applications for discretionary EADs.

USCIS adjudicators are instructed on how to render a discretionary decision and fully understand that a decision cannot be arbitrary and must articulate those factors the USCIS adjudicator considered. USCIS adjudicators also are instructed to consider both positive and negative factors that may be relevant to the applicant’s case and to avoid using any specific formulations or any other analytical tools that may suggest that they are quantifying the exercise of favorable or unfavorable discretion. USCIS adjudicators assess whether on

balance a favorable exercise of discretion is warranted in light of the totality of the circumstances. The ultimate decision to grant discretionary employment authorization in a case depends on whether, based on the facts and circumstances of each individual case, the USCIS adjudicator finds that the positive factors outweigh any negative factors that may be present. In instances where discretionary decisions involve complex or unusual facts, USCIS adjudicators may request supervisory review before the decision is issued.

Further, USCIS adjudicators who decide applications for employment authorization are trained on how to review criminal laws and criminal offenses that may disqualify an alien from eligibility for an EAD. USCIS adjudicators also receive general training on criminal grounds and eligibility for immigration benefits as part of their overall adjudicator training and they are kept abreast of changes in criminal and immigration laws and regulations that may affect decisions on specific immigration benefits. This is particularly true in the (c)(8) EAD context because under the former regulations, an asylum applicant who has been convicted of an aggravated felony is not eligible for employment authorization. *See* former 8 CFR 208.7(a)(1).

Even with the changes DHS is making in this rule to address which crimes will be deemed categorical bars to employment authorization, DHS does not believe this rule presents overburdensome procedural or operational challenges for USCIS adjudicators when it comes to evaluating whether an asylum seeker with criminal history is eligible for employment authorization as a matter of discretion. DHS will update the USCIS Policy Manual, Adjudicator’s Handbook, and the EAD Standard Operating Procedures appropriately and where needed to implement this rule.

#### c. USCIS No Longer Automatically Deeming Asylum Applications Complete

*Comment:* One commenter generally supported eliminating of the requirement that USCIS automatically deem an asylum application complete if not returned in thirty days, however, most commenters opposed it. Several commenters argued that eliminating the requirement would violate asylum seekers due process rights. The commenters believed that this would cause more delays, and increase wait times in EAD adjudications even when the delays were caused by USCIS. One commenter believed it did not take a

long time to review applications for completeness and questioned whether USCIS really was burdened by such reviews. Several commenters noted that many applications for asylum are pending for years and that recently USCIS has been rejecting cases that were in the backlogs for minor omissions or errors. The commenters were concerned that these rejections after the one-year filing deadline had already passed effectively barred many applicants from EAD eligibility. One commenter argued that if USCIS delays returning an incomplete application beyond 30-days that delay should be attributable to USCIS and should not stop the alien's accrual of time towards eligibility to apply for an EAD.

Some commenters believed that removing the requirement would allow the Government to delay processing, remove the incentive for USCIS to reduce backlogs, and would extend EAD processing wait times. One commenter felt that removing the Asylum EAD clock removed the accountability mechanism that had been in place to ensure that USCIS does not delay processing. The commenter stated that eliminating the clock effectively allowed USCIS to "duck" responsibility to process in a timely manner. Finally, one commenter recommended that DHS adopt a tolling mechanism for aliens who file incomplete applications to submit an amended application even after the one-year filing deadline has passed.

*Response:* DHS is eliminating the requirement that any asylum application is automatically deemed complete if not returned to the alien within 30 days. This amendment brings the asylum application filing process in line with the general rules governing all immigration benefit requests under 8 CFR 103.2, which requires all applicants for immigration benefits to file complete applications and petitions. Requiring an applicant to file a complete application does not diminish due process, substantively effect the applicant's eligibility for asylum, or prejudice the applicant. Nor does it preclude the applicant from submitting supporting documents with the application, or later amending the application. DHS is eliminating the requirement because it arbitrarily allowed an incomplete application to be treated as complete and created unnecessary administrative burdens for USCIS. Ensuring that USCIS adjudicators devote time and resources to the processing of *complete* applications not only benefits USCIS, but also applicants.

DHS will not adopt a tolling mechanism to allow aliens who initially

submitted incomplete applications to submit amended applications after the one-year filing deadline or allow aliens to continue to accrue time towards EAD eligibility when they file incomplete applications. Applicants always bear the burden and responsibility to ensure that their applications are complete when filed. USCIS will continue to review all applications for completeness as it currently does and will reject and return applications with the reasons for the rejection, as is done with other applications and benefit types.

Finally, DHS believes that one year is a sufficient length of time to allow an alien to file a complete application. Aliens who fail to file complete applications during the 1-year deadline will still have an opportunity to qualify for employment authorization if they can establish that their failure to file a complete application was due to changed or extraordinary circumstances under section 208(a)(2)(D) of the INA, 8 U.S.C. 1158(a)(2)(D) and 8 CFR 208.4(a)(5)(v).

#### d. Elimination of Recommended Approvals

*Comment:* Several commenters opposed the elimination of recommended approvals. One commenter stated that it was critical for applicants to know the outcome of their asylum interview and to know that their employment authorization continues if their cases are referred to an IJ. Another commenter agreed that if an applicant's case is being referred to an IJ, USCIS should be clear in the referral letter about the applicant's eligibility. One commenter believed that by eliminating recommended approvals, DHS was essentially denying aliens the ability to work even when the delays were attributable to the federal government due to the delays in background checks. The commenter claimed that background checks can take years and eliminating recommended approvals would leave people in limbo. The commenter stated that rather than eliminating recommended approvals, government agencies should work together to clear background checks in a more timely manner. Several commenters argued that the elimination of recommended approvals did not support the purposes of the rule and DHS failed to explain how elimination of recommended approvals would reduce incentives to file frivolous, fraudulent, or non-meritorious claims.

*Response:* As noted earlier, previously DHS issued recommended approvals even when all required background and security check results had not been received, and recipients of such notices

were eligible for employment authorization. However, Congress has since statutorily precluded DHS from granting any immigration benefit, including EADs, until all background and security checks have been completed.<sup>137</sup> DHS understands commenters concerns about the length of time it takes in certain cases to obtain background check results and DHS is working collaboratively with other agencies involved in the background check process to reduce such delays.

DHS disagrees with the commenters who argue that elimination of recommended approvals does not support the purpose of the rule. As noted, this outdated provision is inconsistent with Congressional mandate.<sup>138</sup> This amendment helps restore integrity into the provision of asylum-based EADs by ensuring aliens who might ultimately be found ineligible for asylum after the results of all background and security checks are received and reviewed do not receive EADs based on preliminary decisions. DHS must have the results of all required background and security checks before it grants any immigration benefit to verify an alien's identity and thoroughly review any immigration and criminal history which would disqualify the alien from eligibility for the immigration benefit, including discretionary EADs. Eliminating recommended approvals is consistent with the stated purposes of the rule.

#### e. Applicant-Caused Delays

*Comment:* Several commenters argued that the 14-day period for filing supplementary evidence in asylum cases was not sufficient and strained the resources of nonprofit advocacy organizations and law firms because it did not provide them enough time to prepare responses for their clients. Several commenters mentioned the delays in mail and alleged USCIS's "chronic" mail problems. The commenters were concerned that applicants would not have sufficient time to submit supplementary information prior to the interview or prior to the 14-day window, and argued that it was unfair for applicants to be penalized for agency-caused delays. The

<sup>137</sup> See *supra* fn. 88.

<sup>138</sup> See, e.g., *Consolidated Appropriations Act, 2019*, Public Law 116-6, 113 Stat. 33, Div. A, tit. IV, sec. 402 (2019) ("None of the funds made available in this Act may be used by U.S. Citizenship and Immigration Services to grant an immigration benefit unless the results of background checks required by law to be completed prior to the granting of the benefit have been received by U.S. Citizenship and Immigration Services, and the results do not preclude the granting of the benefit.").

commenters also indicated that, even though interviews are scheduled 21 days prior to the interview date, given current mailing procedures if an applicant does not receive the notice of interview for 5–7 days, then the applicant may not meet the 14-day deadline at all.

One commenter argued that it is unfair to expect an applicant to justify missing an interview date when the NPRM creates no rules for USCIS to notify an applicant when he or she misses an interview or biometric services appointment. Another commenter said that USCIS should not stop sending notifications to applicants when they fail to appear for an interview or miss a biometric services appointment, especially given that there is a problem with USCIS sending notices to the wrong address even though applicants promptly inform USCIS of their new address.

One commenter raised concerns that the new rule, without notice of failure to appear, will more significantly impact EAD adjudications of domestic violence survivors, as violent perpetrators of domestic violence often intercept mail and confiscate hearing notices. Another commenter said that barring those who fail to appear or respond to a notice penalizes survivors for the abuse they've experienced, as many times perpetrators of violence have used deportation as a threat. The commenter stated that the rule disregards the ways in which survivors are isolated and controlled by their abusers, who may exploit victims' lack of English proficiency and isolation from their support systems.

Several comments believed that the definition of what constitutes an applicant-caused delay was overbroad, and that, when combined with other proposals by the administration that target asylum processing, the definition would result in indefinite delays and thereby force asylum seekers into destitution. One commenter argued that rejecting applications for applicant-caused delays would prevent such applicants from making their strongest cases and applicants would have no way of knowing when USCIS would adjudicate their cases.

Several commenters believed that denials for applicant-caused delays would result in arbitrary denials and increased inefficiencies in asylum adjudications. One commenter argued that DHS was denying asylum seekers due process because it did not take into account delays that are out of control of the applicant or out of necessity such as illness or requests for changes in venue. Another commenter argued the denial of

an EAD for actions such as rescheduling or transfer requests, not providing an interpreter, or not appearing for a biometrics appointment violates the rights of asylum seekers under domestic and international law. A few commenters argued that denying employment authorization to asylum applicants who may cause a delay in their asylum case out of necessity will create due process issues because many asylum applicants in desperate financial straits may prioritize employment authorization over taking action critical to their asylum case. One commenter stated that DHS would be forcing asylum seekers to choose between presenting a fully supported asylum application and supporting themselves financially and as such this rule was coercive and violated their rights under the Refugee Convention and the 1980 Refugee Act. Finally, several commenters opposed denials for applicant-caused delays especially because the current regulations allow for an exception where the notice of interview or of the biometrics appointment is not mailed to the applicants correct address.

*Response:* DHS disagrees with commenters' assertions that the definition of applicant-caused delays is too broad, punishes applicants, or violates the Refugee Convention or Refugee Act of 1980. DHS also disagrees that the list of applicant-caused delays is arbitrary and violates asylum seekers due process rights.

While DHS disagrees that the applicant-caused delays infringe on due process, DHS did consider whether the alien would have sufficient notice of the date of the EAD adjudication, which USCIS would use to determine EAD eligibility under the proposed rule. The alien would have little control over the date of adjudication, an eligibility factor, which implicates due process. Accordingly, DHS has amended this provision to provide that applicant-caused delays existing on the date the alien files the (c)(8) EAD application will be considered. Unlike the date of adjudication, the alien has control over the date of filing. DHS believes this amendment provides more certainty of the eligibility requirements, while disincentivizing the alien from prolonging the asylum adjudication.

Under the amended regulations, asylum seekers continue to have the opportunity to present their asylum claims in accordance with international law and with the laws passed by Congress. USCIS provides information about the asylum application process in the Form I-589 and in the accompanying filing instructions.

USCIS also provides advance notice of scheduled asylum interviews and biometric services appointments, and makes information about the status of asylum applications available online. These procedures provide asylum applicants with sufficient notice and adequate process to prepare for the asylum process and establish their eligibility for asylum.

DHS has provided examples of applicant-caused delays in 8 CFR 208.7(a)(1)(iv) which give asylum seekers notice of the types of actions DHS will consider as delays to application processing. Unfortunately, many aliens file skeletal asylum applications without all the necessary supporting documentation as a way to start the EAD clock, and wait until the day of their interview to supplement their application with hundreds of pages of evidence that cannot all be reviewed at the interview. Sometimes skeletal filings or last minute submissions of supplementary evidence require interviews to be rescheduled so that the documents can be reviewed. Such loopholes, left unaddressed, are ripe for abuse by aliens who wish merely to delay the asylum adjudication in order to live and work in the United States. The regulatory reforms in this rule are designed to reduce the need to reschedule interviews by ensuring that all asylum applicants submit a complete application and submit supplementary evidence well in advance of their interviews or hearings.

Nothing in this rule precludes an asylum applicant from submitting a complete application at the time of filing. Even if there are potential delays in obtaining documents that are material to the applicant's eligibility for asylum, nothing precludes the applicant from submitting these documents once they are received at any time after the date of filing of the application up to 14-days prior to the applicant's interview date. USCIS, in its sole discretion, also has the authority to excuse a failure to appear for an interview or biometric services appointment due to exceptional circumstances. See 8 CFR 208.7(a)(1)(iv)(D), 8 CFR 208.10(b)(1). Finally, DHS is not eliminating or ending the practice of notifying asylum applicants about the consequences of failing to appear for an interview or biometrics appointment in their I-589 receipt notice and in their notices for an interview and biometrics appointment.

With regard to an applicant's ability to supplement or amend an EAD application, DHS does not believe that establishing eligibility for an EAD is an onerous requirement and EAD applications do not require extensive



documentation or the level of evidence that is required for asylum applicants. Applicants for employment need only to submit evidence to demonstrate that they are not subject to a disqualifying criminal ground or ground that would result in a mandatory denial, or if they are, that they still warrant an EAD as a matter of discretion because the positive factors in their cases outweigh the negative. DHS has required applicants to show that they are not aggravated felons in the past and USCIS adjudicators are well versed in the criminal laws to be able to make a determination in the EAD context. DHS believes that the time given to prepare the application for an EAD, make arguments, and supplement the EAD application prior to adjudication is sufficient for an alien to make his or her case.

DHS acknowledges the commenters' concerns about the rule's potential impact on domestic violence survivors and that certain circumstances may prevent applicants from appearing for necessary appointments. USCIS strives to ensure that applicants receive proper notice of their scheduled biometric services appointments for EADs. As is provided in the regulation, USCIS may, in its sole discretion, excuse the failure to appear for a biometrics services appointment, and reschedule the missed appointment. See 8 CFR 103.2(b)(13)(ii).

With regard to comments associated with mail problems, asylum applicants are advised in the I-589 instructions and in their I-589 receipt notices that they will need to provide any documentary evidence at least 14 days prior to the interview with USCIS. Accordingly, they are provided notice in advance of receiving information about their scheduled interview that any documents they want considered must be submitted in advance, or they risk causing a delay in the adjudication of their asylum application, which may affect their EAD eligibility. In addition, most asylum interview notices are automatically generated and mailed to applicants, so it is unclear why there would be a 5 to 7 day delay for applicants to receive notices, absent postal issues or improper addresses. These issues are outside the agency's control.

#### f. Denials and Terminations

*Comment:* Some commenters supported terminations immediately after denial of an asylum application or when the asylum decision was administratively final. However, most opposed denying employment authorization to those who sought review of their denials in federal court.

Some commenters believed that it was arbitrary and capricious, premature, and unreasonable not to allow an alien seeking review of a denial in federal courts especially when they might ultimately win their cases in court. The commenter cited examples of cases where asylum seekers were ultimately able to prevail on appeal despite the denials at the administrative levels. A few commenters argued that DHS had not provided a sufficient rationale for restricting eligibility for EAD authorization at the appeals stage or for termination immediately after an asylum officer or IJ renders a decision on the asylum application. One commenter questioned how DHS could believe that limiting employment authorization until the end of the administrative appeal process complied with the due process requirements. One commenter stated that immigration court decision-making is notoriously arbitrary, and this arbitrariness is not corrected by the BIA. The commenter went on to say that immigration courts have been criticized for a multitude of other flaws and cited court cases exemplifying such "adjudicatory failings." The commenter provided examples of recent changes that have made immigration courts and the BIA "even more beholden to the political whims" of the Trump Administration. Thus, the commenter said, given these considerations, petitioning for review is necessary for noncitizens with meritorious claims who are seeking protection. Another commenter argued that, in light of the "meager procedural protections afforded by the administrative scheme," (*citing Thuraissigiam v. United States Department of Homeland Security*, 917 F.3d 1097, 1118 (9th Cir. 2019)), the right to appeal to federal court is particularly important to asylum seekers whose applications have been denied in the "highly flawed administrative process."

Several commenters argued that Congress gave aliens the right to pursue judicial review of their claims through petitions for review under section 242 of the INA and that the proper remedy was not to deny employment authorization during judicial review but for the government to challenge any concerns they had about the validity or frivolousness of the claim at the petition for review stage. Some commenters believed that denying employment authorization during the federal appeals process was an Equal Protection and Due Process violation. Another commenter argued that DHS's rationale was insufficient and the change

amounted to a denial of access to the courts, in violation of the Due Process and the Suspension Clauses. Some commenters argued that the poor would be precluded from challenging denials and that this constituted a denial of access to judicial review. One commenter stated that if an alien was seeking review in the federal courts it was more indicative that the alien had a meritorious claim, not less. The commenter argued that DHS was simply using the changes in this rule as a "backdoor" to deny poor asylum seekers access to the courts. Several commenters believed that denying EADs while a case is on appeal to the federal courts was highly prejudicial especially when the alien puts forth a claim that has merit and that claim is being heard for the first time by an Article III court. One commenter asked why the EAD even needed to be terminated when an asylum officer denies a case, especially since almost all cases are automatically referred to the immigration courts. Several commenters argued that denying asylum seekers the ability to work while they pursue their cases in federal court discourages applicants from seeking review of their cases. Another commenter said that not allowing asylum seekers to work while their cases were on appeal to the federal courts would essentially mean that asylum will only be available to the wealthy. One commenter said that denying or terminating EADs especially in cases where the alien was in a lawful status and their cases were not referred to immigration court would be disruptive.

Some commenters raised concerns about how the auto-termination provisions would work. One commenter believed auto-termination was unworkable, especially for employers. The commenter questioned how employers would know whether an EAD was based on a pending asylum application, if the EAD had been auto-terminated, or if the alien's case was on appeal. Several commenters believed that the new termination procedures would be a huge financial and logistical burden for employers. Many commenters argued that denying or automatically terminating the EADs of asylum applicants who were employment authorized prior to the effective date of the rule essentially meant that they were prohibited from getting their EADs renewed.

Finally, several commenters asked DHS to clarify how the terminations provisions would work in cases where EADs were filed by UACs that were referred to the immigration courts. One commenter said it is unclear how the

termination provisions apply to unaccompanied children whose applications are not granted by USCIS. The commenter stated that, under the TVPRA, when an unaccompanied child's case is denied by USCIS, the case reverts to immigration court, where the child can again seek asylum defensively before an IJ. The commenter asked whether DHS would consider a case that reverted to the immigration court a denial or a referral, for purposes of EAD continuation, under this rule. The commenter suggested that, if the rule is finalized, proposed paragraph 208.7(b)(1)(i) should be revised expressly to state that UAC applications are to be treated the same as the other "referrals" covered by that paragraph.

*Response:* Congress did not mandate employment authorization for asylum seekers, and asylum seekers are not entitled to employment authorization under the law. Nothing in this rule violates the Equal Protection, Due Process, or Suspension Clauses of the U.S. Constitution. In addition, as noted earlier, even if DHS chooses to distinguish between classes of aliens to whom it will give employment authorization, such distinctions are permissible by law.<sup>139</sup> This rule is not arbitrary or capricious and does not draw distinctions based on any protected categories which would trigger judicial scrutiny on constitutional grounds.

Since asylum seekers are not entitled to employment authorization, the Secretary could choose to exercise his discretion to bar all asylum seekers from obtaining employment authorization. However, through this rule, the Secretary has chosen to allow asylum seekers to obtain employment authorization under certain limited circumstances. DHS does not believe that (c)(8) EADs should be granted or remain valid for those who have been denied asylum through multiple levels of administrative review. DHS also disagrees that failing to grant employment authorization to those seeking an appeal in Federal court is arbitrary and capricious. Aliens are afforded multiple levels of administrative review within DHS as well as before the immigration courts and BIA, which provides sufficient time and a reasonable process for asylum seekers to establish that they warrant a favorable exercise of discretion for a grant of asylum. If an alien is in immigration court proceedings and his or her asylum case is denied, the alien will be able to appeal the decision to the

BIA. If a timely appeal is filed, employment authorization will be available to the alien during the BIA appeal process. If an asylum officer denies an affirmative asylum application or an IJ or the BIA denies an asylum application, the alien should not remain authorized to work.

DHS disagrees that prohibiting employment authorization during the federal court appeal process is an attempt to discourage aliens from seeking federal court review. This rule does not place any limits on an alien's right to pursue federal court review. Rather, this rule places limits on access to employment authorization in situations in which aliens have been found not to be eligible for asylum by multiple decision-makers, including an asylum officer and/or IJ, and the BIA. Following the federal court appeals process, the alien could reapply for an EAD if the federal court remands the asylum case to the BIA. DHS believes that aliens seeking federal court review have the opportunity and time to plan and prepare for the lack of access to employment authorization during the federal court appeal process. Prohibiting employment authorization for aliens whose cases have been denied by DHS and DOJ and are moving through the federal court system does not violate the INA.

With regard to questions about referrals to immigration court, not all asylum cases get referred to immigration court after the asylum officer renders a decision. There is a difference between an affirmative asylum referral and an affirmative asylum denial. An affirmative asylum referral means that the alien who filed the application is not in any lawful status, therefore upon not receiving a grant of asylum, they are referred to an IJ. An affirmative asylum denial means that the alien who filed the application is still in lawful status, they are issued a Notice of Intent to Deny (NOID), the alien can respond to the NOID and if he or she does not overcome the reasons for a denial, the affirmative asylum application is denied and not referred to an immigration court. The reason an affirmative asylum denial is not referred to immigration court is because the alien is maintaining valid immigrant or nonimmigrant status or Temporary Protected Status (TPS) and is not amenable to removal. An asylum officer has the authority to deny, dismiss, or refer the case to immigration court.<sup>140</sup> This rule does allow an alien to maintain their EAD while being referred to an immigration court.

Finally, with regard to how these provisions affect cases filed by UACs, this rule will not impact UAC cases that are adjudicated by USCIS. If USCIS has jurisdiction over an asylum application for a UAC, as defined in 6 U.S.C. 279(g)(2), then USCIS can either grant asylum or issue a "UAC Decision Notice for Non-Eligibility" if the UAC is already in removal proceedings. If a UAC is issued a notice for non-eligibility, then their asylum application is returned to immigration court. If a UAC is already in immigration court proceedings they are not issued a new Notice to Appear (NTA). If the UAC had not yet been placed in immigration court proceedings and is not granted asylum before USCIS, then the UAC would be issued an NTA and referred to immigration court, where they can continue to pursue their asylum application. The only instance where a UAC would receive a final denial of their asylum application is where the UAC is in lawful status at the time of the final adjudication of their Form I-589. In all other instances, a UAC does not receive a final denial from USCIS and would still remain eligible for employment authorization. DHS does not find it necessary to amend 8 CFR 208.7(b)(1)(i) to reflect how UACs applications are adjudicated at USCIS. Under the TVPRA, USCIS has initial jurisdiction over a UAC and if the UAC is found ineligible for asylum, they are referred to an IJ and issued an NTA if they were not already in removal proceedings, or if they were already before Immigration Court, their case is returned to DOJ-EOIR to continue proceedings.<sup>141</sup>

#### g. Validity Periods

*Comment:* Some commenters claimed that DHS was shortening the validity periods. One commenter argued that affording USCIS discretion in shortening the duration of EADs would undermine asylum seekers' ability to find employment, as an overly short EAD can render an alien unemployable. The commenter faulted the proposal for failing to provide factors or guidelines concerning the duration of EADs. Multiple commenters generally opposed allowing EADs to have validity periods of less than 2 years, arguing that shorter validity periods would only increase fees and administrative waste by requiring more applications for renewal. One commenter recommended that DHS create a longer EADs validity period of 5 years in order to eliminate renewal applications and reduce immigration

<sup>139</sup> See *Mathews v. Diaz*, 426 U.S. 67, 82-83 (1976).

<sup>140</sup> 8 CFR 208.14.

<sup>141</sup> See TVPRA, Public Law 110-457, sec. 235(d)(7)(B) (effective March 23, 2009).

backlogs. Several other commenters were concerned that granting USCIS discretion to issue EADs with short validity terms would introduce uncertainty into the lives of asylum seekers and harm their job prospects.

*Response:* Individual adjudication officers will not have discretion to change the validity period of an EAD under this rule. The duration of the validity period of an EAD will be at the discretion of USCIS and will be set in order to promote consistency and fairness and will not be left up to the discretion of individual officers. Factors and guidelines concerning the duration of EADs will be set internally as a USCIS policy decision.

Effective October 5, 2016, USCIS increased the validity period for initial or renewal EADs for asylum applicants from one year to two years.<sup>142</sup> This change applied to all (c)(8)-based applications pending as of October 5, 2016 and all such applications filed on or after October 5, 2016. USCIS made this adjustment to align with adjudicatory work flows. Up until October 5, 2016, USCIS had been issuing (c)(8) EADs in 1 year increments. This rule does not shorten the current two-year validity period set by agency policy, but it ensures USCIS will not adjust the EAD validity period to greater than two years. DHS believes it is reasonable to limit the EAD validity period in this manner. The EAD renewal process is necessary for DHS to confirm the alien's continued eligibility for this ancillary benefit, and lengthening the validity period would jeopardize this important verification. These considerations must be balanced against adjudicative efficiency and potential administrative burden. Capping the EAD validity period to two years permits continuity of employment for the alien while ensuring that USCIS periodically verifies continued eligibility. DHS also notes that USCIS maintains multiple successful 1 year EAD programs, including for approved asylum applicants and aliens paroled as refugees. DHS emphasizes this rule does not shorten the existing 2 year EAD validity period, nor does it codify a permanent validity period of 2 years. It restricts the (c)(8) EAD validity duration to not longer than 2 years. However, nothing in this regulation limits USCIS's authority to reduce the validity period for an EAD to less than 2 years. The EAD validity period continues to depend on the adjudicatory work flows of the agency, an ongoing analysis of the

extent to which the validity period of the EAD is encouraging economic migration and baseless asylum claims, and the ongoing security environment.

#### h. Parole-Based EADs for Asylum Seekers Who Establish Credible Fear

*Comment:* Several commenters opposed limiting parole-based EADs for asylum seekers who passed credible fear screenings. One commenter argued that the language in the rule does not give applicants adequate notice of what is being changed and fails to explain or address how many aliens who are paroled into the United States will be affected. The commenter indicated that DHS also failed to address the impact the proposed change would have on long-term parolees who have been in the United States. One commenter argued that DHS failed to define what constitutes "foreign policy, law enforcement, or national security reasons". Several commenters argued that the change to the parole EAD provisions did not support the rationale or stated purposes for the rule, that the rule did not consider or analyze the impact of such a change on long-term parolees, and that the rule lacked information as to how many parolees currently have (c)(11) authorization. One commenter remarked that the 2,700 beneficiaries in the Central American Minors Program (CAM) parole cases from a recent settlement would be impacted. The commenter wrote that employment authorization is important to these beneficiaries, who also relied on a USCIS statement from 2019 which explained that they would be eligible for employment authorization.

A commenter argued that the proposal would unreasonably target meritorious asylum applicants by denying immediate employment authorization under 8 CFR 274a.12(c)(11) to aliens paroled into the United States based on a credible fear determination. One commenter stated that the change furthers neither of the major objectives of the proposed rule, asserting that (c)(11) parolees are likely to qualify for relief under CAT. Another commenter also argued that it is unnecessary to codify current DHS policy and thereby constrain future administrations. One commenter stated that the proposal would increase state costs by removing (c)(11) parolees' ability to work and earn income.

*Response:* Through this rule, DHS is maintaining the distinction between those who are admitted into the country as parolees for urgent humanitarian reasons or significant public benefit and those who are paroled as claimed asylum seekers due to lack of detention

capacity. DHS is revising the language at (c)(11) to more clearly draw this distinction. All asylum seekers should be subject to the same rules, including the rules governing eligibility for employment authorization.

Unfortunately, many criminal organizations and human smugglers are well aware of DHS's limited detention capacity and have relied on this as a selling point for "immediate" employment authorization, which in turn has encouraged more economic migrants to pay to be smuggled and illegally enter the United States. DHS believes that it is important to distinguish the ability to seek employment authorization for certain aliens paroled truly for urgent humanitarian reasons or significant public benefit, and to treat the remaining aliens seeking to enter the United States uniformly in terms of requesting asylum based on credible fear.

In terms of CAM, the approximately 2,700 aliens covered by the April 12, 2019 settlement agreement in *S.A. v. Trump, et al.*, Case No. 3:18-cv-03539-LB (N.D. Cal.) involving CAM will not be impacted by the final rule. Specifically, the final rule continues to allow for individuals paroled for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5), to seek employment authorization, which would encompass minors who entered under CAM. The exceptions to 8 CFR 274a.12(c)(11) in the final rule preserve the ability of entrepreneur parolees and their spouses to obtain employment authorization under the current regulations at 8 CFR 274a.12(b)(37) and (c)(34).

In terms of the impact of the change on long-term parolees and how many aliens would be affected, DHS estimated in the NPRM at 84 FR 62405 that from FY 2014 and FY 2018, an average of 13,000 applicants sought employment authorization through the (c)(11) category. DHS also noted in the NPRM at 84 FR 62417 that even though (c)(11) parole based applications for employment authorization postmarked on or after the effective date of this final rule would be denied, such aliens would still be eligible to apply for employment authorization under the (c)(8) category subject to the eligibility changes in this rule, including the 365-day waiting period. DHS is unable to estimate how many would apply for an EAD under 8 CFR 274a.12(c)(8), and how many would be granted the EAD subject to the eligibility changes in this rule. Impacted aliens may incur delayed earnings or lost earnings if they do not

<sup>142</sup> <https://www.uscis.gov/archive/uscis-increases-validity-work-permits-two-years-asylum-applicants> (last accessed 2/14/2020).

apply for or are not eligible for a (c)(8) EAD.

DHS also disagrees with the commenters' unsupported assertions that the rule targets meritorious asylum applicants by requiring aliens paroled following a positive credible fear determination be subject to the same waiting period as all other asylum seekers. According to DOJ–EOIR data, very few of the aliens found to possess a credible fear ultimately succeed on the merits of their asylum claims. In FY 2019, DOJ–EOIR granted only 15.25 percent of asylum applications filed by aliens found to have a credible fear.<sup>143</sup> Over the past five years, the average DOJ–EOIR asylum grant rate of cases originating with a credible fear claim is only 14.25 percent.<sup>144</sup> Furthermore, according to DOJ–EOIR, between FYs 2008 and 2019 nearly 45 percent of aliens referred to the immigration court following a positive credible fear claim did not file for asylum with an IJ.<sup>145</sup> Even if all credible fear claims resulted in a grant of asylum, this would not justify disparate treatment under section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2). With this provision, DHS seeks to ensure fidelity to INA 208(d)(2), to ensure that all asylum applicants are treated equally, and to ensure consistent application of this policy across the Department's components. Congress purposefully imposed a minimum wait between the filing of an asylum application and the ability to obtain employment authorization. Congress did not provide an exception to obtaining employment authorization earlier for paroled asylum seekers. This final rule is consistent with congressional intent and inserts fairness into the process, so all asylum seekers are subject to the same standards and timeframes for obtaining an EAD.

Finally, with regard to the concern over the potential costs to States, as discussed in more detail later, DHS acknowledges that this rule could result in lost tax revenue. The NPRM stated at 84 FR 62418, "There could also be a reduction in income tax transfers from employers and employees that could impact individual states and localities." DHS notes that the tax rates of states vary widely, and many states impose no income tax at all. It is also difficult to

quantify income tax losses because individual tax situations vary widely. As a result, although DHS recognizes these impacts on states, DHS is unable to quantify the potential lost state taxes. DHS also realizes that the loss or deferment of income for asylum applicants could pose burdens to asylum applicants' support networks—which could involve state and local public service providers. See Section VI, Public Comments on Economic Analyses and Other Statutory and Regulatory Comments, and Section VII, Statutory and Regulatory Requirements below for additional discussion of the economic impact and analyses of this rule.

#### 6. Miscellaneous Comments

DHS received several other comments on the rule, some of which were out of scope, including arguments about the constitutionality of the Administration's position on sanctuary cities. DHS will not address these comments. There also were some additional broader comments about the rule that DHS addresses below:

##### a. Administrative Burdens and Agency Backlogs

*Comment:* Several commenters argued that the rule would create additional burdens on USCIS overall and exacerbate existing backlogs. The commenters also believed that the rule would increase burdens on USCIS adjudicators by adding more requirements for asylum and EAD adjudications. Several commenters argued that with current agency backlogs (which they attributed either to agency mismanagement, eliminating the 30-day processing deadline, or decreased application receipts), it would be impossible for asylum seekers to ever obtain an EAD or to survive while waiting for their applications to be adjudicated. Other commenters argued that this rule would worsen agency backlogs and contribute to delays in processing of other immigration benefit types.

Several commenters recommended alternatives to the rule to alleviate agency backlogs, including requesting additional funding from Congress, allowing concurrent filing of the asylum and EAD applications, improving EAD processing, increasing asylum and immigration court staff, improving technology and allowing electronic filing, and creating a separate processing channel for cases involving cancellation of removal.

*Response:* DHS disagrees with the commenters' assertions that the current backlogs will make it impossible for

asylum seekers to obtain employment authorization. Once an asylum applicant is granted asylum, the alien is immediately eligible for employment authorization as mandated by statute. See INA 208(c)(1)(B), 8 U.S.C. 1158(c)(1)(B). If an asylum application is still pending after 365 days, an alien can apply for employment authorization, and if eligible, receive an EAD.

With regard to the asylum backlogs, DHS disagrees that the agency has been mismanaging its resources. DHS recognizes that there are a large number of cases pending in the affirmative asylum backlog. However, one of the reasons for the backlog is the crisis at the southern border and the need for DHS to divert resources from the affirmative asylum caseload to the credible and reasonable fear caseload. DHS believes that by deterring economic migrants and those who are not bona fide asylum seekers from seeking asylum in the United States, DHS will be able to reallocate it resources to the affirmative asylum caseload and, through the LIFO policy, maintain timely adjudications. Backlogs at USCIS and the years-long wait for hearings in the immigration courts have allowed aliens to remain in the United States for many years, obtain EADs, and ultimately gain equities for an immigration benefit, even when most of their asylum applications will be denied on their merits.<sup>146</sup>

DHS also disagrees that this rule will worsen backlogs. USCIS adjudicators are well-trained and have numerous resources at their disposal for adjudicating cases. For instance, adjudicators already consider criminality, admissibility, and date of entry on a variety of forms. The requirements for the EAD adjudication set out in this rule are not new to USCIS adjudicators. Further, as this rule imposes more stringent requirements for employment authorization to disincentivize aliens who are economic migrants and who are not bona fide asylum applicants from filing asylum applications and exacerbating existing backlogs, DHS believes it will result in decreased filings of frivolous, fraudulent, or non-meritorious asylum applications, and relatedly, asylum-based EAD applications.

Finally, DHS does appreciate some of the recommendations and alternatives offered by the commenters. DHS has

<sup>143</sup> See Executive Office for Immigration Review Adjudication Statistics, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim, available at <https://www.justice.gov/eoir/page/file/1062976/download>.

<sup>144</sup> *Id.* This average equals the sum of the grant rates from FY15 through FY19 divided by five.

<sup>145</sup> *Id.* This average equals the sum of Percentage of No Asylum Application Filed from FY08 through FY19 divided by twelve.

<sup>146</sup> See, e.g., Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis: Charting a Way Forward*, Migration Policy Institute (Sept. 2018) at pp. 4 and 9–12, for additional discussion on the impact of backlogs and delays in immigration proceedings.

been hiring additional staff in the Asylum Division to address the large number of affirmative asylum applications and increase in credible and reasonable fear screenings due to the crisis at our southern border. In addition to increasing Asylum Division staff, this rule will build upon a carefully planned and implemented comprehensive backlog reduction plan and amends the (c)(8) EAD process so that those with bona fide asylum claims can be prioritized and extended the protections, including employment authorization, that the United States offers to aliens seeking refuge from persecution or torture. Further, USCIS is already engaged in a multi-year initiative to transform its current paper-based process to a fully electronic filing and adjudication system and the agency is steadily making more applications available for online filing. DHS cannot adopt the recommendation to allow concurrent filing. This would contravene the intent of this rule as well as the prior regulations, which were specifically designed to ensure there is a waiting period for applying for an EAD that follows the filing of asylum application and have mechanisms for addressing periods where applicants delay the adjudication of their asylum applications. Additionally, allowing asylum seekers to file earlier creates a different operational burden. Because the statutory scheme mandates that employment authorization cannot be granted until the asylum application has been pending for a minimum of 180 days, USCIS would need to implement new tracking and records mechanisms to ensure applications would not be adjudicated too early. This would impede the agency's ability to nimbly move workloads between centers and officers. Allowing applicants to file earlier than the timeline currently in place would also necessitate creation of a new clock system to track how long asylum applications were pending prior to approval. This would require tracking and potentially holding applications over a longer span of time, adding complexity.

#### b. Rationale for the Rule

*Comment:* Several commenters argued that the changes made by the rule do not support the stated rationale for the rule (in other words, deterring frivolous, fraudulent, and non-meritorious filings). Other commenters doubted that the rule would address fraudulent filings. One commenter argued that contrary to DHS's characterization, the number of border apprehensions is not unprecedented, citing prior fiscal years where the numbers of apprehensions

were significantly higher and when the number of border patrol agents were lower. Another commenter claimed that 90 percent of asylum seekers pass their credible fear interviews and pursue asylum despite its "arduous, costly process." A few commenters argued that DHS's rationale for the rule was flawed because nearly one third of asylum applicants who passed a credible fear screening were successful in immigration court. Another commenter stated that one third of asylum claims succeed in substantive decisions and that the grant rate for those with legal representation should be used when considering what percent of applications are considered successful. Finally, one commenter argued that there were less "harmful" alternatives to address fraud in the asylum process than the proposals in the rule, such as changing the I-589 to emphasize the existing legal consequences of filing frivolous or fraudulent applications for asylum and requiring biometrics collection for initial EAD applicants only and not for renewal applicants.

*Response:* DHS disagrees that this rule fails to state a sufficient rationale or lacks data to support the changes made by this rule. The data illustrate a clear picture of a longstanding, critical and growing crisis in the U.S. asylum system and the need for strengthened laws.<sup>147</sup> Border enforcement resources, detention space, and adjudication capacity are far outpaced by the numbers of aliens illegally entering the United States and claiming asylum each year. Historical data indicate that only about twenty percent of these applicants are eligible for asylum. This rule, standing alone, is not intended to solve every aspect of the crisis in the asylum system. It is one of several measures that the Administration is combining to mitigate the crisis and ensure the integrity of the immigration system and security of our communities.

According to CBP data from FY 2019, the level of aliens unlawfully attempting to cross the Southern border reached a twelve-year high and nearly doubled

from the same period in the previous fiscal year.<sup>148</sup> This increase demands that DHS respond to this crisis and strengthen and enforce our immigration laws. According to one DOJ–EOIR snapshot measuring eleven years of data, of the approximately 81% of USCIS credible fear referrals to IJs, only 17% of these aliens are granted asylum by an IJ.<sup>149</sup> While approximately one third of adjudicated asylum applications stemming from a positive credible fear finding are granted, the commenter fails to acknowledge that about forty five percent of aliens with a positive credible fear finding fail to pursue their asylum claims and are therefore never adjudicated.

According to another DOJ–EOIR snapshot, in FY 2019, DOJ–EOIR granted only 15.25 percent of asylum applications filed by aliens found to have a credible fear.<sup>150</sup> Over the past five years, the average DOJ–EOIR asylum grant rate of cases originating with a credible fear claim is only 14.25 percent.<sup>151</sup> This rule is designed to reduce the number of aliens who leave their home countries seeking economic opportunities in the United States by gaming the asylum system and its attendant employment authorization. DHS does not dispute that some applicants may have filed for asylum in good faith, but will still have their application denied. Nonetheless, by implementing this rule along with other measures, the integrity of the asylum system will be bolstered.

DHS remains committed to finding options to curb abuse of the asylum system while prioritizing bona fide asylum seekers. DHS has considered alternatives, including taking no action, rescinding its regulation conferring employment authorization to all asylum seekers, hiring more staff, and accepting forms electronically. In addition to this rulemaking, DHS has undertaken a range of initiatives to address the asylum adjudication backlog and mitigate its consequences for bona fide asylum seekers, agency operations, and the integrity of the asylum system.

<sup>147</sup> See *Humanitarian and Security Crisis at Southern Border Reaches 'Breaking Point'* (2019, March 6), available at <https://www.dhs.gov/news/2019/03/06/humanitarian-and-security-crisis-southern-border-reaches-breaking-point> ("Every DHS Secretary since the Department's inception has sounded the alarm about our unsecured border and its consequences. The American people and our law enforcement personnel rightfully demand effective border security: building the wall, *strengthening our laws*, and giving the men and women serving on the front lines the tools and resources they need to keep Americans safe. To that end, this Department pledges our unwavering resolve to confronting present and ever-evolving future threats to our national security at our Southwest Border.") (emphasis added).

<sup>148</sup> See *Humanitarian and Security Crisis at Southern Border Reaches 'Breaking Point'* (2019, March 6), available at <https://www.dhs.gov/news/2019/03/06/humanitarian-and-security-crisis-southern-border-reaches-breaking-point>.

<sup>149</sup> See Adjudication Statistics, Credible Fear and Asylum Process: Fiscal Year (FY) 2008–FY 2019 (Oct. 23, 2019), available at <https://www.justice.gov/eoir/file/1216991/download>.

<sup>150</sup> See Executive Office for Immigration Review Adjudication Statistics, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim, available at <https://www.justice.gov/eoir/page/file/1062976/download>.

<sup>151</sup> *Id.* This average equals the sum of the grant rates from FY15 through FY19 divided by five.

These efforts include: (1) Revised scheduling priorities including changing from First in First out (“FIFO”) order processing to LIFO; (2) staffing increases and retention initiatives; (3) acquiring new asylum division facilities; (4) assigning refugee officers to the Asylum Division; (5) conducting remote screenings; and (6) launching a pilot program for applicants seeking a route to immigration court to request cancellation of removal.<sup>152</sup> USCIS already accepts several forms electronically, and is considering steps to accept the Form I-765 electronically in the future. These efforts are a top priority for the agency.

DHS disagrees that a viable alternative to this rule is to reduce immigration enforcement. Reducing enforcement would add to the pull factors incentivizing abuse of the asylum system and exacerbate the asylum backlog rather than reduce it. The asylum adjudication backlog coupled with the previous (c)(8) EAD regulations’ very low eligibility threshold with nearly unlimited renewal opportunity already created significant pull factor incentivizing abuse of the overburdened asylum system.<sup>153</sup> DHS does not agree that simply modifying the existing Form I-589 to emphasize the existing legal consequences of filing frivolous or fraudulent applications constitutes a sufficient deterrent to this practice and disagrees that this is a viable alternative to the rule.

DHS seeks to balance deterrence of those abusing the asylum process for economic purposes and providing more timely protection to those who merit such protection, which includes immediate and automatic employment authorization when the asylum application is granted. DHS believes the amendments in this rule strike a greater balance between these two interests.

#### c. Frivolous, Fraudulent, and Non-Meritorious Filings

*Comment:* Some commenters argued that the rule would not deter frivolous, fraudulent, or non-meritorious filings and that DHS had not provided any evidence or data showing fraudulent intent of asylum seekers to support the rationale. One commenter argued that DHS was conflating fraudulent applications with non-meritorious applications and noted that asylum applications can be denied for many

reasons that are unrelated to the merits of the asylum claim.

Several commenters also stated that even if there are cases that are not ultimately successful, it does not necessarily mean that the filings were frivolous. One commenter recommended that DHS define the terms “frivolous” and “fraud” and another commenter argued that it is unclear what constitutes a “non-meritorious” claims and whether non-meritorious claims are nothing more than frivolous and fraudulent applications. A number of commenters attributed the failure of many asylum cases to lack of legal counsel, and cited data showing that represented applicants succeeded between 2–5 times the rate of their pro se peers. The commenters argued that DHS would not consider denied asylum cases “frivolous” if asylum seekers were provided legal counsel and DHS established more uniform standards.

*Response:* DHS agrees that not every case which is ultimately denied by an asylum officer or the immigration court is frivolous or fraudulent. However, DHS is promulgating this rule to also address cases where there is fraud and, to reduce the number of non-meritorious asylum applications. While an alien may have filed an asylum application in good faith, it does not mean that the application had merit, especially when the alien clearly does not meet any of the grounds for eligibility for asylum. As noted earlier, fleeing generalized violence or poverty in one’s home country does not make an alien eligible for asylum. DHS seeks to reduce the incentive for aliens to file asylum applications simply to gain employment, have economic stability, and to avoid the generalized violence that is occurring in their country of origin or nationality.

DHS is not conflating fraudulent applications with non-meritorious applications. Fraud requires that a person knowingly made a false representation of a material fact with the intent to deceive the other party.<sup>154</sup> Fraud differs from non-meritorious applications; an alien who has a non-meritorious application may not have a legitimate asylum claim, but does not knowingly make a false representation of material facts to USCIS. The surge in border crossings and asylum claims has placed a strain on the nation’s immigration system and DHS must take action to deter those who are not legitimate asylum seekers. DHS strongly

believes that one of the ways to deter fraudulent, frivolous, and non-meritorious asylum claims is to adjust the eligibility requirements for an employment authorization for those with pending asylum applications and who are denied asylum. DHS agrees that an asylum application may be denied for many reasons unrelated to the merits of the claim, such as being barred from receiving asylum based on criminal grounds or the filing outside of the one year filing window. DHS intends to remove the incentives for aliens who are not legitimate asylum seekers and who come to the United States to exploit the system.

It is the asylum seeker’s burden to establish that he or she has met the eligibility requirements for asylum and that is dependent on the specific circumstances and facts in the individual asylum seeker’s case. In addition, asylum seekers are advised of their right to counsel in the affirmative asylum process. Aliens are provided a list of legal services in their area during the reasonable or credible fear processes. An alien is not required to have an attorney to file an EAD application or asylum application. DHS believes that aliens have numerous opportunities to obtain legal counsel at cost, low cost, or no cost.<sup>155</sup>

Finally, DHS has already provided a definition for a frivolous application under 8 CFR 208.20, which defines a frivolous application as, “an asylum application is frivolous if any of its material elements is deliberately fabricated.”<sup>156</sup> In addition, Congress has provided a specific ground of inadmissibility to address when an alien commits fraud for the purposes of obtaining a benefit under the INA<sup>157</sup> and USCIS adjudicators are well trained on how to make admissibility and removal determinations where there is a concern about fraud in the application or during the asylum process. DHS has existing definitions that clearly explain fraud in the context of immigration adjudications. Inadmissibility based on fraud requires a finding that a person knowingly made a false representation of a material fact with the intent to deceive the other party.<sup>158</sup> Further, the Form I-589 instructions indicate that if an alien knowingly makes a frivolous application for asylum, they may be

<sup>152</sup> Annual Report 2018 Citizenship and Immigration Services Ombudsman June 28, 2018 (page 44) [https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb\\_2018-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2018-annual-report-to-congress.pdf).

<sup>153</sup> *Id.*, at 43–44.

<sup>154</sup> See *Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998) (addressing excludability based on fraud and willful misrepresentation).

<sup>155</sup> See e.g., EOIR’s list of pro bono legal service providers, available at <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>.

<sup>156</sup> 8 CFR 208.20.

<sup>157</sup> INA 212(a)(6)(C)(i).

<sup>158</sup> See *Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998).

permanently ineligible for any benefits under the INA.<sup>159</sup>

Asylum applications that are non-fraudulent and non-frivolous will still need to be evaluated on the merits of the case if they are eligible for the immigration benefit as defined in 8 CFR 208. Nothing in this rule changes eligibility for asylum and an application is still evaluated based on the merits. The purpose of this rule is to deter frivolous and fraudulent asylum claims, in addition to deter those who are not eligible for asylum and have the purpose of only obtaining employment authorization.

#### 7. Effective Date and Retroactive Application

*Comment:* Several commenters expressed concern that the proposal would apply to any employment authorization applications pending on the effective date of this Final Rule. One commenter argued that rulemakings generally cannot have a retroactive effect. One commenter stated that if DHS imposed the requirements of the rule retroactively it would be unconstitutional. Another commenter opposed applying the rule to aliens with pending asylum applications who, in reliance on the prior regulations, made “major” life decisions, such as finding employment and “buil[ding] their social lives” in the United States. One commenter argued that applying the one-year filing EAD provision to aliens with pending asylum applications could result in loss of employment authorization, especially if the one-year filing bar would not be determined until the asylum application is adjudicated by an asylum officer or IJ. Another commenter argued that applying the biometrics requirement to aliens with (c)(8) EAD applications pending on the effective date of the rule would be impermissible under the APA.

*Response:* DHS initially proposed to apply changes made by this rule only to initial and renewal applications for employment authorization under 8 CFR 274a.12(c)(8) and (c)(11) filed on or after the effective date of the final rule, with two exceptions. DHS proposed to apply the provisions relating to criminal offenses and failure to file the asylum application within one year of the alien’s last entry to the United States to initial and renewal (c)(8) EAD applications pending on the effective date of this rule and to require that these aliens appear at an ASC for biometrics collection.

DHS has carefully considered the comments about applying the rule to pending EAD applications, and has determined it will not apply any provisions of this rule to applications for employment authorization under 8 CFR 274a.12(c)(8) and (c)(11) pending with USCIS on the effective date of the final rule. Although DHS has an interest in immediately applying the criminal and one-year filing provisions, it is persuaded by the commenters’ concerns about applying the provisions to pending (c)(8) EAD applications, and has determined that applying only portions of this rule to the population of pending (c)(8) EAD applicants may cause confusion externally and internally by implementing a two-tiered adjudication system. Accordingly, the provisions of this rule will apply only to (c)(8) (initial and renewal) and (c)(11) EAD applications that are postmarked (or if applicable, electronically submitted) on or after the effective date; applications that were postmarked before the effective date and accepted by USCIS pursuant to 8 CFR 103.2(a)(1) and (a)(2), and are pending on the effective date will be adjudicated under the respective prior regulations. As the criminal provisions will not be applied to aliens with EAD applications pending on the effective date of this rule, DHS will not require these aliens with EAD applications pending on the effective date of this Final Rule to appear for biometrics collection associated with the EAD. Aliens who file initial or renewal (c)(8) EAD applications on or after the effective date will be required to submit biometrics consistent with this rule.

Additionally, in recognition that the illegal-entry provision is designed to deter illegal entry and reduce its attendant risks and costs, DHS has determined that it will only apply the illegal-entry provision to aliens who enter or attempt to enter the United States illegally on or after the effective date of this Final Rule. Similarly, DHS will only apply the one-year filing bar to aliens who file their asylum applications on or after the effective date, and filed the application after the one-year filing deadline. Further, DHS will only apply the criminal bars for particularly serious crimes and serious non-political crimes where the conviction or offense triggering the bar occurred on or after the effective date of the rule. The criminal bar described in 8 CFR 208.7(a)(1)(iii)(D), which refers to 8 CFR 208.13(c), will apply where the conviction or offense occurred on or after the effective date of the Procedures for Asylum and Bars to Asylum

Eligibility rulemaking, if finalized.<sup>160</sup> DHS will apply the aggravated felony bar to any conviction regardless of the conviction date.

DHS acknowledges that this rule will impact some aliens who filed asylum applications prior to the effective date of this rule, and that these applicants may have relied to some degree on the prior regulations governing (c)(8) employment authorization. However, DHS disagrees that this reliance renders this rulemaking impermissibly retroactive. Many of these applicants will remain eligible for employment authorization under the new rule, though some may be subject to a longer waiting period depending on when they filed their asylum application. Asylum applicants who are already employment authorized on the effective date will remain employment authorized until the expiration date on their EAD, unless the authorization is terminated or revoked on grounds noted in the prior regulations.

Employment authorization under section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), is an ancillary benefit conferred at the discretion of the Secretary, a benefit which Congress determined an asylum applicant “is not entitled to.” Further, DHS has authorized this discretionary benefit by regulation, and it is therefore subject to amendment or rescission by the agency at any time through subsequent rulemaking. Under the previous regulatory framework and under this final rule, asylum applicants requesting employment authorization are required to submit regular renewal applications, which are subject to de novo eligibility review each time they seek to renew. As noted above, DHS has long sought to separate the asylum process from employment authorization in order to address abuses of the asylum system for economic benefit, and it is apparent that Congress concurred with the agency’s separation of the two when it adopted DHS’ regulation in the INA.

The reliance interests raised by the commenters do not outweigh the government’s compelling interests in promulgating this rule. It is not reasonable to assume DHS would never

<sup>160</sup> See Proposed rule: *Procedures for Asylum and Bars to Asylum Eligibility*, 84 FR 69640 (Dec. 19, 2019). Under that proposed rule, aliens are only subject to the new criminal bars based on convictions or criminal behavior that occur on or after the effective date of that rule. Because 8 CFR 208.7(a)(1)(iii)(D) only applies to aliens who are “subject to a mandatory bar to asylum” under 8 CFR 208.13(c), those aliens with disqualifying convictions or criminal behavior that takes place after the effective date of the Asylum Bars rule, if finalized, will be barred from receiving a (c)(8) EAD.

<sup>159</sup> See INA 208(d)(6); <https://www.uscis.gov/i-589>.

alter the eligibility criteria for a discretionary EAD. It is not reasonable to presume, as one commenter suggested, that an alien would have based major life decisions on employment or engaging in “social lives” on an assumption or reliance that DHS would not amend its EAD regulations in the future. Further, it is not reasonable to presume that an alien would have refrained from violating immigration laws requiring lawful entry or a timely-filed asylum application, or criminal laws proscribing public safety offenses, if he had known it would later render him ineligible for an ancillary, discretionary benefit. Asylum itself is discretionary, and depending on the circumstances, the same violations of immigration and criminal law rendering a (c)(8) EAD applicant ineligible could render him ineligible for asylum. An asylum applicant hoping to maintain eligibility for asylum would presumably conduct himself in a way that preserved his eligibility for both asylum and ancillary employment authorization under this rule. Further, limiting the application of this rule to aliens who filed their asylum applications prior to the effective date would result in a two-tiered, parallel adjudication system, creating confusion. Accordingly, the interests raised by the commenters do not outweigh the government interests expressed in this rulemaking, and its application to aliens with asylum applications pending on the effective date of this final rule does not amount to impermissible retroactivity.

DHS disagrees with the claim that this rule violates the U.S. Constitution. The Constitution’s *ex post facto* clause prohibits changes to the legal consequences of actions that were committed before the enactment of the law. The *ex post facto* clause would generally only apply to laws that impose criminal penalties. Although EAD eligibility determinations are not criminal penalties, and so are generally not subject to the *ex post facto* clause, this rule, in any event, is not impermissibly retroactive in application, as retro in the immediately preceding response.

#### **VI. Public Comments on Economic Analysis and Other Statutory and Regulatory Requirements**

Several commenters argued that DHS’s economic analysis was deficient and that DHS should withdraw the rule until it completed a more thorough economic analysis of the impact of the rule. Others argued that the economic analysis underestimated the costs of the rule of the significant impact on the economy especially if those who were

working in specialized areas or had professional skills in high demand lost their ability to work. Some commenters argued that DHS provided no statistics to actually quantify the problem the rule was trying to address re: fraud in the asylum process. The commenters also argued that DHS provided no evidence or statistics to support the claim that the rule would reduce the incentives of aliens to file frivolous, fraudulent, or otherwise non-meritorious claims. Some commenters noted that it failed to take into account state income taxes. Another commenter said that it failed to take into account how the rule protects U.S. workers.

Many commenters stated that DHS failed to take into consideration the impact and the costs of the rule on (1) the asylum applicants and their families, (2) state and local governments, (3) U.S. employers and businesses, (3) U.S. taxpayers, (4) faith-based organizations, (5) social services organizations, (6) USCIS applicants and petitioners, (7) the organizational impact of the agency itself in terms of financial, resource, and workload burdens. One commenter indicated that the rule failed to take into account the significant hardship it placed on nonprofit organizations, private attorneys and law firms because of the rule increases the complexity of asylum EAD adjudications and adds uncertainty to the asylum and EAD processes overall.

One commenter said that it forces USCIS applicants and petitioners to pay more in increased fees for less services. Many commenters discuss the impact the rule would have on the national, state, and local economics, arguing that it threatened the growth of businesses and productivity. Some commenters stated that the rule failed to address the negative impact on state tax revenue streams and failed to calculate loss to states especially in certain sectors. The commenters also indicated that it failed to take into account the increased costs to states such as healthcare costs. Some commenters argued that the rule would cause losses to companies and reduce tax transfers to the government. One commenter said that it would increase costs to the states, especially if paroled aliens were delayed in employment authorization, because they would have to rely on state benefits for a longer period of time. It would be a detriment to society and result in a loss of workforce. The commenters stated that it would threaten business growth and local economies especially in light of the record low national unemployment rate and the more than 1 million plus jobs that were vacant that did not have

enough workers to fill them. One commenter argued that USCIS is mismanaging its resources as a fee-funded agency and if this rule was an attempt to fix this mismanagement it failed.

Several commenters said that DHS failed to do a proper analysis under the Executive Orders, Regulatory Flexibility Act and Federalism Assessment. One commenter said that the rule failed to take into account the increased costs to asylum seekers even after they were granted asylum because of how long it may take for the asylum seeker to obtain work.

Several commenters said that the rule failed to address the recent Presidential policies and costs and impact of such policies such as the Proclamation 9844 and instead just relied on data from prior years. The commenters argued that the rule disregarded the cumulative effect that policies like MPP and metering had on the asylum system overall. Some commenters argued that DHS failed to consider other alternatives and ways to gain efficiencies such as through electronic filing, restoring policies such as barring re-adjudication of original petition decisions, restoring the ability of aliens to get an interim EAD within 90 days, ending the diversion of asylum officers to other tasks, hiring more asylum officers, and increasing asylum interviews each month.

One commenter argued that DHS failed to do a correct impact assessment because it only assessed the impact for a quarter of the population of EAD holders. The commenter stated that DHS underestimated the actual population that would be affected. Another commenter said that it failed to deduct the UAC filing numbers and overestimated the cost of the rule. Another commenter said that it failed to take into account the burden on UACs in terms of their ability to access non-work resources like obtaining social security numbers and access to long-term educational opportunities.

Finally, some commenters said that the rule failed to take into account the cost to employers on loss of workforce and hiring new employees because of the retroactive application of the rule to aliens who were already work authorized. DHS addresses these comments below.

#### *A. Impacts and Benefits (E.O. 12866 and 13563)*

##### 1. Assumptions

Approximately 20 submissions provided input on the assumptions and



methodology utilized for the rule's regulatory impact assessment.

*Comments:* A commenter claimed that the rule makes unfounded assumptions. First, when calculating the savings and costs, the analysis is said to have relied on the number of asylum application and EAD filings, but did not deduct the number of filings from unaccompanied minors, the numbers of whom have surged in recent years. The commenter said the rule specifically exempts UACs, but, by not deducting the UAC population from the number of asylum applications filed historically, DHS overestimated the savings and deterrent effect. Furthermore, the commenter said DHS assumed that aliens file for employment authorization only for the purpose of working, which is "demonstrably false." For example, employment authorization is required in order to be issued a social security number (which is in turn needed to obtain a driver's license).

*Response:* DHS appreciates the submitted input. In the analysis, it was not possible to parse out which EADs linked to asylum claims represented UACs. However, any adjustment for UACs, if it were possible, would reduce the quantified costs of the rule. Additionally, DHS recognizes the reality that some who obtain EADs do so for purposes of documentation. However, DHS also does not have information about the number of aliens that file for employment authorization but do not obtain employment. Although USCIS issues EADs, it does not collect information about the employment of aliens with EADs. Accordingly, DHS conservatively assumes that all that seek and obtain EADs would enter the labor market and find employment. To the extent that the number of employed aliens is overstated, it would reduce the quantified impacts of the rule.

## 2. Adequacy of Cost/Impact Analysis

*Comments:* A submission said the rule violates Executive Order 12866 because DHS did not assess all the costs associated with the rule or provide an analysis of the available alternatives. Another said DHS has not considered all of the costs and benefits involved in making this regulatory change, and recommend that DHS abandon the proposed rule and keep in place the current regulations governing the issuance of EADs to asylum applicants.

Another commenter stated "nowhere to be found" is data about the number of legitimate and illegitimate asylum seekers, as well as the costs and benefits associated with implementation of the proposed rule on either group. Another commenter said DHS "admits" that it

does not have the necessary data to fully quantify the rule's impacts, concluding that DHS cannot justify the rule and its substantial harms without fully considering and quantifying the impact of the proposed provisions, which it has failed to do here. The commenter further claimed that DHS "does not know" how many aliens will be subject to several of the proposed provisions, because DHS does not have the data necessary to quantify the impacts of these provisions, including barring asylum applicants with certain criminal history, barring those who did not enter at a U.S. port of entry, and barring those who did not file for asylum within one year of their last arrival to the United States. As such, DHS cannot quantify the lost earnings of asylum seekers or lost tax revenue for cities, states, and the federal government.

A commenter said DHS does not provide a breakdown of the affected population and how it determined who would be impacted by the rule, asserting that DHS has not quantified impacts with respect to the full pool of affected asylum seekers. Another argued that the analysis understated the number of applicants who would be impacted by the rule and failed to consider other impacts including loss of medical care and other necessary services. A commenter said DHS's method of calculating costs dramatically underestimates the costs to asylum seekers because DHS could not obtain data for a large portion of affected asylum seekers. Also, the commenter said DHS calculated losses based on the assumption that asylum seekers would receive employment authorization in 151 days under the rule, relying on average processing times from prior years, but this calculation is based on a flawed premise given that the proposed rule would significantly add to current processing times. In addition, the commenter said DHS does not attempt to estimate how many asylum seekers would be prevented from obtaining employment authorization due to the categorical bars. In summary, the commenter imparted that DHS significantly underestimates the losses even to those asylum seekers it identifies as adversely affected by the proposed rule.

Another commenter said the only projected costs of the proposed rule are based on an underestimation of the number of asylum applicants who would be impacted. Specifically, the commenter said DHS's calculation fails to estimate (1) the number of initial asylum applicants who will be impacted by elimination of employment authorization for asylum applicants who

do not arrive at ports of entry, and (2) the number of asylum applicants who would be barred from employment authorization on the basis of past criminal convictions. This commenter also said 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, and a quarter of EAD holders is likely an underestimation of the impacted population. In addition, the commenter said the estimated lost earnings is likely a substantial underestimate given the analysis's exclusion of all defensive cases. Lastly, the commenter said DHS fails to estimate how the proposed rule would impact the renewal of employment authorization for many asylum applicants who have also previously been granted EADs but would no longer be eligible for an EAD renewal.

A commenter said DHS has failed to consider reliance interests, asserting that it fails to calculate or consider the number of currently working asylum seekers who will be unable to continue working, the length of time they have been in the workforce, or any of the impacts on this group. The commenter also said the rule failed to consider the serious reliance interests related to asylum seekers who remain eligible for employment authorization and are able to renew but with a shorter period for employment authorization.

A commenter argued that the analysis underestimated the impacts of the proposal by understating the wages of asylum seekers, comparing the experience and wages of its own program participants to the wages relied on. Citing data to support their argument, a commenter challenged the wage rates used to calculate the lower and upper bound of the rule's financial impact, stating that some asylum seekers earn above-average salaries after securing an EAD. This commenter also said \$12/hour should be the minimum wage relied on to calculate the lower bound of lost compensation to asylum seekers. Referencing the 365-day waiting period specifically, a commenter said while the rule accounts for the salary and wage loss of those waiting for a decision, amounting to nearly \$542.7 million, it does not account for the promotions or raises aliens will miss out on due to lack of employment. The commenter cited a study showing that delaying asylum seeker's employment by seven months had persistent effects, and those who started work earlier had about a 27 percent higher income.

A commenter claimed that the proposal underestimated its impacts to employers, stating that most asylum seekers in its program are skilled workers with STEM and healthcare backgrounds, industries in the U.S. with high demand for additional labor.

*Response:* DHS disagrees that the rule does not comply with E.O. 12866 because it failed to adequately assess the costs associated with the rule or discuss available alternatives. Although DHS was not able to quantify all of the impacts of the rule, DHS has considered the major categories of impacts. DHS summarized in Table 5 of the NPRM at 84 FR 62396, each of the provisions of the rule, the affected populations, and the estimated impacts. This table illustrates the provisions for which it is not possible to provide a quantified estimate of the affected population, or a quantified estimate of the impacts. DHS assessed the costs and benefits to the extent possible given data availability, and discussed qualitatively those that could not be quantified, and included a reasoned discussion about why they could not be quantified. DHS considered qualitative benefits at 84 FR 62417, such as reducing incentives to files frivolous, fraudulent, or otherwise non-meritorious asylum applications thereby prioritizing aliens with bona fide asylum claims. At 84 FR 62398, DHS provided a separate description of possible distributional effects (e.g. transfers) resulting from the regulation. Finally, DHS discussed steps USCIS has undertaken to address the asylum backlog and mitigate its consequences for asylum seekers, agency operations, and the integrity of the asylum system, as alternatives to this rule, at 84 FR 62393. DHS appreciates commenters' input on the types of costs or other impacts that were not captured in the analysis, and has incorporated many into the analysis for this final rule.

As it relates to the concern regarding the understatement of costs, although DHS agrees that the quantified impacts are likely an underestimate of the total, the analysis also considers additional unquantified impacts of the rule. Indeed, DHS has an entire section of the analysis, beginning at 84 FR 62416, devoted to discussing impacts of the rule that DHS is unable to quantify. Specifically, DHS acknowledges that some of the most significant unquantified impacts of the rule include those from eliminating employment authorization for applicants who do not arrive at ports of entry, eliminating employment authorization on the basis of criminal convictions, and terminating employment authorization early for asylum applications denied/dismissed

by an IJ. Please refer to Table 1 in this final rule for a summary of the unquantified impacts of the rule. DHS also acknowledges that certain quantified estimates may be overstated because, due to data limitations, DHS was only able to provide a maximum estimate of the potential impacts. These are also identified in the summary provided in Table 1 of this final rule.

Although there is nothing in this rule that specifically will drive the EAD processing times significantly higher, on average, it is possible that some applications could take longer to process, as some of the conditions in the rule could require more resources and add complexity to adjudicative review. There is potential for delay with the criminal bars. The I-765 form instructions require the alien to list all arrests and convictions, to explain those events, and provide certified copies of police and court documents. If the alien fails to provide sufficient information or documents relating to his or her criminal activity with the (c)(8) EAD application, the evaluation and assessment of biometrics that return criminal history information to determine ineligibility may require more resources and delays if USCIS must issue an RFE to complete the adjudication. Notably, DHS amended the criminal bars in the final rule, which no longer include many of the offenses and arrests about which many of the commenters expressed concern.

With respect to the concern that the analysis excluded all defensive cases and only analyzed the impacts of the 365-day wait period for a quarter of affected EADs, DHS disagrees. DHS adjudicates all EADs for applicants with pending asylum claims and therefore, DHS has data about the number of EADs for affirmative and defensive cases potentially impacted by this rule. This allows DHS to estimate the impacts to defensive cases for certain provisions, such as the proposed 365-day wait period. See analysis of "the residual population" at 84 FR 62410. However, DHS does not have data on when defensive asylum cases are adjudicated, and so DHS is unable to estimate the impacts to defensive cases for other provisions, such as terminating EADs when an asylum application is denied by an IJ. However, DHS again stresses that it has considered qualitatively any impacts for which DHS is unable to quantify the impacts of the rule for defensive cases.

As it relates specifically to the concern about the costs and benefits to legitimate and illegitimate asylum seekers, the analysis covers the cost to applicants that will have an asylum

application approved and applicants that will have an asylum application denied. Where the impacts differ depending on an approved or denied asylum application (e.g., the provisions for which an EAD would be terminated early for an alien denied asylum), DHS has assessed the costs specific to the impacted group.

Regarding the comment that DHS failed to consider reliance interests for currently working asylum seekers who will be unable to continue working under this rule, DHS disagrees. Although DHS was unable to quantify some of these impacts because it does not have data on the length of time that asylum seekers have been working or might continue to work had it not been for this rule, DHS did qualitatively consider the impacts of the rule on asylum seekers whose EAD renewal would be subject to changes made by this rule. See the discussion of unquantified impacts in the NPRM beginning at 84 FR 62416.

In terms of the wage rates relied upon, data are not directly available on the earnings of asylum seekers and, faced with uncertainty, DHS made reasonable estimates of the bounds. DHS frequently relies upon the prevailing minimum wage as a lower bound for new labor force entrants and it is consistent with other current DHS rulemakings. DHS agrees that some asylum seekers with EADs earn more than the national average, just as some could also earn less than the prevailing minimum wage. However, these possibilities in no way undermine the wage range we utilize as these bounds simply represent estimates of the range for this population's average wage.

In response to the comment regarding skilled workers in STEM and healthcare, it is noted that the information applies to an advocacy organization that assists asylum seekers in professional career development. While we do not question the validity of the data submitted, it is not clear that the data relevant to 300 aliens under the organization's purview can be extrapolated to the much larger population under the rule. As mentioned above, our impact assessment does not rule out the possibility that some asylum seekers with EADs earn high salaries or those above the national average, whether at the average STEM level or otherwise. The wage bounds and incumbent range are meant to capture average earnings levels.

Regarding the rule's effect on earnings over time, a commenter cited a study by the Immigration Policy Lab at Stanford University that found a seven-month

delay in work authorization for German asylum seekers dragged down their economic outcomes for a decade after. DHS reviewed the paper cited and its methodology and findings. We do not rule out the possibility that there could be some persistence effects for delayed labor force entrants that could impact their integration into the workforce and income. DHS agrees that earnings generally rise over time, meaning that the earnings at the end of an EADs validity period could be higher than at the time of issuance. However, it is noted that the paper focused on a particular European labor market. It is not clear that the findings from this study on German asylum applicants can be linearly extrapolated to the population regulated by this rulemaking. Further, we note that by relying on a range for the wage the asylum applicants might earn, any increases in wages that would have been earned had the asylum applicants been employment authorized sooner would be captured within the range unless the true average wage is at the higher end of the range used. We appreciate the input and include it qualitatively in the analysis herein.

DHS appreciates the commenters concerns regarding logistical burdens to employers, including small businesses, due to the provision to end some EADs early. However, this rule making is not imposing new obligations or conditions on employers, so DHS disagrees that this rule directly impacts small entities or imposes costs that DHS did not consider. As it relates to statistics to quantify fraud in the asylum process, DHS does not track cases that are frivolous, or fraudulent, or otherwise non-meritorious claims. However, we note that the relatively high rate of EOIR denials is reflective of the problem.

### 3. Cost Analysis Should Account for Other Asylum Initiatives

*Comments:* A commenter stated that DHS has recently issued other rule changes related to asylum and this proposed rule threatens to further limit avenues of relief for asylum seekers with valid claims, particularly in conjunction with recent administration policies such as the Migrant Protection Protocols. The commenter said DHS must conduct a full cost analysis of the compounded impact of these separate rules and policies. Similarly, a commenter stated that, through a combination of interim final rules, proposed regulations, and policy announcements, the Administration has restricted access to U.S. asylum protection, or even entrance to the United States to make such a request. As

a result, the commenter said one would expect far fewer applications for employment authorization by asylum seekers, but the proposed rule curiously disregards the cumulative effect of these policies while asserting the necessity of the proposed reforms. The commenter said the rule must be withdrawn and an analysis of the anticipated effects of these other policies must be incorporated into the baseline analysis.

*Response:* DHS has assessed the costs and benefits of this rule with respect to its specific provisions. When examining the impacts of this rule, DHS considered the impacts of regulations and policies in effect when establishing the baseline used for the rule's analysis. For example, DHS' analysis controlled for the 2018 change from FIFO to LIFO. For other regulations that are proposed, but not yet implemented, the analysis acknowledges the potential interactions with other regulatory efforts, when possible. For example, the NPRM acknowledged DHS' rule regarding Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications. However, incorporating such interactions in the impact assessments for this rule would be speculative as it assumes these rules will be finalized, and without change. While DHS agrees that a reduction in asylum claims caused by other asylum initiatives would, by definition reduce asylum-linked EAD filings, such a reduction would not necessarily be driven by the current rule and could falsely underestimate the impacts of this rule.

### 4. Population

Approximately 15 submissions provided input on the population that would be impacted by the proposed rule.

*Comments:* A joint submission stated that "hundreds of thousands" of asylum seekers would either have to wait for years before they could legally work, or many may not receive employment authorization at all. Another referenced research and estimates on the thousands of people that would be impacted by the rule. Many commenters provided an estimate on the number of asylum applicants that live in a specific city, county, or state that would be detrimentally impacted. A few commenters said that the number of foreign-born residents or asylees in certain states, including California, Maine, and Massachusetts, is high if not the highest in the nation. One local government stated that more foreign-born residents live in the county than native born residents. Citing the number

of affirmative asylum applications in FY 2015, an individual commenter stated that Massachusetts was one of the top-ten states for new asylee residence.

*Response:* DHS does not question the accuracy of the comments and underlying data. The analysis is benchmarked to national figures—in other words, for wages, labor force, taxes—but does not rule out the likelihood that specific locations would experience more impacts, relatively speaking, than other areas. Based on historical I-765 data, DHS estimated in the NPRM that the maximum population that could be impacted at just over 300,000 the first effective year and slightly lower in subsequent years.

### 5. Impacts on Applicants (Lost Compensation/Wages)

Approximately 70 submissions provided input on the impacts on applicants.

*Comments:* Many expressed opposition to the proposed rule, as delaying and/or eliminating employment authorization eligibility would cause significant harm. Their arguments focused on: (1) Asylum seekers would lack sufficient income to support their families and pay for food, clothing, adequate housing, medical care, educational opportunities, and basic necessities; (2) Asylum seekers would not be able to integrate and contribute to local communities and the United States; (3) Asylum seekers would be forced to rely on local government assistance, social service organizations, and faith-based organizations when they would rather be self-supporting and contributing to their communities; (4) Asylum seekers would be pushed into the "shadow" economy, where there are no legal protections and the risk of exploitation is high; (5) Asylum seekers' mental health and wellbeing, capacity to recover from trauma would be negatively impacted. Commenters added that the ability to work is a form of therapy and self-help that sustains a person's dignity, purpose, independence, and feeling of self-worth; and (6) Asylum seekers would have difficulty obtaining a drivers' license, state-issued identification card, social security card, banking services, and social services benefits. Another commenter stated that the rule will force many bona fide asylum seekers, who do not have the means to go without employment, to abandon their meritorious asylum claims.

Citing a 2013 report documenting the hardships asylum seekers face by being denied employment authorization, a comment discussed specifically four major areas of impact: "psychological

harm and interference with the ability to heal after torture and persecution; economic hardships and vulnerability to further victimization; the physical and health-related hardships created by an inability to provide for oneself; and difficulties with access to legal counsel in pursuit of asylum claims and work authorization.”

*Response:* DHS reviewed the cited reports and research, and understands that there could be monetary and qualitative impacts to applicants and their support networks, including numerous types of hardships. However, it is noted that aliens granted asylum would not need an EAD to work, and that other factors notwithstanding, denied asylum seekers would be generally removed from the labor force. The rule will alter the timing in which some or many asylum seekers are able to work. Asylum applicants will not be impacted in their pursuit of their asylum claims because this rule does not change any eligibility criteria for asylum. DHS expects asylum seekers to obey the law while in the United States, and will not assume otherwise in promulgating its employment authorization policies.

#### 6. Impact to Health, Wellbeing, Access to Justice, and Vulnerable Populations

*Comments:* Citing multiple sources of research, commenters discussed how gainful employment is directly tied to food security, access to health care, housing, good physical and mental health. The commenters wrote that the proposed rule would worsen these issues by barring or delaying access to employment. Referencing multiple studies, a commenter argued that providing asylum seekers with employment authorization increases their access to social supports necessary to overcome trauma and reduce their likelihood of criminal and violent behavior. One comment supplied stories from trauma survivors and clinical therapists recounting how eventual employment authorization and employment reduced their emotional distress and allowed them to heal from trauma.

Multiple commenters said that the rule would limit applicants' ability to afford and procure legal assistance, which will in turn diminish their chances of succeeding in their cases. Citing studies, several commenters stated that legal counsel more than triples asylum seekers' odds of success, while also minimizing the need for the immigration court to provide lengthy explanations and continuances for individuals confused and overwhelmed by the system. A few comments

addressed the other costs inherent in immigration cases, such as transportation costs to and from court, interviews, and meetings, which applicants may not be able to afford without employment authorization. The commenters added that loss of these would impact applicants' access to justice.

Numerous commenters argued that the proposed restrictions will result in further exploitation of already vulnerable populations, including LGBT individuals, women, survivors of violence, and children. Some stated that delaying and/or prohibiting employment authorization would irreparably harm women and children fleeing from gender-based violence. Many commenters warned that asylum seekers would be left with no choice but to work illegally in order to meet their needs while their asylum claims are pending which can lead to their abuse and exploitation. Citing multiple studies, commenters stated that unauthorized employees are often forced to endure abuses, including harassment, violence, and discrimination, unsafe working conditions, and wage theft.

An individual commenter wrote that restricting access to employment for LGBT applicants is particularly harmful. They wrote that many LGBT applications are unable to rely on traditional safety nets for housing and other basic needs due to widespread family and social rejection. They also cited a study that showed that LGBT asylum seekers are more likely to be poor, criminalized in their home countries, and to miss the 1-year deadline when filing. Another added that LGBTQ asylum seekers are more likely to suffer from mental health issues as a result of their heightened vulnerability in the criminal justice system, lack of healthcare, and exposure to health risks such as HIV.

Several commenters warned that the proposed rule would create a significant risk to the health, safety, education, and wellbeing of children. One warned that children need EADs to receive a social security number, which is required to access long-term educational opportunities, vocational and technical programs, health insurance, preventative care, as well as local benefit programs. Another cited research indicating the lifelong health and development consequences to young people's malnutrition, housing instability, and other consequences of financial insecurity. Citing multiple research studies, group-sponsored comment urged DHS to withdraw the proposed rule due to its long-term

detrimental impacts on children and families, describing its prospective impacts to housing, mental health, and academic success. Another warned that child support collections would be negatively impacted as any barrier to employment authorization limits a parent's ability to support a child.

One commenter cautioned that the largest share of the noncitizens they represent are minors with pending asylum applications who are either detained, likely to be “stepped-down” or reunified, or already reunified. The commenter reasoned that minors would be disproportionately affected by the proposal because an EAD provides minors with (1) their only form of identification and (2) provides them an opportunity to gain self-sufficiency and reduce their dependency on support services or sponsors. Another commenter reasoned that even those children who are too young for jobs will be harmed, as infants and other young children are forced to bear the burden of the immigration system's treatment of their parents' or guardians' delayed or barred eligibility.

*Response:* DHS has reviewed the cited reports and research. Nothing in this rule changes access for asylum seekers to housing. It continues to be incumbent upon every asylum seeker to have a plan for where they intend to live during the pendency of their asylum claim and, in particular, while they are not employment authorized. Many asylum seekers stay with friends or relatives or avail themselves to community organizations such as charities and places of worship. There are no federal housing programs for asylum seekers. The Department of Health and Human Services maintains resources about housing in each state in the United States. Asylum seekers who are concerned about homelessness during the pendency of their employment authorization waiting period should become familiar with the homelessness resources provided by the state where they intend to reside.

Asylum seekers may file after one year of entering the United States if they demonstrate to the satisfaction of an asylum officer or an IJ that an exception applies under INA section 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D). However, there is still a statutory requirement to file an asylum application within one year, unless a changed or extraordinary circumstance is met. As part of the reforms to the asylum process, DHS also is emphasizing the importance of the statutory one-year filing deadline for asylum applications. Both USCIS and DOJ-EOIR adjudicate asylum applications filed by aliens who reside

in the United States for years before applying for asylum. Many aliens filing for asylum now are aliens who were inspected and admitted or paroled but failed to depart at the end of their authorized period of stay (visa overstays), or who entered without inspection and admission or parole and remained, not because of a fear of persecution in their home country, but for economic reasons.

Asylum seekers will not be impacted in their pursuit of their claims because this rule does not change any eligibility criteria for asylum. The commenters' other assertions that the rule arbitrarily imposes bars to eligibility for employment authorization and contravenes Congressional intent that asylum applicants receive employment authorization expeditiously is based on a misunderstanding of the INA. The INA provides that "[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General." INA 208(d)(2); 8 U.S.C. 1158(d)(2). Indeed, Congress forbids DHS from conferring employment authorization upon an asylum applicant before at least 180 days has passed since the filing of the asylum application. *Id.* While this rule allows asylum applicants to apply for employment authorization, the INA makes it clear that there is no entitlement to it.

#### 8. Impacts on Support Network

Approximately 65 submissions provided input on impacts to support networks.

*Comments:* Multiple commenters cautioned that the rule would stretch social service organizations, nonprofits, faith-based organizations, and State and local governments beyond capacity as asylum seekers would lose their ability to be self-sufficient. Several commenters stated that, especially with the current backlog for asylum applicants, the proposal would impose an unreasonable burden on applicants' support networks. An individual commenter reasoned they would need to dramatically redirect focus and resources to shift its program to unemployment, public benefits, legal services, and other life-saving assistance that asylum applicants and their families would require as a result of the proposed rule change.

Many commenters warned that the proposed rule requires an "unprecedented level of legal analysis" for EAD applications, negatively impacting the capacity of legal service providers as more time, documentation, training, and resources will be required to put together EAD applications. A few

commenters claimed that the proposal failed to consider the cost and time burden to social service and legal organizations. Commenters, mostly attorneys and advocacy groups, said that the proposed rule would negatively affect the legal community by:

a. Forcing legal organizations to redirect limited financial and staff resources towards training staff on new applicable standards governing how to counsel clients, litigate erroneously denied applications, and stay abreast of case-by-case USCIS adjudications.

b. Forcing organizations to serve fewer clients due to complexity and uncertainty of the EAD application processes, which could in turn jeopardize meeting funding deliverables and thereby put nonprofits' future funding at risk.

c. Forcing State-funded nonprofits to shift limited resources to handle the influx of asylum seekers who will need pro bono services due to financial hardships.

d. Increasing staff caseloads, as fewer clients would choose a plea deal in criminal cases that might render them ineligible for employment authorization.

A submission opposed the proposed rule claiming it would increase uncompensated care costs and strain safety net providers' already limited resources. Citing multiple studies, commenters said the proposed rule would increase states' healthcare costs and cause a decline in overall public health as asylum seekers would be uninsured and skip preventative care. An individual commenter and group of attorneys general explained that states and communities would have to bear health care costs as a result of denying asylum applicants work.

A few commenters argued that non-profit service providers and other charitable organizations that attempt to help the homeless would especially be impacted by the proposed rule. A State government opposed the rule because it would force non-citizens into homelessness, increasing unbudgeted costs (studies have found costs associated with homelessness could range from \$20,000 to \$50,000 per person per year) to local governments' already strained homeless shelter systems. An advocacy group stated that USCIS should partner with HHS and HUD to perform a comprehensive review on the impact the lack of employment authorization will have on domestic violence, shelter and housing providers, and victim advocacy organizations more generally before implementing the rule.

A comment stated that without a social security number, non-profit

service providers and other charitable and faith-based organizations would be negatively impacted. The commenter wrote that a universal identifier for all individuals is necessary and organizations would be forced to expend time and money to create a totally new tracking systems for all state and federal aid provided.

Some commenters said the rule does not consider the estimated costs and substantial burdens that this proposed rule will likely create for legal services organizations, social services organizations, and state, local, and federal government agencies.

*Response:* DHS notes this rule does not directly regulate private support networks or any state programs. How the states or private organizations allocate their resources is a choice by the state or organization and is not compelled by this rule. DHS notes that asylum applicants statutorily cannot receive employment authorization prior to 180 days after filing an asylum application and may need to rely on their support networks during that time. DHS discussed in the NPRM, and reaffirms in this final rule, that the impacts of the rule, specifically in terms of lost or deferred labor compensation, could further burden the applicants' support network. The longer an asylum applicant is without an EAD, the longer the applicant's support network is providing assistance to the applicant. The types of entities affected could include, but may not be limited to, religious organizations and charities, family members and friends, state and local tax jurisdictions, non-governmental organizations (NGOs), legal services, and non-profit providers. However, DHS notes that the immediate indirect impact of this rule to an applicant's support network is likely not significantly more than the wages and benefits the applicant would have earned without this rule.

#### 9. Impacts on Companies

Approximately three dozen submissions discussed the impacts on employers.

*Comments:* An individual commenter argued that the rule would disrupt business. A few commenters argued that the rule would make hiring more difficult for employers. Some of the commenters cited references and discussed the critical importance of asylum seekers to local economies, states, and businesses in the United States. The commenters wrote that many industries rely heavily on the labor of noncitizens, including direct healthcare, food services, housekeepers,

nannies, construction, and farming and agriculture.

Many commenters argued that the rule would hurt the U.S. and State economies by reducing the number of prospective employees. Some commenters argued that businesses would have a difficult time finding people to fill jobs especially as the United States is experiencing a widespread labor shortage. A few commenters provided State unemployment figures and statistics in arguing that the proposal would harm State economies. Other commenters cited national unemployment in making the same argument. An advocacy group reasoned that U.S. businesses may incur opportunity costs by having to choose the next best alternative to immediate labor provided by asylum seekers and have to pay additional workers overtime hours to compensate for labor shortages.

A few commenters warned that the rule fails to evaluate the impact on the economy and provide details on the costs to employers being required to hire new staff, or the disruptive effect of abruptly losing existing employees. Some commenters said the rule creates significant logistical burdens and liability costs due to possibly hiring an unauthorized noncitizen if the employer is unaware that for whatever reason employment is no longer authorized.

A commenter cited studies which show that that noncitizens' lack of access to lawful employment drives down wages and decreases Gross Domestic Product (GDP) for the entire U.S. economy, in large part because lack of employment authorization creates a "shadow" class of workers with weak bargaining power, who earn an average of 42% less than employment authorized workers.

*Response:* DHS reviewed the input, data, and sources cited by the commenters. While DHS agrees that certain industries in certain states or localities disproportionately employ immigrants, DHS reiterates that this rule affects only aliens with pending asylum applications (not all immigrants), which DHS estimates is 290,000 annually. DHS acknowledged in the NPRM, and reaffirms here in this final rule, that ending EADs early for denied/dismissed DHS affirmative asylum applications might cause businesses that have hired such workers to incur involuntary labor turnover costs earlier than without this rule. In addition, DHS also acknowledges that some businesses might be impacted in terms of employment, productivity, and profits. Such possible disruptions to companies would depend on the interaction of a large number of complex variables that

are constantly in flux, including national, state, and local labor market conditions, economic and business factors, the types of occupations and skills involved, and the substitutability between the EAD holders and U.S. workers. It is not possible to draw inferences a priori concerning whether, or, to what extent, impacts to employers would be costs (in terms of lost productivity, lost profits, or increased search costs) or transfers of wages from asylum applicants to other available labor.

Nonetheless, DHS expects that asylum seekers will obey the law while in the United States and will not assume otherwise in promulgating its employment authorization policies. DHS does not have an obligation to refrain from promulgating regulation because some aliens may try to ignore the law of the U.S. and put themselves into vulnerable and ill-advised employment situations.

#### 10. Impact on Tax Programs

Approximately 20 submissions provided input on tax program impacts.

*Comments:* An individual argued that the proposal may actually increase tax revenue by increasing the income of American citizens. However, several commenters stated general opposition on grounds that it would reduce tax revenue. Commenters also stated that the proposed rule would cause millions to be lost in tax contributions to Social Security and Medicare.

A few commenters wrote that the proposal fails to consider State income taxes and asylum seekers' contribution to local economies. A commenter said the significant employment tax losses suggest that annual income tax loss at multiple levels of government could also be significant, and DHS makes no attempt to calculate these annual losses at the state and local levels. The commenter concluded that if (as some have stated) DHS's calculations of lost compensation are too low, and if (as this commenter argued) DHS has not quantified impacts with respect to the full pool of affected asylum seekers, then DHS has also [not] accounted for or considered the full scope of lost tax contributions, including both employment tax losses and income tax losses.

A comment argued that DHS' estimate of \$682.9 million in lost tax revenue is too low as the estimate does not account for factors such as long-term increases in wages. A group of commenters contended that the Department's estimate that the federal government would lose up to \$682.9 million in tax revenue does not include the losses

incurred by barring previously eligible groups from obtaining EADs nor does DHS calculate the substantial losses to the states. Other commenters provided estimates by state of local and state tax losses, and a few warned that the states would also lose revenue as a result of increased wage theft.

*Response:* DHS agrees with commenters that in circumstances in which a company cannot transfer additional work onto current employees and cannot hire replacement labor for the position the asylum applicant would have filled there would be an impact to state and local tax collection. The NPRM stated at 84 FR 62418, "There could also be a reduction in income tax transfers from employers and employees that could impact individual states and localities." DHS notes the tax rates of the states vary widely, and many states impose no income tax at all.<sup>161</sup> It is also difficult to quantify income tax losses because individual tax situations vary widely. Although DHS is unable to quantify potential lost income taxes, DHS has provided a quantified estimate of lost employment taxes. We were able to estimate potential lost employment taxes since there is a uniform national rate (6.2 percent social security and 1.45 percent Medicare for both the employee and employer, for a total of 15.3 percent tax rate) for certain employment taxes. DHS agrees that even this quantified estimate is not representative of all potential federal employment taxes losses because although it considered the impact of all provisions, as discussed previously, DHS was unable to quantify all impacts. DHS also recognizes that this quantified estimate of federal employment taxes is not representative of all potential tax losses by federal, state, and local governments and we made no claims this quantified estimate included all tax losses. Finally, DHS recognizes that earnings could increase with time (in other words, over the EAD validity period), but has no way to integrate this possibility into the cost methodology. We continue to acknowledge the potential for additional federal, state and local government tax loss in the scenario where a company cannot transfer additional work onto current employees and cannot hire replacement labor for the position the asylum applicant would have filled.

<sup>161</sup> See generally Turbotax, "States with the Highest and Lowest Taxes," <https://turbotax.intuit.com/tax-tips/fun-facts/states-with-the-highest-and-lowest-taxes/L6HPAVqSF> (last visited Feb. 24, 2020).

### 11. Other Impacts on Governments and Communities

Approximately 35 submissions discussed impacts on governments and communities.

*Comments:* Some commenters argued that the proposal would hurt American workers, as asylum seekers would have to work without authorization and employment law protections, driving down wages and lowering labor standards overall. An individual argued that there is no evidence that asylum employment authorization negatively impacts American worker employment rates. Another cited research that suggests that noncitizens tend to complement native workers rather than to compete with them directly for jobs.

Some commenters warned that the rule introduces new eligibility requirements that would negatively impact USCIS processing times, the quality of asylum adjudications, and other impacts on the U.S. immigration system and federal agencies. One commented that the proposal would increase burdens on USCIS by adding criteria that officers must review before granting work permits. Another claimed the rule would impose additional administrative costs as State motor vehicle agencies would be impacted by delayed adjudications and the USCIS' Ombudsman would have to handle more complaints about the USCIS backlogs.

Multiple commenters argued that asylum seekers contribute to local communities and the United States in various ways, including bringing new businesses and culturally diversity, resettling deserted neighborhoods, filling undesirable or unfilled jobs, and helping to reduce crime. A few commenters wrote that Maine, specifically, benefitted from asylum seekers, especially as it has low unemployment and an aging population. Two submissions stated that in denying asylum seekers the ability to work, the rule would deny hundreds of communities across the United States the opportunity to grow. Another commenter wrote that the United States is generally becoming older and needs more young workers. A few commenters, including a researcher citing multiple studies, stated that allowing immigrants to live and work in the United States boosts innovation and patents and leads individuals to choose jobs that match their skill levels.

Citing multiple studies, a few commenters argued that legal access to work improves refugee integration and improves public safety. One warned that the proposal could cause heightened

crime rates and in turn compel local law enforcement to increase expenditures and resources to investigate and prosecute crimes. A few commenters argued that the proposed rule would make it more difficult for states to fulfill their mandates to enforce their own labor and civil rights laws. The commenters explained that these laws are enforced without respect to immigration status, but effective enforcement relies on employees' ability and willingness to report violations. An individual remarked that asylum seekers who witness a crime would refrain from calling the police out of fear of reprisal for not having a work permit and thus valid proof of identification. Citing studies, several commentators said fear of reprisal and deportation would inhibit unauthorized workers from reporting crimes and violations, and that, with the potential for increased violence and crimes, the proposed rule fails to account for costs to local communities, including:

- a. Increased resources in public schools to provide counseling and psychological services to traumatized children who have witnessed or suffered violence;
- b. Potential societal impacts to U.S. citizens and other community members; and
- c. Subsequent financial costs incurred by local communities where asylum applicants live.

A few commenters stressed that the proposed rule stands against everything they represent as a welcoming city and would impede efforts to welcome asylum seekers to their communities.

*Response:* DHS recognizes that asylum seekers can have important, positive impacts on local communities, including cultural diversity and participation in local labor markets. It also appreciates the commenters' concerns about community security, local law enforcement resources, and preventing exploitation of non-citizen labor. DHS has a strong interest in discouraging criminal behavior to protect communities, which is a significant impetus of promulgating this rule, and protecting the U.S. and non-citizen worker. DHS has and continues to engage in other rulemakings that strengthen protections of U.S. and non-citizen workers and detect and prevent fraud in employment-based immigrant and non-immigrant programs. While DHS has considered all of the commenters' concerns, many of them are outside the purview of DHS. It has weighed the relevant impacts and determined that this final rule is necessary to achieve its stated goals. Further, the U.S. asylum program is in

place to vet and provide protections to those aliens who qualify, and is not a jobs, labor, or employment program. DHS believes that achieving the stated goals of this final rule outweigh speculative adverse effects to local labor markets and challenges attracting younger workers among aging populations. Those concerns, while they may be valid, are outside the purview of DHS. Further, it does not appear that it was the intent of Congress to address local labor issues by providing asylum seekers with work authorization.

With regard to comments related to the willingness of aliens to report crimes, while DHS does not dispute that aliens employed unlawfully might be less willing to report a crime, DHS cannot reliably estimate this rule's speculative impact on local policing. Asylum applicants can often remain without employment authorization for over one year under the prior regulatory regime. DHS does not agree that codifying a one calendar-year waiting period will result in a significant amount of crimes going unreported, and a resulting need for social services. Nothing in this regulation prevents any alien from reporting a crime.

As we stated in an earlier response, DHS does not believe that this rule will negatively impact average processing times for asylum applications, the quality of asylum adjudications, and other impacts on the U.S. immigration system and federal agencies. USCIS adjudicators are well-trained and have numerous resources at their disposal for adjudicating cases. Adjudicators already have applications and forms that they have to consider criminality, admissibility, and date and manner of entry. The requirements in this rule are not new to adjudications. In addition, adjudicators have access to attorneys, law libraries, and research material, and country of origin information to help determine eligibility. This rule intends to establish more stringent requirements of eligibility for employment authorization, in order to disincentivize aliens who are not legitimate asylum seekers that, in turn, should result in a decrease of frivolous, fraudulent, or otherwise non-meritorious asylum applications. DHS disagrees that this can further prolong adjudicating EADs or asylum applications. However, DHS acknowledges that the review of biometrics information and complexity of review to determine ineligibility due to the conditions in this rule may require additional time and resources for some EAD applications, especially where the alien fails to provide the requisite information and

documentation required by the (c)(8) EAD application.

While DHS supports the ability of lawfully present aliens, including legitimate asylum seekers, to become economically self-sufficient and contribute to the U.S. economy, employment authorization is carefully regulated in the United States in order to protect the U.S. labor market, and also to maintain the integrity of the U.S. immigration system. DHS has identified employment authorization, coupled with the lengthy asylum adjudication process, as a driver of non-meritorious asylum applications. Asylum applicants must currently wait at least 180 days before they may be employment authorized. During this period, they may not have the financial resources to be economically self-sufficient upon arrival into the United States, and it is unreasonable for any asylum seeker to come to the United States with the expectation of immediate economic self-sufficiency and/or the absence of economic and other types of hardship.

#### 12. Benefits

Three submissions addressed the benefits of the proposed rule.

*Comments:* A couple of commenters argued that DHS' claim that the proposed rule would provide qualitative benefits to asylum seekers, communities, the U.S. government, and society at large is "absurd" and without adequate justification. An individual argued that the assertion that the U.S. labor market would benefit is not supported in the proposed rule, as the Department of Labor was not consulted. The commenter argued that this renders the economic arguments at best speculative.

*Response:* DHS disagrees with the claims that this rule will not provide benefits. As we discussed in detail in the NPRM, and reaffirm in this final rule, it is not possible to quantify and monetize the benefits this rule stands to generate, which are summarized below.

Aliens with bona fide asylum claims will be prioritized because the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization will be reduced. A streamlined system for employment authorizations for asylum seekers will reduce fraud and improve overall integrity and operational efficiency, thereby benefiting the U.S. government and the public.

In addition, the rule removes incentives for aliens to enter the United States illegally for economic reasons and allow bona fide asylum seekers who

present themselves at the U.S. ports of entry to have their applications for employment authorization easily granted, provided other criteria are met. DHS believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States, which will reduce injuries and deaths that occur during dangerous illegal entries.

Providing low-threshold employment authorization with nearly limitless renewals to asylum seekers incentivizes such aliens to come to and remain in the United States, and also undermines the Administration's goals of strengthening protections for U.S. workers in the labor market. Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD program.

Finally, the biometrics requirement will benefit the U.S. Government by enabling DHS to know with greater certainty the identity of aliens seeking (c)(8) EADs and more easily vet those aliens for benefit eligibility, and will strengthen the ability to limit identity fraud and combat human trafficking and other types of exploitation.

In addition, the assertion that "the U.S. labor market would benefit is not supported in the proposed rule, as the Department of Labor was not consulted" is generally out of context. We are not aware of claims in the NPRM that the U.S. labor market would benefit per se, but rather that some U.S. workers might benefit if they are able to acquire jobs that the asylum seekers held sooner, which, as we have conveyed in multiple responses, will depend on a host of factors. Moreover, DHS works closely with inter-agency partners to identify equities that might be impacted in its rulemakings. In this particular rulemaking, the asylum related EAD protocol does not require an agreement or certification from the U.S. Department of Labor.

#### 13. Alternatives

Three submissions discussed alternatives.

*Comments:* Despite advancing significant changes to longstanding processes and policies, a commenter wrote the rule fails to meaningfully consider alternatives and said that DHS could have considered a pilot program to evaluate and gather data on the need for and effectiveness of one or more of the proposed reforms before proceeding to a rule. Further, the commenter

provided examples of initiatives that the agency has already undertaken that have made progress to address the asylum backlog. A commenter concluded that the rule makes only passing efforts to consider other alternatives to the proposed changes. Another commenter argued that since DHS failed to provide an "adequate explanation of what it hopes to achieve with the proposed rule," the public is unable to adequately determine whether there are reasonable alternatives the agency failed to consider for achieving the desired outcome, because the desired outcome is unknown.

*Response:* DHS has undertaken a range of initiatives to address the asylum adjudication backlog and mitigate its consequences for legitimate asylum seekers, agency operations, and the integrity of the asylum system. DHS has made the determination that the asylum system in its entirety is vulnerable to being EAD-driven—that is, utilized by aliens who may not have a meritorious claim but know they can file an asylum application and become work-authorized for years while their asylum application is processed.

As it relates to the 365-day period, DHS started with the premise that the current 180-day waiting period is insufficient to deter aliens from filing asylum applications that are without merit, and likely driven in part by the intent to become employment authorized while waiting years for the adjudication of the asylum application. DHS made this determination based on record wait times, adjudications, and denials of asylum applications—a trend that continued into Fiscal Year 2019. DHS noted that the 365-day EAD waiting period is based on an average adjudication time that can stretch beyond two years, but did not provide an analysis of why a 365 day waiting period was chosen, as opposed to any other length of time, because it would be unfeasible and unnecessary for DHS to do a comparison of 365 days versus any time period between the current 180 day requirement and 365 days and what the deterrent effect would be. DHS is confident that 365 days is a sufficient wait period to deter aliens from filing non-meritorious, EAD-motivated asylum applications. DHS is also confident that those aliens legitimately fleeing persecution in their home countries will be willing to adapt to the longer wait period for employment authorization, if necessary, in favor of pursuing an asylum application. With a reduction in non-meritorious filings and other changes, such as LIFO processing reinstated in January 2018, bona fide claims could be adjudicated and granted



in far fewer than 365 days, which would result in immediate employment authorization. In 2018, the average affirmatively-filed asylum application completed by USCIS was decided in 166 days. DHS acknowledges that the longer wait period may result in some additional hardship for some asylum seekers. However, this is a temporary hardship that has been balanced against the need to deter EAD-motivated asylum applications. DHS considered the possibility of not offering employment authorization to aliens with pending asylum applications. DHS determined that a 365 day waiting period would be less restrictive and would better balance the impact on asylum seekers with the goals of DHS. While there might be another waiting period that might have slightly less impact on the asylum seeker, such as 240 days, DHS believes that period would also have less of a deterrent effect on EAD-motivated asylum applications. In selecting the 365 day waiting period, coupled with removing the Asylum EAD Clock, DHS believes it is achieving an appropriate balance between the impact that the rule has on the asylum seeker with the goals of the government. DHS believes that any sort of “pre-screening” of asylum seekers to exempt them from the wait period would be inappropriate. The adjudication of an asylum application is a complex and detailed process conducted by specially trained asylum officers or IJ. The process does not lend itself to “screening” but instead relies upon an hours-long interview with the asylum applicant or hearings before an IJ to ascertain eligibility and credibility. On the issue of reducing I–589 adjudication times before USCIS, the reduction of adjudication times is an overarching goal of USCIS, and 500 new asylum officers were hired between fiscal years 2019 and 2020 to help achieve this. However, such a significant reduction of asylum adjudication times is not a feasible short term goal for USCIS, nor does DHS have any ability to impact the timelines of those asylum cases being heard by DOJ–EOIR. DHS believes that allowing aliens to become employment authorized concurrent with the filing of their asylum claim is similarly unfeasible, and DHS believes this would lead to an immediate and devastating glut of asylum applications being filed, making it virtually impossible for legitimate asylum seekers to have their claims adjudicated with any semblance of timeliness.

### *B. Other Comments on Statutory and Regulatory Requirements*

#### 1. Unfunded Mandates Reform Act (UMRA)

*Comment:* A few commenters argued that the Department did not provide the analysis required by the UMRA, as there is no indication that reasonable alternatives were fully considered, nor the most cost-effective and least burdensome option evaluated. Another commenter said the rule does not consider the estimated costs and substantial burdens that this proposed rule will likely create for legal services organizations, social services organizations, and state and local government agencies.

*Response:* DHS does not agree that this rulemaking violates the Unfunded Mandates Reform Act (UMRA) because this rulemaking does not impose any Federal mandates on State, local, or tribal governments, in the aggregate, or the private sector.

As it relates to alternatives, DHS is committed to finding options to deter baseless asylum claims while protecting the rights of true asylum seekers. DHS has undertaken a range of initiatives to address the asylum adjudication backlog and mitigate its consequences for asylum seekers, agency operations, and the integrity of the asylum system. These efforts include: (1) Revised scheduling priorities including changing from First in First out (“FIFO”) order processing to Last in First Out (“LIFO”) order; (2) staffing increases and retention initiatives; (3) acquiring new asylum division facilities; (4) assigning refugee officers to the Asylum Division; (5) conducting remote screenings; and (6) launching a pilot program for applicants seeking a route to immigration court to request cancellation of removal. These efforts are a top priority for the agency, because DHS recognizes that adjudication backlogs may be a driver in attracting asylum applicants who are knowingly file a weak or baseless asylum application and remain employment authorized in the United States for months or years while that application is adjudicated. DHS has made the determination that the asylum system in its entirety is vulnerable to being EAD-driven—that is, utilized by aliens who may not have a meritorious claim but know they can file an asylum application and become work-authorized for years while their asylum application is processed.

See the preceding section for a discussion on alternatives to the 365-day period and “pre-screening” asylum applicants.

As it relates to the concern regarding estimated costs and substantial burdens that this rule will likely create for legal services organizations, social services organizations, and state and local government agencies, DHS explained in the NPRM, and reaffirms here, that the support network for some asylum seekers will be burdened longer than the 180 days that they currently would rely on. Legal and social organizations could embody this network. DHS is confident that with a reduction in non-meritorious filings and other changes, such as LIFO processing, bona fide claims can be adjudicated in less than 365 days. DHS does not know what the specific burdens to states and local governments would be, but does recognize the potential impact to taxes, as discussed elsewhere.

#### 2. Federalism

*Comments:* A few commenters also stated that the proposed rule failed to conduct an adequate federalism analysis under Executive Order 13132 as the proposed rule did not provide detailed costs to State and local programs nor consult with the states prior to drafting the rule.

*Response:* DHS disagrees that the regulatory assessment is not in compliance with Executive Order 13132. DHS did consider federalism concerns and determined that the rule would not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government, as it only adjusts regulations pertaining to applications, interviews, and eligibility for employment authorization based on a pending asylum application, which is within the purview and authority of DHS and does not directly affect states.

However, DHS does note that this rule indirectly impacts states. DHS discusses these indirect impacts in the NPRM and in this final rule. For example, DHS noted that if companies are unable to find replacement labor for the work asylum applicants would have performed, there could be a reduction in State taxes.

Additionally, DHS recognizes there may be additional distributional impacts on states, such as for assistance from state-funded agencies and for healthcare from state-funded hospitals.

*Comment:* A lawyer also argued that the proposed rule failed to account for derivatives on asylum applications, most often children, and failed to properly address Executive Order 13045, Protection of Children from Environmental Health Risks and Safety

Risks, as the proposed rule creates significant risk to the health and safety of children.

*Response:* With regard to dependent applicants, dependents listed on an applicant's I-589 are accounted for in adjudication in the same manner as the principal applicant. In the majority of cases, dependents would receive the same adjudicative treatment as the principal. Environmental health risks or safety risks refer to risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breathe, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to).<sup>162</sup> When promulgating a rule of this description, DHS must evaluate the effects of the planned regulation on children and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. DHS does not believe the reforms in this rulemaking create significant risk to the health and safety of children with regard to the products or substances a child is likely to come into contact with.

## VI. Statutory and Regulatory Requirements

### A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a "significant regulatory action" that is economically significant, under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this rule. This final rule is considered an E.O. 13771 regulatory action.

#### Summary

DHS has considered alternatives and has undertaken a range of initiatives to address the asylum backlog and mitigate

its consequences for asylum seekers, agency operations, and the integrity of the asylum system. These efforts include: (1) Revised scheduling priorities including changing from FIFO order processing to LIFO order; (2) staffing increases and retention initiatives; (3) acquiring new asylum division facilities; (4) assigning refugee officers to the Asylum Division; and (5) conducting remote screenings.<sup>163</sup>

a. *Revised Interview Scheduling Priorities:* A significant scheduling change occurred in January 2018 with FIFO scheduling returning to LIFO scheduling order. Previously implemented in 1995, LIFO remained in effect until 2014. Under FIFO scheduling, USCIS generally processed affirmative asylum applications in the order they were filed. The now-operative LIFO scheduling methodology prioritizes newly-filed applications. Some offices already report a 25 percent drop in affirmative asylum filings since implementation of the LIFO scheduling system in January 2018.<sup>164</sup>

b. *Staffing Increases and Retention Initiatives:* Since 2015, USCIS has increased the number of asylum officer positions by more than 50 percent, from 448 officers authorized for FY 2015 to 686 officers authorized for FY 2018. Along with these staffing enhancements, USCIS increased the frequency with which it offered its Combined Training and Asylum Division Officer Training Course. Moreover, to address asylum officer turnover, USCIS has made efforts to increase telework options and expand opportunities for advancement.<sup>165</sup>

c. *New Asylum Division Facilities:* The Asylum Division also expanded its field operations, opening the Asylum Pre-Screening Center in Arlington, VA, and sub-offices in Boston and New Orleans. Its most significant expansion, however, is just getting underway. Currently, the Asylum Division is establishing an asylum vetting center—distinct from the planned DHS-wide National Vetting Center—in Atlanta, Georgia. This center will allow for the initiation of certain security checks from a central location, rather than at individual asylum offices, in an effort to alleviate the administrative burden on asylum officers and to promote vetting and processing efficiency. USCIS has already begun hiring for the center, which will ultimately staff approximately 300 personnel, composed of both asylum and Fraud Detection and

National Security Directorate (FDNS) positions. USCIS expects completion of the center's construction in 2020.<sup>166</sup>

d. *Remote Screenings:* Telephonic: In 2016, the Asylum Division established a sub-office of the Arlington Asylum Office dedicated to adjudicating credible and reasonable fear claims. This sub-office performs remote (primarily telephonic) screenings of applicants who are located in detention facilities throughout the country. The Asylum Division states that its practice of performing remote telephonic screenings of credible and reasonable fear claims have enhanced processing efficiency since implementation. These screenings allow asylum offices greater agility and speed in reaching asylum seekers whose arrival patterns in the United States are not always predictable and who may be detained at remote detention facilities.<sup>167</sup>

e. *Refugee Officers Assigned to the Asylum Division:* Throughout 2018, USCIS had approximately 100 refugee officers serving 12-week assignments with the Asylum Division at any given time. These refugee officers are able to interview affirmative asylum cases, conduct credible fear and reasonable fear screenings, and provide operational support. USCIS now assigns refugee officers both to asylum offices and DHS's family residential centers.<sup>168</sup>

A simple regulatory alternative to extending the waiting period to 365 days and strengthening eligibility requirements is rescinding employment authorization for asylum applicants altogether, which is permissible under INA 208(d)(2). This too would reduce pull factors and alleviate the asylum backlog.

However, DHS seeks to balance deterrence of those abusing the asylum process for economic purposes and providing more timely protection to those who merit such protection, which includes immediate and automatic employment authorization when the asylum application is granted. DHS believes the amendments in this rule strike a greater balance between these two goals. The amendments build upon a carefully planned and implemented comprehensive backlog reduction plan and amends the (c)(8) EAD process so that those with bona fide asylum claims can be prioritized and extended the protections, including employment authorization, that the United States offers to aliens seeking refuge from persecution or torture.

<sup>162</sup> See <https://www.epa.gov/laws-regulations/summary-executive-order-13045-protection-children-environmental-health-risks-and> (last accessed 03/02/2020).

<sup>163</sup> See Dep't of Homeland Security, 2018 Citizenship & Immigration Services Ombudsman Annual Report at 44.

<sup>164</sup> *Id.* at 45.

<sup>165</sup> *Id.* at 46.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 46–47.

1. Baseline  
 The impacts of this rule are measured against a baseline. This baseline is the best assessment of the way the world would look absent this action. The table below explains each of the provisions of this rule, and the baseline against which the change is measured.

TABLE 4—BASELINE BY PROVISION

Description	CFR citation	Change	Baseline
<b>Provisions that affect asylum and employment authorization</b>			
Eliminate the issuance of “Recommended Approvals” for a grant of affirmative asylum.	8 CFR 208.7, 8 CFR 274a.12.	USCIS would no longer issue grants of recommended approvals as a preliminary decision for affirmative asylum adjudications. As such, aliens who previously could apply early for an EAD based on a recommended approval now will be required either to wait 365 days before they could apply for an EAD based on a pending application, or wait until they are granted asylum (if the asylum grant occurs earlier than 365 days).	Aliens who have received a notice of recommended approval are able to request employment authorization prior to the end of the waiting period for those with pending asylum applications.
“Complete” asylum applications	8 CFR 208.3	Removing outdated provision that application for asylum will automatically be deemed “complete” if USCIS fails to return the incomplete application to the alien within a 30-day period.	Application for asylum is automatically deemed “complete” if USCIS fails to return the incomplete application to the alien within a 30-day period.
Eligibility for Employment Authorization—Applicant-caused delay.	8 CFR 208.4, 8 CFR 208.9.	Applicant-caused delays unresolved by the date the EAD application is filed result in denial of the application for employment authorization. Examples of applicant-caused delays include, but are not limited to the list below: 1. A request to amend a pending application for asylum or to supplement such an application if unresolved on the date the (c)(8) EAD application is adjudicated; 2. An applicant’s failure to appear to receive and acknowledge receipt of the decision following an interview and a request for an extension to submit additional evidence, and; 3. Submitting additional documentary evidence fewer than 14 calendar days prior to asylum interview.	Applicant-caused delays toll the 180-day Asylum EAD clock. No regulatory restriction on how close to an asylum interview applicants can submit additional evidence.
<b>Provisions that affect employment authorization only</b>			
365-day wait	8 CFR 208.7	All aliens seeking a (c)(8) EAD based on a pending asylum application wait 365 calendar days from the receipt of their asylum application before they can file an application for employment authorization.	150-day waiting period plus applicant-caused delays that toll the 180-day Asylum EAD Clock.
Revise eligibility for employment authorization—One Year Filing Deadline.	8 CFR 208.7	For aliens who file their asylum application on or after the effective date of this rule, exclude from (c)(8) EAD eligibility aliens who have failed to file for asylum for one year unless and until an asylum officer or IJ determines that an exception to the statutory requirement to file for asylum within one year applies.	No such restriction.
Revise eligibility for employment authorization—Criminal Convictions.	8 CFR 208.7	In addition to aggravated felons, also exclude from (c)(8) eligibility aliens who have committed certain lesser criminal offenses on or after the effective date of this rule.	Aggravated felons are not eligible.

TABLE 4—BASELINE BY PROVISION—Continued

Description	CFR citation	Change	Baseline
Revise eligibility for employment authorization—Illegal Entry.	8 CFR 208.7 .....	Exclude from (c)(8) eligibility aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry on or after the effective date of this rule, with limited exceptions.	No such restriction.
Termination of EAD after Asylum Denial or Dismissal by USCIS Asylum Officer.	8 CFR 208.7 .....	When a USCIS asylum officer denies or dismisses an alien's request for asylum, the (c)(8) EAD would be terminated effective on the date the asylum application is denied. If a USCIS asylum officer refers the case to an IJ and places the alien in removal proceedings, employment authorization will be available to the alien while the IJ adjudicates the asylum application.	An asylum applicant's EAD terminates within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. When an asylum officer refers an affirmative application to an IJ, the application remains pending and the associated EAD remains valid while the IJ adjudicates the application.
Termination of EAD after Asylum Denial by IJ.	8 CFR 208.7 .....	If the IJ denies the asylum application, employment authorization would continue for 30 days after the date the IJ denies the application to allow for appeal to the BIA. If the alien files a timely appeal of the denied asylum application with the BIA, employment authorization eligibility would continue through the BIA appeal.	8 CFR 208.7(b)(2) provides that when an IJ denies an asylum application, the EAD terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review.
Termination of EAD after Asylum Denial Affirmed by the BIA.	8 CFR 208.7 .....	Employment authorization would not be granted after the BIA affirms a denial of the asylum application and while the case is under review in Federal court, unless the case is remanded to DOJ–EOIR for a new decision.	Asylum applicants are currently allowed to renew their (c)(8) EADs while their cases are under review in Federal court.
Eligibility for Employment Authorization—Failure to appear.	8 CFR 208.10 .....	An applicant's failure to appear for an asylum interview or biometric services appointment may lead to the dismissal or referral of his or her asylum application and may be deemed an applicant-caused delay affecting employment authorization eligibility.	No such restriction.
Limit EAD validity periods .....	8 CFR 208.7 .....	USCIS will, in its discretion, determine validity periods for initial and renewal EADs but such periods will not exceed two years. USCIS may set shorter validity periods.	No such restriction.
Incorporate biometrics requirements into the employment authorization process for asylum seekers.	8 CFR 208.7 .....	Asylum applicants applying for (c)(8) employment authorization must submit biometrics at a scheduled biometrics services appointment.	No such requirement. However, there is a requirement to submit biometrics with an asylum application.
Eligibility for Employment Authorization—aliens who have been paroled after being found to have a credible fear of persecution or torture.	8 CFR 274a.12 .....	Aliens who have been paroled into the United States after being found to have credible fear or reasonable fear of persecution or torture may not apply for employment authorization under 8 CFR 274a.12(c)(11). They may, however, continue to apply for an EAD under 8 CFR 274a.12(c)(8) if their asylum application has been; pending for more than 365 days and they meet the remaining eligibility requirements.	DHS policy guidance since 2017, consistent with Congressional intent regarding making asylum seekers wait at least 180 days after filing asylum application to obtain employment authorization, instructs that when DHS exercises its discretion to parole such aliens, officers should endorse the Form I–94 with an express condition the employment authorization not be provided under 8 CFR 274a.12(c)(11).
Application for EAD .....	8 CFR 274a.13 .....	Clarifying that EAD applications must be filed in accordance with the general filing requirements in 8 CFR 103.2(a), 208.3, and 208.4.	N/A.
Application for EAD .....	8 CFR 274a.13(a)(1) ..	Provides USCIS discretion to grant (c)(8) EAD applications consistent with INA 208(d)(2).	Current regulations do not give the agency discretion to issue (c)(8) EADs. 8 CFR 274a.13(a)(1) currently states: The approval of applications filed under 8 CFR 274a.12(c), <i>except for 8 CFR 274a.12(c)(8)</i> , are within the discretion of USCIS.

TABLE 4—BASELINE BY PROVISION—Continued

Description	CFR citation	Change	Baseline
Application for EAD—automatic extensions and automatic terminations.	8 CFR 274a.13(d)(3), 8 CFR 208.7(b)(2).	For asylum applications denied, any EAD that was automatically extended pursuant to 8 CFR 274a.13(d)(1) based on a timely filed renewal application will automatically terminate on the date the asylum officer, the IJ, or BIA denies the asylum application, or on the date the automatic extension expires (which is up to 180 days), whichever is earlier.	For asylum applications denied, any EAD that was automatically extended pursuant to 8 CFR 274a.13(d)(1) will terminate at the expiration of the EAD or 60 days after the denial of asylum, whichever is longer.
Cross-reference to any automatic termination provision.	8 CFR 274a.14 .....	Cross-reference to any automatic termination provision elsewhere in DHS regulations, including the automatic termination provision being implemented in this rule.	N/A.
Specify the effective date .....	.....	EAD applications, including renewals, postmarked or electronically submitted on or after the effective date will be adjudicated under the rule.	N/A.

2. Costs and Benefits

This rule amends the (c)(8) EAD process by extending the period that an asylum applicant must wait in order to be employment authorized, and by disincentivizing asylum applicants from causing delays in the adjudication of their asylum applications. DHS has considered that some asylum applicants may seek unauthorized employment without possessing a valid employment authorization document, but is unable to estimate the size of this effect and does not believe this should preclude the Department from making procedural adjustments to how aliens gain access to employment authorization based on a pending asylum application. The provisions herein seek to reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization and remain for years in the United States for economic purposes.

The quantified maximum population this rule will apply to is about 290,000 annually. This include aliens filing both meritorious and non-meritorious asylum applications. DHS assessed the potential impacts from this rule overall, as well as the individual provisions, and provided quantitative estimates of such impacts where possible and relevant.

For the provisions involving biometrics and the removal of recommended approvals, the quantified analysis covers the entire population. For the change to a 365-day waiting period to file an EAD, the quantified analysis also covers the entire population; however, DHS relies on historical data to estimate the costs for affirmative cases and certain assumptions to provide a maximum potential estimate for the remaining affected population. For the provisions that will potentially end some EADs early, DHS estimated only the portion of the costs attributable to affirmative cases because DHS has no information available to estimate the number of defensive cases.

DHS provides a qualitative analysis of the provisions to terminate EADs earlier for asylum cases denied/dismissed by an IJ (defensive cases), to remove employment eligibility for asylum applicants under the (c)(11) category, and to bar employment authorization for asylum applicants with certain criminal history, who did not enter at a U.S. port of entry, or who, with certain exceptions, did not file for asylum within one year of their last arrival to the United States. As described in more detail in the unquantified impacts section, DHS does not have the data necessary to quantify and monetize the impacts of these provisions.

To take into consideration uncertainty and variation in the wages that EAD holders earn, all of the monetized costs rely on a lower and upper bound, benchmarked to a “prevailing” minimum wage and a national average wage, which generates a range. Specific costs related to the provisions are summarized in Table 5. For the provisions in which impacts could be monetized, the single midpoint figure for the range capturing a low and high wage rate is presented.<sup>169</sup>

<sup>169</sup> The populations reported in Table 1 reflect the maximum population that could be covered by each provision. Some of the populations that would incur monetized impacts are slightly different due to technical adjustments. It is noted that the maximum population is smaller than that in the NPRM baseline because in this final rule DHS will not apply any provisions of this rule to applications for employment authorization pending on the effective date. As such, the resulting cost estimates are slightly lower than were developed in the NPRM. In the NPRM the pending pool was 14,451 at the time the data was obtained. The pending population at any point in time can vary due to many factors. In the NPRM, the pending population was not slated to pay the biometrics fee, hence the difference in cost in this final rule only accrue to the time and travel related costs of submitting biometrics. Based on an estimated 12,805 persons in the pending pool who would submit biometrics under the original proposal, the difference in cost for the rule in the first year the rule will take effect at the low and upper wage bounds are \$921,389 and \$2,078,200, in order. DHS also removed qualitative cost discussion for pending EAD applicants who would not be subject to the criteria proposed on the NPRM.

TABLE 5—SUMMARY OF COSTS AND TRANSFERS

Provision summary	Annual costs and transfers (mid-point)
Quantified:	
365-day EAD filing wait period (for DHS affirmative asylum cases and partial estimates for DHS referrals to DOJ).	<ul style="list-style-type: none"> <li>a. Population: 39,000.</li> <li>b. Cost: \$542.7 million (quantified impacts for 39,000 of the 153,381 total population).</li> <li>c. Reduction in employment tax transfers: \$83.2 million (quantified impacts for 39,000 of the 153,381).</li> <li>d. Cost basis: Annualized equivalence cost.</li> <li>e. Summary: Lost compensation for a portion of DHS affirmative asylum cases who will have to wait longer to earn wages under the rule; nets out cost-savings for aliens who will no longer file under the rule; includes partial estimate of DHS referral cases to DOJ–EOIR. It does not include impacts for defensively-filed cases.</li> </ul>
365-day EAD filing wait period (for the residual population).	<ul style="list-style-type: none"> <li>e. DHS emphasizes that the costs of the rule in terms of lost or deferred labor readings will potentially depend on the extent of surplus labor in the labor market. In the current environment with COVID–19-related layoffs and unemployment, there is the potential that the impacts will be mainly transfers and less in terms of costs.</li> <li>a. Population: 114,381.</li> <li>b. Cost: \$2.39 billion (quantified impacts for the remaining 114,381 of the 153,381 total population).</li> <li>c. Reduction in employment tax transfers: \$366.2 million (quantified impacts for the remaining 114,381 of the 153,381).</li> <li>d. Cost basis: Annualized equivalence cost.</li> <li>e. Summary: Lost compensation for the population of approved annual EADs for which DHS does not have data to make a precise cost estimate. The costs reported are a maximum because the potential impact is based on the maximum impact of 151 days; in reality there will be lower-cost segments to this population and filing-cost savings as well.</li> </ul>
Biometrics requirement .....	<ul style="list-style-type: none"> <li>a. Population for initial and renewal EADs: 290,094.</li> <li>b. Cost: \$36.3 million.</li> <li>c. Reduction in employment tax transfers: None.</li> <li>d. Cost basis: Annualized equivalence cost.</li> <li>e. Summary: For initial and renewal EADs, there will be time-related opportunity costs plus travel costs of submitting biometrics, as well as \$85 fee for (c)(8) I–765 initial and renewal populations subject to the biometrics and fee requirements. A small filing time burden to answer additional questions and read associated form instructions in the I–765 is consolidated in this provision’s costs.</li> </ul>
Eliminate recommended approvals .....	<ul style="list-style-type: none"> <li>a. Population: 1,930 annual.</li> <li>b. Cost: \$13.9 million.</li> <li>c. Reduction in employment tax transfers: \$2.13 million.</li> <li>d. Cost basis: Annualized equivalence cost.</li> <li>e. Summary: Delayed earnings and tax transfers that would have been earned for an average of 52 calendar days earlier with a recommended approval.</li> </ul>
Terminate EADs if asylum application denied/dismissed (DHS).	<ul style="list-style-type: none"> <li>a. Population: 575 (current and future).</li> <li>b. Cost: \$31.8 million.</li> <li>c. Reduction in employment tax transfers: \$4.9 million.</li> <li>d. Cost basis: Maximum costs of the provision, which would apply to the first year the rule takes effect.</li> <li>e. Summary: Forgone earnings and tax transfers from ending EADs early for denied/dismissed DHS affirmative asylum applications. This change will affect EADs that are currently valid and EADs for affirmative asylum applications in the future that will not be approved. DHS acknowledges that as a result of this change, businesses that have hired such workers will incur labor turnover costs earlier than without this rule.</li> </ul>
2. Unquantified:	
Clarify employment eligibility under (c)(11) category for I–765.	<ul style="list-style-type: none"> <li>a. Population: 13,000.</li> <li>b. Cost: Delayed/foregone earnings.</li> <li>c. Cost basis: N/A.</li> <li>d. Summary: DHS does not know how many of the actual population will apply for an EAD via the (c)(8) I–765, but the population would be zero at a minimum and 13,000 at a maximum, with a mid-point of 6,500. The population would possibly incur delayed earnings and tax transfers by being subject to the 365-day EAD waiting period (it is noted that this population would also incur costs under the biometrics provision, above), or lost earnings if they do not apply for a (c)(8) EAD.</li> </ul>
Criminal activity/illegal entry bar .....	<p>DHS is unable to estimate the number of aliens that would no longer be eligible to receive an EAD while their asylum applications are being adjudicated. Impacts would involve forgone earnings and potentially lost taxes.</p>
One-year filing deadline .....	<p>Some portion of the 8,326 annual filing bar referrals will no longer be eligible to receive an EAD while their asylum applications are being adjudicated. Impact would comprise deferred/delayed or forgone earnings and potentially lost taxes. DHS does not have data on filing bar cases referred to DOJ–EOIR.</p>

TABLE 5—SUMMARY OF COSTS AND TRANSFERS—Continued

Provision summary	Annual costs and transfers (mid-point)
Terminate EADs if asylum application denied/dismissed (DOJ—EOIR).	DOJ—EOIR has denied an average of almost 15,000 asylum cases annually; <sup>170</sup> however, DHS does not have data on the number of such cases that have an EAD and are employed. Costs would involve forgone earnings and tax transfers for any such EADs that would be terminated earlier than they otherwise would, as well as forgone future earnings and tax transfers. DHS acknowledges that as a result of this change businesses that have hired such workers will incur labor turnover costs earlier than without this rule. Businesses unable to replace these workers will also incur productivity losses.

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.<sup>171</sup> The distributional impacts would fall on the asylum applicants who would be delayed in entering the U.S. labor force or who would leave the labor force earlier than under current regulations. They would be in the form of lost compensation (wages and benefits). A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the impacts of this rule would also be borne by companies that would have hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These

companies will incur a cost, as they will be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided and by having to pay workers to work overtime hours. DHS does not know what this next best alternative may be for those companies. As a result, DHS does not know the portion of overall impacts of this rule that are transfers or costs, but estimates the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies are able to easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will bear little or no costs, so \$4.459 billion (annualized at 7%) will be transferred from asylum applicants to workers currently in the labor force or induced back into the labor force (we assume no tax losses as a labor substitute was found). Conversely, if companies are

unable to find reasonable labor substitutes for the position the asylum applicant would have filled then \$4.459 billion is the estimated maximum monetized cost of the rule, and \$0 is the estimated minimum in monetized transfers from asylum applicants to other workers. In addition, under this scenario, because the jobs would go unfilled there would be a loss of employment taxes to the Federal Government. DHS estimates \$682.5 million as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

Because the biometrics requirement implemented in this rule is a cost to applicants and not a transfer, its minimum value of \$27.08 million is the minimum cost of the rule. The range of impacts described by these two scenarios, plus the consideration of the biometrics costs, are summarized in Table 6 below (Table 6A and 6B capture the impacts a 3 and 7 percent rates of discount, respectively).

TABLE 6A—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 3% [Millions \$]

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	\$0.0	\$0.0	\$1,473.2	\$4,459.0	\$2,229.5
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225.5	682.4	0.0	0.0	341.2
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements .....	27.1	45.5	27.1	45.5	36.3
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,473.2	4,459.0	0.0	0.0	2,229.5

<sup>170</sup> See <https://www.justice.gov/eoir/page/file/1248491/download>.

<sup>171</sup> Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB Circular A-4 pages 14 and 38 for further discussion of transfer

payments and distributional effects. Circular A-4 is available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

TABLE 6A—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 3%—Continued  
[Millions \$]

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Total Costs ....	.....	1,500.2	4,504.5	27.1	45.5	2,265.8

TABLE 6B—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 7%

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	\$0.00	\$0.00	\$1,473.3	\$4,459.5	\$2,229.7
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225.5	682.5	0	0	341.2
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements .....	27.1	45.5	27.1	45.5	36.3
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,473.3	4,459.5	0.0	0.0	2,229.7
Total Costs ....	.....	1,500.4	4,505.0	27.1	45.5	2,266.1

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect the amount of time an asylum applicant is employed. However, DHS is aware that the outbreak of COVID-19 will likely impact these estimates in the short run.<sup>172</sup> As discussed above, the analysis presents a range of impacts, depending on if companies are able to find replacement labor for the jobs asylum applicants would have filled. In April 2020, the reported unemployment rate increased by 10.3 percentage points to 14.7 percent.<sup>173</sup> This marks the highest rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948). By comparison, the unemployment rate for the same month in 2019 was 3.6%.<sup>174</sup> DHS assumes that during the COVID-19 pandemic, with additional available

labor nationally, companies are more likely to find replacement labor for the job the asylum applicant would have filled.<sup>175</sup> Thus, in the short-run during the pandemic and the ensuing economic recovery, the lost compensation to asylum applicants as a result of this rule is more likely to take the form of transfer payments from asylum applicants to other available labor, than it is to be costs to companies for lost productivity because they were unable to find replacement labor. DHS notes that although the pandemic is widespread, the severity of its impacts varies by locality. DHS also notes that asylum applicants who have pending employment authorization might become employment authorized during the pandemic. Consequently, it is not clear to what extent the distribution of asylum applicants overlaps with areas of the country that will be more or less impacted by the COVID-19 pandemic.

Accordingly, DHS cannot estimate with confidence to what extent the impacts will be transfers instead of costs.

DHS’s assumption that all asylum applicants with an EAD are able to obtain employment (discussed in further detail later in the analysis), also does not reflect impacts from the COVID-19 pandemic. It is not clear what level of reductions the pandemic will have on the ability of EAD holders to find jobs (as jobs are less available), or how DHS would estimate such an impact with any precision given available data. Consequently, the ranges projected in this analysis regarding lost compensation are expected to be an overestimate, especially in the short-run.

As required by Office of Management and Budget (OMB) Circular A-4, Table 7 presents the prepared A-4 accounting statement showing the impacts associated with this regulation:

<sup>172</sup> On March 13, 2020, the President declared that the COVID-19 outbreak in the United States constitutes a national emergency. See ‘Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,’ available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>173</sup> Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: [https://www.bls.gov/news.release/archives/empsit\\_05082020.pdf](https://www.bls.gov/news.release/archives/empsit_05082020.pdf).

<sup>174</sup> Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020, Employment Situation Summary Table A. Household data, seasonally adjusted. Available at:

[https://www.bls.gov/news.release/archives/empsit\\_05082020.pdf](https://www.bls.gov/news.release/archives/empsit_05082020.pdf).

<sup>175</sup> The Congressional Budget Office estimates the unemployment rate is expected to average close to 14 percent during the second quarter. See: CBO’s Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021, <https://www.cbo.gov/publication/56335>, April 24, 2020.



TABLE 7—OMB A-4 ACCOUNTING STATEMENT  
 [\$ millions, 2019]  
 [Period of analysis: 2020–2029]

Category	Primary estimate		Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)
	(7%) (3%)				
<b>Benefits:</b>					
Monetized Benefits .....	(7%) (3%)	N/A N/A	N/A N/A	N/A N/A	RIA.
Annualized quantified, but un-monetized, benefits .....	N/A		N/A	N/A	RIA.
Unquantified Benefits .....	The benefits potentially realized by the rule are qualitative and accrue to a streamlined system for employment authorization for asylum seekers that will reduce fraud, improve overall integrity and operational efficiency, and prioritize aliens with bona fide asylum claims. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large. The rule aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. The biometrics requirement will enhance identity verification and management.				RIA.
<b>COSTS:</b>					
Annualized monetized costs (discount rate in parenthesis) .....	(7%) (3%)	\$2,266.1 \$2,265.8	\$27.08 \$27.08	\$4,505.0 \$4,504.5	RIA. RIA.
Annualized quantified, but un-monetized, costs .....	N/A		N/A	N/A	RIA.
Qualitative (unquantified) costs .....	In cases where companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, affected companies would also lose profits from the lost productivity. In all cases, companies would incur opportunity costs by having to choose the next best alternative to immediately filling the job the pending asylum applicant would have filled. There may be additional opportunity costs to employers such as search costs. Estimates of costs that will involve DOJ–EOIR defensively-filed asylum applications and DHS-referrals could not be made due to lack of data. Potential costs would involve delayed/deferred or forgone earnings. There would also be delayed or forgone labor income for EAD applicants impacted by the criminal and one-year filing deadline provisions, renewal applicants, transfers from the (c)(11) group, and filing bar cases, all of whom would be subject to some of the criteria being implemented in this rule. In addition, such impacts could also affect those who would be eligible currently for an EAD, or have such eligibility terminated earlier, but would be ineligible for an EAD under the rule. Delaying and/or eliminating employment authorization eligibility would have a negative impact on asylum seekers' welfare. The removal or delay of some workers regarding employment could have an adverse effect in terms of their health insurance.				RIA.
<b>TRANSFERS:</b>					
Annualized monetized transfers: "on budget" .....	(7%) (3%)	\$0 \$0	\$0 \$0	\$0 \$0	RIA.
From whom to whom? .....	N/A				N/A.
Annualized monetized transfers: compensation .....	(7%) (3%)	\$2,229.7 \$2,229.5	\$0.00 \$0.00	\$4,459.5 \$4,459.0	RIA.
From whom to whom? .....	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals). Some of the deferred or forgone earnings could be transferred from asylum applicants to workers in the U.S. labor force or induced into the U.S. labor force. Additional distributional impacts from asylum applicant to the asylum applicant's support network that provides for the asylum applicant while awaiting an EAD; these could involve burdens to asylum applicants' personal private or familial support system, but could also involve public, private, or charitable benefits-granting agencies and non-governmental organizations (NGOs).				RIA.
Annualized monetized transfers: taxes .....	(7%) (3%)	\$341.2 \$341.2	\$0.00 \$0.00	\$682.5 \$682.4	RIA.
From whom to whom? .....	A reduction in employment taxes from companies and employees to the Federal Government. There could also be a transfer of Federal, state, and local income tax revenue (provisions: 365-day wait + end EADs early + end recommended approvals) that are not quantified.				

Category	Effects	Source citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments .....	DHS does not know how many workers will be removed from the labor force due to this rule. There may also be a reduction in state and local tax revenue, including state and local income tax revenue. Budgets and assistance networks that provide benefits to asylum seekers could be impacted negatively if asylum applicants request additional support.	RIA.
Effects on small businesses .....	This rule does not directly regulate small entities, but has indirect costs on small entities. DHS acknowledges that ending EADs linked to denied DHS affirmative asylum claims and EADs linked to denied asylum cases under DOJ–EOIR purview will result in businesses that have hired such workers incurring labor turnover costs earlier than without this rule. Such small businesses may also incur costs related to a difficulty in finding workers that may not have occurred without this rule.	RFA.
Effects on wages .....	None .....	RIA.
Effects on growth .....	None .....	RIA.

As will be explained in greater detail later, the benefits potentially realized by the rule are qualitative. This rule will reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization or other forms of non-asylum-based relief from removal, thereby allowing aliens with bona fide asylum claims to be prioritized. A streamlined system for employment authorization for asylum seekers will reduce fraud and improve overall integrity and operational efficiency. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States.<sup>176</sup> These effects stand to provide qualitative benefits to asylum seekers, communities where they live and work, the U.S. government, and society at large.

The rule also aligns with the Administration’s goals of strengthening protections for U.S. workers in the labor market. Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD process. While this rule will not implement labor market tests for the (c)(8) EAD process, it will put in place mechanisms to reduce fraud and deter those without bona fide claims for asylum from filing applications for asylum primarily to obtain employment authorization or other, non-asylum-based forms of relief

<sup>176</sup> The rule may also provide less incentive for those pursuing unauthorized employment in the United States to use the asylum application process to move into authorized employment status.

from removal. DHS believes these mechanisms will protect U.S. workers.

The biometrics requirement will provide a benefit to the U.S. government by enabling DHS to know with greater certainty the identity of aliens requesting EADs in connection with an asylum application. The biometrics requirement also will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant’s biometrics against government databases (for example, FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant’s identity, and to facilitate card production.

Along with the changes summarized above and discussed in detail in the preamble and regulatory impact sections of this rule, DHS will modify and clarify existing regulations dealing with technical and procedural aspects of the asylum interview process, USCIS authority regarding asylum, applicant-caused delays in the process, and the validity period for EADs. DHS discusses these provisions in the unquantified impacts section of the analysis.

*A. Background and Purpose of Rule*

The purpose of this final rule is to reform, improve, and streamline the asylum process, so that those with bona fide asylum claims can be prioritized and extended protection, including immediate employment authorization based on an approved asylum application. The provisions seek to reduce incentives to file frivolous, fraudulent, or otherwise non-meritorious asylum applications and other forms of non-asylum based relief primarily to obtain employment authorization. As is detailed in the preamble, it has been decades since

significant reforms were made to the asylum process, and there have been no major statutory changes to the asylum provisions to address the current aspects of the immigration laws that incentivize illegal immigration to the United States and frivolous asylum filings.

DHS has seen a surge in illegal immigration into the United States, and USCIS currently faces a critical asylum backlog that has crippled the agency’s ability to timely screen and vet applicants awaiting a decision.

As a result of regulatory review required by E.O. 13767, Border Security and Immigration Enforcement Improvements, DHS identified the regulations that were inconsistent with this order and is revising them in this rule. While working with Congress on legal reforms to deter frivolous, fraudulent, and non-meritorious filings, DHS is also taking administrative steps to improve the asylum application process, pursuant to the Secretary’s authorities over immigration policy and enforcement. The broad goal is to minimize abuse of the system by inadmissible or removable aliens who are not eligible for asylum, but who seek to prolong their stay in the United States. The changes will remove incentives for aliens to cross the border for economic reasons and better allow DHS to process bona fide asylum seekers in an expedited manner. As a result, bona fide asylum applications would be adjudicated timelier, and the significant benefits associated with grants of asylum would be realized sooner.<sup>177</sup>

<sup>177</sup> A grant of asylum allows an alien to remain in the United States, creates a path to lawful permanent residence and citizenship, and allows for certain family members to obtain lawful

Information and data pertinent to the ensuing analysis is provided. A thorough qualitative discussion of the asylum application and related

employment authorization application process is available in the preamble. Table 8 provides data concerning DHS affirmative asylum filings via Form I-

589 for the five-year span of fiscal years 2014–2018.<sup>178</sup>

TABLE 8—USCIS FORM I-589 AFFIRMATIVE ASYLUM PETITION DATA, FY 2014–2018

FY	Receipts	Approvals	Denials	Admin. close	Referrals-DOJ–EOIR	Pending pool
2014 .....	56,912	10,811	582	2,008	15,537	61,479
2015 .....	84,236	14,344	365	3,107	19,475	108,725
2016 .....	115,888	9,538	131	3,830	16,186	194,986
2017 .....	142,760	13,105	116	5,675	28,928	289,835
2018 .....	106,041	17,537	726	9,436	51,680	319,202
5-year total .....	505,837	65,335	1,920	24,056	131,806	.....
Average .....	101,167	13,067	384	4,811	26,361	194,845

DHS administratively closes 4.8 percent of receipts.<sup>179</sup> More significantly, DHS refers a large share of cases to DOJ–EOIR, and the average referral rate is 26.1 percent. Measured against receipts, the average approval and denial rates are 12.9 percent and .4 percent, respectively. However, if the basis is recalibrated to “adjudicated cases”—the sum of approvals, denials, referrals (interviewed), and filing bar referrals—more salient approval and denial rates of 35.9 and 1.1 percent, respectively, are obtained.<sup>180</sup> These rates are more tractable because they remove the impact of administrative

closures, referrals that did not involve an USCIS interview, and most importantly, the effect embodied in the growth of the pending (hence not yet processed cases) pool. Against “adjudicated cases,” DHS referred more than three-fifths (63 percent) of asylum cases initially filed “affirmatively” to DOJ–EOIR, and this share does not include non-interview referrals. As it relates to the total of referrals, on average the share attributed to interview, filing bar, non-interview cases are 55.4, 31.6, and 13.1 percent, respectively.<sup>181</sup>

In Table 8, the average across the five-year period is provided. It is noted that the pending pool of applications has grown substantially, as is evidenced by the fact that the 2017 and 2018 figures for end-of-year pending pool far exceeded the overall five-year average. For receipts, there has also been substantial growth, though filings declined markedly in 2018 from 2017.

Data pertaining to DOJ–EOIR defensively-filed asylum cases was obtained and relevant data are collated in Table 9.<sup>182</sup>

TABLE 9—DOJ–EOIR ASYLUM CASELOAD AND DECISIONS (FY 2014–2018)

FY	USCIS referrals to DOJ–EOIR	Defense filed	Total filed	Cases granted	Cases denied	Other outcome	Admin. closed
2014 .....	16,258	31,196	47,454	8,562	9,292	10,418	9,540
2015 .....	17,289	46,203	63,492	8,113	8,847	11,018	15,420

immigration status. See INA sec. 208(b)(3) (allowing derivative asylum for asylee’s spouse and unmarried children); INA sec. 208(c)(1) (prohibiting removal or return of an alien granted asylum to alien’s country of nationality, or in the case of a person have no nationality, the country of last habitual residence); INA sec. 209(b) (allowing adjustment of status of aliens granted asylum); INA sec. 316(a) (describing requirements for naturalization of lawful permanent residents). An asylee is authorized to work in the United States and may receive financial assistance from the Federal Government. See INA sec. 208(c)(1)(B) (authorizing aliens granted asylum to engage in employment in the United States); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A), 1613(b)(1) (describing eligibility for Federal Government assistance).

<sup>178</sup> The data in Table 8 are obtained as follows. For the receipts, approvals, denials, and end of year pending pool counts, the data are provided by the USCIS Office of Performance and Quality (OPQ), and are reported publicly under “All USCIS Application and Petition Form Types” for the end of each respective fiscal year, accessible at: [https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic\\_id=23035&field\\_native\\_doc\\_issue\\_date\\_value%5Bvalue%5D%5Bmonth%5D=&field\\_native\\_doc\\_issue\\_date\\_value\\_1%5Bvalue%5D%5Byear%5D=&combined=items\\_per\\_page=100&=Apply+Filter](https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=23035&field_native_doc_issue_date_value%5Bvalue%5D%5Bmonth%5D=&field_native_doc_issue_date_value_1%5Bvalue%5D%5Byear%5D=&combined=items_per_page=100&=Apply+Filter). The other data in Table 8 for FY 2014–2017 are reported

publicly at “Affirmative Asylum Decisions FY09–FY18 Q2,” at [https://www.uscis.gov/sites/default/files/Affirmative\\_Asymylum\\_Decisions\\_FY09-FY18\\_Q2.pdf](https://www.uscis.gov/sites/default/files/Affirmative_Asymylum_Decisions_FY09-FY18_Q2.pdf). For the full FY 2018, the USCIS RAIQ office provided the data from workflow statistics data. The data were good as of April 1, 2019.

<sup>179</sup> USCIS administratively closes I–589s where no decision can be made on the application by USCIS for various reasons, including, but not limited to: (1) Lack of jurisdiction over the I–589 where the applicant is already in removal proceedings before EOIR and not a UAC (in those cases, the case is administratively closed but no NTA is issued since the person is already in proceedings); (2) an application is abandoned, withdrawn, or the applicant fails to show up for the interview or biometric services appointment after rescheduling options are exhausted (in those cases, no decision is made on eligibility but an NTA would be issued if the person is out of status and is still in the U.S.); (3) the applicant has a final administrative removal or ICE has reinstated a prior removal order (in those cases, the I–589 would be administratively closed and the person would be referred for a reasonable fear screening).

<sup>180</sup> It is noted that the rate of administrative closures and total referrals can vary slightly from the percentage reported here. The data is stored and collated in several databases and systems. Some search queries can collate some un-interviewed cases with administrative closures based on specific

action codes assigned to some cases, for various reasons.

<sup>181</sup> The adjudicated basis also excludes some other minor categories such as “dismissals,” which comprise around a dozen cases each year. It is noted that the definitional basis for adjudicated cases is the same as (or similar to with minor adjustments) the basis that DHS uses in much of its public facing and official reporting on asylum. Relevant calculations are all based on the five-year averages: The FY 2014–2018 average of “adjudicated” cases, as defined in the text, is 36,368. Dividing the annual average approvals of 13,067 by 36,368 yields the approval rate of 35.9 percent. Dividing the annual average denials of 384 by 36,368 yields the denial rate of 1.1 percent. The referral rate (excluding non-interviewed cases) is obtained by dividing the sum of annual average filing bar and interview referrals, of 22,972 by 36,268, which yields 63.1 percent. The annual average of total referrals is 26,361. Counts for interview, filing bar, and non-interview cases, in order of, are 14,592, 8,326, and 3,444. Dividing each of the former by the latter yield 55.4, 31.6, and 13.1 percent, respectively.

<sup>182</sup> Data and information on EOIR asylum cases are available publicly from the EOIR “Workload and Adjudication Statistics” portal, at the following report, <https://www.justice.gov/eoir/page/file/1248491/download>.

TABLE 9—DOJ—EOIR ASYLUM CASELOAD AND DECISIONS (FY 2014—2018)—Continued

FY	USCIS referrals to DOJ—EOIR	Defense filed	Total filed	Cases granted	Cases denied	Other outcome	Admin. closed
2016 .....	12,718	69,349	82,067	8,684	11,737	12,883	21,623
2017 .....	22,143	121,418	143,561	10,539	17,632	14,745	10,889
2018 .....	49,118	111,887	161,005	13,161	26,594	22,328	2,098
5-year total .....	117,526	380,053	497,579	49,059	74,102	71,392	117,526
Average .....	23,505	76,011	99,516	9,812	14,820	14,278	23,505
share of completions .....				15.7%	23.7%	22.9%	37.7%

The first data column in Table 9 captures DHS referrals to DOJ—EOIR, and generally corresponds with data in the fifth data column of Table 8.<sup>183</sup> As the data indicate, asylum filings at DOJ—EOIR have also increased sharply over the five-year period, noting that the increase in defensive filings over the last three years has been particularly

strong. Defensive cases also comprise the bulk of filings, more than tripling affirmative filings on average. Over the entire five-year period there were 312,079 total completions, noting that this tally comprises grants, denials, cases that were administratively closed, and “others.” The latter comprises defensively-filed asylum

applications that were abandoned, not adjudicated, or withdrawn.

Table 10 provides data on (c)(8) I–765 filings, and DHS notes that these apply to both DHS affirmative filings (including referrals to DOJ—EOIR) and those filings connected to defensively-filed asylum cases.

TABLE 10—DHS I–765(c)(8) FILING DATA FOR DHS AFFIRMATIVE FILINGS (INCLUDING REFERRALS TO DOJ—EOIR), AND DEFENSIVE CASES [FY 2014–2018]

FY	Initials			Renewals		
	Receipts	Approve	Deny	Receipts	Approve	Deny
2014 .....	62,169	48,555	10,747	47,103	42,917	2,539
2015 .....	106,030	85,501	13,269	72,559	63,548	3,213
2016 .....	169,970	152,269	14,446	128,610	115,536	4,166
2017 .....	261,782	234,053	21,197	212,255	166,186	4,869
2018 .....	262,965	246,525	29,057	62,026	90,974	4,675
5-year total .....	862,916	766,903	88,716	522,553	479,161	19,462
Average .....	172,583	153,381	17,743	104,511	95,832	3,892

As Table 10 indicates, the number of employment authorization applications filed under the (c)(8) eligibility category has increased steadily since 2014, although the trend appears to have levelled off in 2018 (it is too early to tell if this will continue) at a historically high level. Over the entire period, 88.9percent of initial filings for employment authorization were

approved. There is also a relatively high rate of renewal filings, and 62.5 percent of initial approvals were followed by an approved renewal.<sup>184</sup>

DHS obtained and performed analysis on a data set capturing a portion of (c)(8) Form I–765 information that covers principal applicants and dependents who also filed an I–589 Form with DHS (in other words, DHS affirmative cases, including DOJ—EOIR referrals), from

2014 through 2018.<sup>185</sup> Details and caveats concerning this data set are dealt with in detail in ensuing discussion of the costs of the 365 EAD filing time wait. Based on analysis of this data, several time-centered variables are developed that are relevant to the forthcoming analysis. These indicators are produced and displayed in Table 11.

<sup>183</sup> DHS Asylum cases referred to DOJ—EOIR over the period (Table 8) on average are a higher by about 13 percent on average, than the DOJ—EOIR Affirmative asylum filings. The primary reason is UAC cases. DHS counts them as referrals, but, since they are already in EOIR’s caseload as an NTA has been filed in these cases, USCIS does not enter

them into CASE—ISS and transfer the application through the usual referral process. EOIR counts them as defensively-filed asylum cases as opposed to affirmative asylum cases that have been referred.

<sup>184</sup> Relevant calculations: for approval rate, 153,381 average approvals/172,583 average receipts = .889, and for renewal rate, 95,832 average

renewals/153,381 initial approvals = .625. Both decimals are rounded and multiplied by 100.

<sup>185</sup> The (c)(8) I–765 data was provided by the USCIS Office of Performance and Quality (OPQ) from file tracking data (data accessed on Jan. 19, 2019).

TABLE 11—CALCULATED TIME INTERVALS FOR DHS AFFIRMATIVE FILINGS (INCLUDING DOJ–EOIR REFERRALS)  
[Average calendar days, FY 2014–2018]

FY	I-589 affirmative filing to I-765(c)(8) filing interval	I-765(c)(8) process time for affirmative cases	I-589 process time for DHS affirmative cases (excl. DOJ–EOIR referral cases)	Time between I-589 filing with DHS and referral to DOJ–EOIR	I-589 affirmative filing to I-765(c)(8) approval interval
2014 .....	223	83	820	590	307
2015 .....	228	84	812	737	312
2016 .....	231	68	537	476	298
2017 .....	210	67	380	278	277
2018 .....	181	43	190	84	223
5-Yr Average .....	215	69	* N/A	* N/A	283

\* DHS does not show a 5-year average for these time intervals because they are directly affected by the change from FIFO to LIFO processing.

The data presented in Table 11 capture average calendar days.<sup>186</sup> The ‘I-589 process time’ reflects the filing time to decision for DHS affirmative cases only, as DHS does not have data on I-589 process time for cases referred to DOJ–EOIR. The following column captures the average time interval between when an I-589 was filed with DHS and when it was referred to DOJ–EOIR. The final column captures the average time interval between when an I-589 was filed with DHS and a (c)(8) I-765 was approved. As is readily seen, there have been substantial declines in all of the intervals.

Before developing the general and provision-specific populations that the rule could impact, a final data element is provided. In January 2018, USCIS reinstated its LIFO scheduling priority for asylum applications. DHS partitioned out LIFO cases starting after January 2018 until the end of January 2019 to capture a full calendar year of time. The mean processing time was 166 days, which is even lower than the 190-day average for DHS adjudicated cases displayed in Table 11 for the fiscal year 2018. Note this means that the average affirmatively filed asylum application completed by USCIS was decided in 166 days in 2018, which is less than the proposed 365-day wait period to apply for employment authorization.

**B. Population**

In this section, the baseline population estimates are conducted for

<sup>186</sup> The final data column captures the important ‘wait’ time, between the filing date of the I-589 asylum petition and the approval of a (c)(8) I-765. This interval captures the amount of time an individual has between filing for asylum and being able to work and earn labor income. This metric is not exact though, as once a favorable decision is made concerning the EAD application, it takes some time to finalize the adjudication and send the approval notice.

the rule in general and each specific provision. The term ‘baseline’ applies to the maximum population that the rule could involve. However, an important consideration in this regard is that there could be feedback from one provision that affects the baseline population. In the ensuing section on costs, the baseline figures will be tuned and modified to reflect the specific populations that could be impacted by the provisions. These adjusted populations will be the ones incurring specified cost impacts.

The final rule requires aliens who file for an EAD under the (c)(8) asylum category to submit biometrics and pay the \$85 biometric services fee. This biometrics requirement is the encompassing provision that captures the largest population under the rule. There will also be a small burden increase associated with the Form I-765. Asylum applicants filing for employment authorization under (c)(8) will be required to attend a biometric services appointment and will also need to answer new, additional questions on the form relating to new eligibility requirements, and read the associated instructions. DHS estimates that the biometric services appointment will add an additional 1 hour and 10 minutes, while reading the instructions and answering the questions will add an estimated 15 minutes to the overall Form I-765 time burden for this category of filers. The encompassing population is the average of 172,583 initial filers (Table 10) would incur the small forms-centered time burden and biometrics requirement. In addition, current EAD holders who file for renewals would also submit biometrics and pay the \$85 biometric services fee. Currently, initial (c)(8) I-765 filers do not pay the I-765 filing fee, but renewal filers do, and this rule does not suggest

a change to the protocol. The annual average renewal (c)(8) I-765 filing population is 104,511 (Table 10).

The final rule requires all asylum applicants to wait 365 calendar days before filing for, and being granted, an initial EAD. Currently, applicants have a 150-day waiting period before they can file for an initial (c)(8) EAD. However, applicants whose initial EAD applications are denied would not be affected, and renewal EADs would not be affected by the 365-day waiting period. Hence, the baseline population for the 365-calendar-day waiting period provision is the average number of initial (c)(8) I-765 approvals from FY 2014–2018, which is 153,381 (Table 10).

DHS is eliminating the preferential category of recommended approvals for asylum, under which an asylum applicant can file an EAD request upon initial favorable review by an asylum officer, prior to completion of all background, security, and related checks. Currently, aliens who have received a notice of recommended approval are able to request employment authorization ahead of the waiting period for those with pending asylum applications. From FY 2014 to FY 2018, DHS issued 15,359 recommended approvals, or 3,072 on average annually. This population will be subject to the final rule.

The final rule makes any alien who entered or attempted to enter the United States illegally ineligible for a discretionary EAD, absent mitigating circumstances discussed in the preamble. DHS does not know how many persons would have been subject to this provision in the past, and cannot determine this population going forward. This rule will also bar any alien who has been convicted of or charged with a serious crime from eligibility for a discretionary EAD, with

some exceptions, as is discussed in detail in the preamble. DHS does not know how many persons would have been subject to this provision in the past and cannot determine this sub-population going forward. While individual adjudicative and security-related records can capture evidence and factors related to criminal activity, such information is not available in a dataset that can be queried for the requisite type of analysis and estimation needed.

DHS will terminate an alien’s employment authorization connected to affirmative asylum applications on the date the asylum application is denied or dismissed by USCIS. Currently, such EADs terminate within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. DHS analysis reveals that about 215 EADs were approved annually on average concomitant to denied DHS affirmative asylum claims; as of the present write-up, 360 such EADs are valid. Eliminating EADs linked to DHS affirmative asylum denials will end the

validity of those EADs earlier than they otherwise end.

DHS is revising its regulations prescribing when employment authorization terminates following the denial of an asylum application by an IJ or BIA. DHS cannot determine how many DOJ–EOIR cases (either via DHS referral or defensive) apply to either the annual or existing population because DHS does not have granular data on DOJ–EOIR cases that would facilitate analysis of EADs. The employment authorization will continue for 30 days following the date that an IJ denies an asylum application to allow for a possible appeal of the denial to the BIA. If the alien files a timely appeal of the denied asylum claim with the BIA, employment authorization will continue through the BIA appeal. Currently, such EADs are allowed to naturally expire according to the terms of their EAD, unless the applicant seeks administrative or judicial review.

DHS will bar from eligibility for employment authorization aliens who failed to file for asylum within one year of their last arrival in the United States, as required by law, if an asylum officer

or IJ determines that an exception to the one-year filing bar does not apply. This bar would not apply to UACs. From FY 2014 to FY 2018, DHS referred 41,628 cases to DOJ–EOIR based on the one-year filing bar, for an annual average of 8,326.

The final rule seeks to clarify that aliens who are paroled from custody after receiving a positive credible fear or reasonable fear determination are not eligible to seek immediate employment authorization under 8 CFR 274a.12(c)(11), although, historically, USCIS has granted many of these requests. Aliens could still file under the (c)(8) category, if eligible. However, they will be subject to the 365-day wait period. From FY 2014 to FY 2018, an average of 13,000 applications sought employment authorization through the (c)(11) category. However, DHS is unaware how many will apply for an EAD under 8 CFR 274a.12(c)(8) and would meet this rule’s eligibility requirements.

Table 12 presents a summary of the populations that could be affected by this rule.

TABLE 12—SUMMARY OF ASYLUM EAD POPULATIONS UNDER THE FINAL RULE  
[Annual]

Abbreviated provision (description)	Population estimate
a. I–765(c)(8) initial filers—biometrics .....	172,583.
b. I–765(c)(8) renewal filers—biometrics .....	104,511.
c. Enact 365-day EAD filing wait period .....	153,381.
d. Eliminate recommended approvals .....	3,072.
e. Bar criminals from obtaining EADs .....	Unknown.
f. End EADs for denied/dismissed asylum claims .....	1. DHS affirmative = 215 annually and 360 currently valid. 2. Affirmative referrals to DOJ–EOIR = Unknown. 3. DOJ–EOIR defensive = Unknown.
g. Bar for illegal entry into the U.S .....	Unknown.
h. One-year asylum filing bar .....	8,326.
i. Clarify(c)(11) I–765 eligibility .....	13,000.
Total final rule population (maximum) .....	290,094.

In order to derive the total population potentially impacted by the rule, we add the annual flow volumes of the encompassing current biometrics (and time burden) population of 172,583 and the renewal filing volume of 104,511, which total to 277,094. To this sub-total, adding the potential 13,000 (c)(11) filers yields 290,094, which is the encompassing population. Since the other sub-populations collated in Table 12 are, by definition, (c)(8) I–765 filers, we do not add them to the flow volume, to safeguard against double-counting. But for the first year, the expected annual population of 290,094 is annotated the 360 existing EADs that are connected to denied affirmative asylum

claims that could be ended early. When added to the encompassing population expected annual flow volume, yields a maximum population of 290,454, which could be expected in the first year the rule takes effect. Starting in year two, the population would expectedly revert to the annualized flow volume of 290,094.

Having estimated the general population subject to the rule and the sub-populations germane to the specific provisions, DHS next conducts the economic impact assessment, noting, as was done in the introduction to this section, that the populations reported

above are adjusted for technical considerations regarding the effects.<sup>187</sup>

*C. Transfers, Costs and Benefits of This Rule*

1. Costs

This section will be parsed into three modules. In Module 1, some key assumptions that will apply to multiple provisions are established. Module 2 develops quantitative costs and transfers for relevant provisions, while Module 3

<sup>187</sup> Preliminary data revisions indicate that the (c)(8) I–765 filings and approvals in 2018 and 2017 could be higher than reported herein (Table 10). Finalized adjustments to the populations based on revised and validated data will be made at the appropriate stage of final rule development.

covers costs and transfers that are not amenable to quantification.

#### Module 1. Data and Assumptions

As was mentioned in the “Population” section above, DHS obtained a data set capturing (c)(8) I–765 filing data for initial applicants (this includes EAD filing data for both affirmative and defensive asylum applicants). These data include a large number of variables. DHS also obtained asylum application data for affirmatively-filed asylum applications, and integrated elements of the two data sets to capture information on affirmative asylum applicants who also filed for an EAD. However, DHS does not have a way to match decisions for cases adjudicated by an IJ with EAD data. Our analysis is based on this large scale data set that captured numerous variables important to the analysis. Several key assumptions and foundations apply across multiple provisions, which, in favor of brevity and readability, are introduced up front and only discussed hereafter where necessary.

For the provisions that would delay or prohibit an asylum applicant from earning employment authorization, the impacts of this rule would include both distributional effects (which are transfers) and costs. These distributional impacts would fall to the EAD holders in the form of lost or delayed compensation (wages and benefits). A portion of this lost compensation would be transferred from these aliens to others that are currently in the U.S. labor force, possibly in the form of additional work hours or overtime pay. A portion of the impacts of this rule would also be costs borne by companies that would have hired the asylum applicants had they been in the labor market earlier, but were unable to find available replacement workers.

Companies may also incur opportunity costs by having to choose the next best alternative to immediately filling the job the asylum applicant would have filled. As a result, DHS does not know the portion of overall impacts of this rule that are transfers or costs. If companies can find replacement labor for the position the asylum applicant would have filled, this rule would have primarily distributional effects in the form of transfers from asylum applicants to others already in the labor market (or workers induced to return to the labor market). If companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, this rule would primarily be a cost to these companies through lost productivity and profits. DHS uses the

lost compensation to asylum applicants as a measure of the overall impact of the provisions that would delay or prohibit an asylum applicant from obtaining employment authorization—either as distributional impacts (transfers) or as a proxy for businesses’ cost for lost productivity.

Furthermore, in instances where a company cannot hire replacement labor for the position the asylum applicant would have filled, there may be tax losses to the government. It is difficult to quantify income tax impacts because individual tax situations vary widely, but DHS estimates the potential reduction in employment taxes, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).<sup>188</sup> With both the employee and employer not paying their respective portion of Medicare and Social Security taxes, the total estimated reduction in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent.<sup>189</sup> We will rely on this total tax rate where applicable. DHS is unable to quantify other tax losses, such as for federal income taxes and state and local taxes.

The assessments of possible distributional impacts rely on the implicit assumption that everyone who received an approved (c)(8) EAD entered the labor force and found work, and thus earned wages of labor. We believe this assumption is justifiable because applicants would generally not have expended the direct and opportunity costs of applying for an EAD if they did not expect to recoup an economic benefit. However, as was stated earlier, DHS recognizes that impacts from COVID–19 have pushed the U.S. national unemployment rate to a much higher level than the historically low rate of 3.6 percent prior to the pandemic.<sup>190</sup>

Because the (c)(8) EAD does not include or require, at the initial or

<sup>188</sup> The various employment taxes are discussed in more detail at <https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes>. See IRS Publication 15, Circular E, Employer’s Tax Guide for specific information on employment tax rates. [https://www.irs.gov/pub/irs-pdf/p15\\_18.pdf](https://www.irs.gov/pub/irs-pdf/p15_18.pdf). See More Than 44 Percent of Americans Pay No Federal Income Tax (September 16, 2018), available at: <https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16>.

<sup>189</sup> Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

<sup>190</sup> This unemployment rate reflects the Bureau of Labor Statistics (BLS) most recent data, for April 2019. It can be found in the “Employment Situation Summary” of the Economic News Release section: <https://www.bls.gov/news.release/empsit.toc.htm>.

renewal stage, any data on employment, and, since it does not involve an associated labor condition application (LCA), DHS has no information on wages, occupations, industries, or businesses that may employ such workers. In some DHS rulemakings, the estimates of distributional impacts and time-related opportunity costs were linked to the Federal minimum wage for new entrants to the labor force. The Federal minimum wage is \$7.25, which, when adjusted for benefits by a multiple of 1.46, is \$10.59 per hour, with an annual salary of \$15,080.<sup>191</sup> This reliance is grounded in the notion that most of the relevant EAD holders would not have been in the labor force long, and would thus not be expected to earn relatively high wages. In this rulemaking, we rely on a slightly more robust “prevailing” minimum wage of \$8.25. As is reported by the Economic Policy Institute (EPI, 2016), many states have their own minimum wage, and, even within states, there are multiple tiers.<sup>192</sup> Although the prevailing minimum wage, without accounting for benefits, could be considered a lower-end bound on true earnings, DHS uses a fully loaded wage rate, at \$12.05, which is 13.8 percent higher than the Federal minimum wage.<sup>193</sup> While DHS does not rule out the possibility that some portion of the population might earn wages at the average level for all occupations, without solid a priori or empirical information we believe that providing a range with the lower bound relying on the prevailing minimum wage is justifiable. Therefore, for the purpose of this analysis, DHS also uses a national average wage rate of \$24.98, to take into consideration the variance

<sup>191</sup> The benefits-to-wage multiplier is calculated by the BLS as (Total Employee Compensation per hour)/(Wages and Salaries per hour) = \$36.32/\$24.91 = 1.458 (1.46 rounded). See Economic News Release, Employer Cost for Employee Compensation (March 2019), U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (March 19, 2019), available at [https://www.bls.gov/news.release/archives/ecec\\_03192019.pdf](https://www.bls.gov/news.release/archives/ecec_03192019.pdf). Calculation for annual Federal minimum salary: Hourly wage of \$10.59 × 2,080 annual work hours = \$15,080.

<sup>192</sup> The EPI report is available at: <https://www.epi.org/publication/when-it-comes-to-the-minimum-wage-we-cannot-just-leave-it-to-the-states-effective-state-minimum-wages-today-and-projected-for-2020/>. There are multiple tiers of minimum wages across many states that apply to size of business (revenue and employment), occupations, working hours, and other criteria. Some of these variations per state are described at: <https://www.minimum-wage.org>.

<sup>193</sup> Calculations (1) for prevailing minimum wage: \$8.25 hourly wage × benefits burden of 1.46 = \$12.05; (2) ((\$12.05 wage–\$10.59 wage)/\$10.59) wage = .1378, which rounded and multiplied by 100 = 13.8 percent.

in average wages across states as an upper bound. The fully-loaded average hourly wage is \$36.47. All of the quantified estimates of costs and transfer payments in this analysis incorporate lower and upper bounds based on these fully-loaded wages.<sup>194</sup>

In light of the public comments on the Notice of Proposed Rulemaking, we make two additional notes here. In developing the quantified impacts that follow, the reliance on an upper and lower bound for the wages is meant to reflect the potential averages for the asylum EAD population. It by no means precludes the possibility that some may earn more than the average, or, that some earn lower than the prevailing minimum. Second, DHS recognizes that earnings may increase over the course of an EADs validity period; for example, a person who enters a job at the prevailing minimum may earn more by the time their EAD expires. However, this possibility alone does not rule out the reliance on the wage bounds that we have developed, and we see no way of credibly integrating this potential into the ensuing estimates. Nonetheless, DHS relies on a range which does allow for some variation in wages that asylum applicants may earn, including over the period of analysis.

Most of the cost impacts will result from delayed or forgone earnings to asylum applicants. Since the data analysis centers on calendar days, and costs are specifically linked to hours, we apply a scalar developed as follows. Calendar days are transformed into work days to account for the actuality that typically, 5 out of 7, or 71.4 percent, of the calendar week is allotted to work-time, and that a workday is typically 8 hours. Based on the prevailing minimum wage of \$12.05, the combined scalar is \$68.83, and, based on the average wage it is \$208.32.<sup>195</sup> In summary, based on the prevailing minimum wage relied upon, each calendar day generates \$68.83 dollars in relevant delayed or forgone earnings. It follows that for the upper wage bound that each calendar day generates \$208.32 dollars in relevant delayed or forgone earnings/delayed earnings.

<sup>194</sup> The average wage for all occupations is found BLS Occupational Employment Statistics, May 2018 National Occupational Employment and Wage Estimates, and reflects the 2017 average for all occupations nationally. The data is found at: [https://www.bls.gov/oes/2018/may/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/2018/may/oes_nat.htm#00-0000). Calculation: hourly wage of \$24.98 x benefits burden (1.46) = \$36.47.

<sup>195</sup> Calculations:  $.714 \times 8 \text{ hours per day} \times \$12.05 \text{ wage} = \$68.83$ , and  $.714 \times 8 \text{ hours per day} \times \$36.47 \text{ wage} = \$208.32$  (rounded).

## Module 2. Quantified Cost Impacts and Transfers

As was mentioned above, DHS will require all asylum applicants to wait 365 calendar days before filing for an initial EAD. Currently, applicants have a 150-day waiting period before they can file for an initial (c)(8) EAD. The baseline population specific to the 365-day wait period is the average annual flow of initial (c)(8) EAD approvals (153,381, Table 10), as there would not be a cost for denied applicants. Of the 153,381 average annual EAD approvals, DHS is able to conduct a detailed analysis of the impacts of the 365-day wait on only 39,000 affirmative asylum applicants, including cases later referred to DOJ–EOIR, below. While DHS does not have the data to estimate the impacts with the same confidence for the remaining residual population, DHS separately quantifies a maximum impact for the residual population later in the analysis.

The analysis of the 365-day EAD filing wait involves the interaction between data germane to the asylum cases and the EAD simultaneously. In this context, we discuss several reasons why the analyzable 39,000 is relatively low, about a quarter of the approval population. Foremost, it captures no defensively-filed asylum cases because DHS does not have data about asylum case decisions for defensively adjudicated cases. Second, it does not capture cases germane to pending asylum cases—it captures cases in which a DHS decision or referral to DOJ–EOIR was made. Third, the data had to be obtained by developing a program to query several disparate data sets at once and match data between them in a structured format, with dozens of data points and indicators for each case. For cases in which one or more of the key data points was missing or not viable, the analysis as required was not possible. DHS parsed and filtered the data to exclude extreme outliers and erroneous data to obtain the most viable and tractable data amenable for the analysis.

For the approximately 39,000 EADs associated with affirmative asylum filings adjudicated by DHS for which data are available, a reasonably detailed estimation of the impacts from changing the wait period to file for employment authorization from the 150-day Asylum EAD Clock to the 365 day waiting period can be conducted. For affirmative cases referred to DOJ–EOIR by DHS for which data are available some estimation can be performed, but not with the same extent of precision and completeness, due to data

constraints. This part of the analysis focuses on the DHS affirmative asylum cases for which complete data is available, and for DHS affirmative cases referred to DOJ–EOIR, for which some data is available. DHS does not have complete data for the “residual” population, and estimates a maximum potential impact for this population separately.

The analysis of the 365-day wait begins with consideration that some aliens, for whatever reason, did not file for an EAD until after 365 days. Our analysis of the approximately 39,000 I–765(c)(8) initial EAD approvals for affirmative asylum indicate that this group comprises 10.2 percent of the 39,000 approved EADs with available data. Technically, this group, comprising 3,978 EADs, would not be impacted by the 365-day wait, and, adjusting for them yields a “narrowed” baseline of 35,022. While the percentage filing for an EAD after 365 days could vary in the future, it is integrated herein for the cost estimates.

As noted above, the impact of the provision depends on the interaction between the asylum decision and the EAD approval, since a granted asylum application provides de facto employment authorization. Therefore, the narrowed baseline can be decomposed into specific cost-segments to more appropriately hone the potential impacts. There has been a substantial reduction in DHS affirmative asylum processing time over the five-year span 2014–2018, and the adoption of LIFO processing has further contributed to the reduction. As noted above, in January 2018, USCIS reinstated LIFO processing. Although DHS typically relies on 3- or 5-year averages in most cost benchmarks, in this specific case, since LIFO is more likely to be representative of the future than an average of four years of FIFO and one year of LIFO, and, since it appears to have had a significant impact on asylum processing times, the costs are benchmarked to the calendar year of time covering the end of January 2018 to the end of January 2019 for DHS affirmative asylum decisions.

Of the narrowed baseline, DHS referrals to DOJ–EOIR comprise 74.4 percent (26,056 cases) and DHS affirmative adjudication comprises 25.6 percent (8,966 cases) annually. The narrowed baseline for DHS affirmative asylum is parsed into four groups, A–D, that capture different cost segments germane to the potential interaction between approved asylum and the EAD and expected future conditions. Group A comprises DHS affirmative asylum adjudicated prior to 365 days, in which



the EAD was “binding”. The latter impart that the EAD was approved prior to the asylum decision. For Group A, because the asylum application for these applicants would be adjudicated prior to the 365-day wait period, the cost in terms of the rule is the time interval between the current wait time and asylum approval. To explain this via an example, consider an alien that currently files for an EAD at the 150-day mark and has it approved 40 days later, at 190 days. If the concomitant asylum adjudication is at the 200-day mark, the true benefit the EAD could provide is 10 days (assuming the asylum claim is approved). Table 13 is introduced, which shows that Group A represented 11 percent of the narrowed baseline, or 3,852 aliens annually, and the average impact in terms of the EAD benefit is 53 days (in Table 13 all the shares are provided on the basis of the narrow baseline).

Group B similarly consists of DHS affirmative asylum adjudicated prior to 365 days, but in contradistinction to Group A, under Group B the EAD was “non-binding”—which means the grant of asylum could provide *de facto* employment authorization, as it was adjudicated before the EAD. Because of this, Group B would not incur a cost impact in terms of delayed earnings from the provision. For this 9.5 percent of the narrowed baseline, or 3,327 aliens, the EAD benefit was zero (as it was non-binding). Essentially, the EAD approval was inconsequential, and invoked a net cost because the filing costs were sunk. Hence, the cost in terms of this rule is nil, but the forgone filing (sunk) costs can appropriately be credited as cost-savings.

A key takeaway is that Groups A and B would potentially not file for an EAD in the future, since the asylum application was adjudicated in less than the 365-day wait period to apply for employment authorization. Moreover, a key inference is that under LIFO, the majority of DHS affirmative asylum cases were adjudicated in less than one year. Accordingly, forgone filing costs for the 7,180 aliens are accredited a cost-savings. There is currently no filing fee for the initial (c)(8) EAD, and the time burden is currently 4.5 hours, which includes the time associated with submitting two passport-style photos along with the application.<sup>196</sup> The Department of State (DOS) estimates that passport photos cost about \$20 per

<sup>196</sup> DHS is currently drafting a final comprehensive fee rule such that on the effective date of that rule, there may be changes to the burdens and filing costs reported herein.

application.<sup>197</sup> At the lower wage bound of \$12.05, the time related cost is \$54.23, which, when added to the photo cost of \$20, yields a per person cost of \$74.25 (rounded to \$74.3). The cost savings accruing to this group (A and B) would be \$533,438 annually. At the high wage bound, cost-savings per person would be \$184.10 and cost-savings to the group would be \$1,321,748 annually. DHS notes that this cost-savings estimate assumes the full sub-population would not file under the circumstances. However, as was mentioned in the preamble, some aliens might file for an EAD after being granted asylum if they want to have documentation that reflects that they are employment authorized.

Group C involves DHS affirmative asylum adjudicated after 365 days. It is within this context that some assumptions need to be established. We assume that in the future, all EAD filers would file at exactly 365 days and the processing time would be the global average of 69 days (Table 11), noting that the processing time relies on the five-year average because it is not directly impacted by the change to LIFO asylum processing.<sup>198</sup> These assumptions make the analysis tractable and do not impose a loss of generality. Group C comprises those whose asylum claim is decided after 434 days (the sum of the 365 day wait and the average 69 EAD processing days). This group of 981 cases comprises 2.8 percent of the narrowed baseline. For this group, the EAD is binding (*i.e.*, it provides employment benefits prior to an asylum decision), and the impact accrues to the difference between the global average current EAD-wait time of 283 days (Table 11) and 434 days (the estimated new average wait time), which is 151 days.

For Group D, affirmative asylum is currently adjudicated between 365 and 434 days. For Group D, under the baseline the EAD was approved before the asylum decision, and was therefore binding. But under the final rule,

<sup>197</sup> DOS estimates an average cost of \$10 per passport photo in the Paperwork Reduction Act (PRA). Supporting Statement found under OMB control number 1450-0004. A copy of the Supporting Statement is found on *Reginfo.gov* at: [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201102-1405-001](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001) (see question #13 of the Supporting Statement).

<sup>198</sup> The 365-day benchmark is relied upon because makes the ensuing analysis and cost estimation tractable. In reality, some aliens will wait until after 365 days if they need to resolve outstanding applicant-caused delays. However, it is also noted that submitted comments claimed that the 365-day wait period to file for an EAD is too long. As such, it is reasonable to assume that filers would generally file as soon as they can, which will be 365 days.

retaining the assumptions from above concerning average EAD processing time of 69 days, the EAD would “switch” to a non-binding state because it would be granted after the asylum application was adjudicated. As a result, there would be two impacts. First, the distributional effect to Group D is equal to the current EAD benefit (the current EAD benefit would, by definition, be strictly greater than zero). The average calendar-day impact to this 2.3 percent of the narrowed baseline, or 806 aliens, is calculated to be 130 days. Secondly, because under this rule the asylum application will be adjudicated after 365 days but before the EAD approval, the EAD filing costs will become sunk (*i.e.* while the applicant would apply for an EAD, it would not result in any benefit). Based on the population of 806 and the per-person filing cost of \$74.30 and \$184.10, reflecting the wage bounds, sunk filing costs would be \$59,849 and \$148,294, respectively. Subtracting this amount from the filing cost savings (Groups A and B) generates “net cost-savings” that will range from \$473,588 to \$1,321,748.<sup>199</sup>

The remainder of the narrowed EAD approval baseline applies to DHS referrals to DOJ-EOIR, which comprise 26,056 cases (Group E). DHS cannot partition these cases into cost segments akin to Groups A–D. While the data does allow DHS to calculate the average wait time in terms of when asylum was filed and when the EAD was approved for DHS referrals to DOJ-EOIR, because we do not have data concerning the decision on the asylum application the interaction between the EAD and asylum decision cannot be calculated. DHS analysis indicates that the impact is 133 days (the difference between the global average current EAD-wait time for Group E and the estimated new average wait time under this rule), and it is requisite to justify why this figure is reported as opposed to the 151-day impact for Group C. In practice, the average wait time and EAD processing times for Group C differ very slightly from the global averages reported in Table 11, but the difference is not statistically significant. However, the current wait for DHS referrals—measured strictly as the time interval between the filing for affirmative asylum and the EAD approval—is larger, at 301 days, and the difference is

<sup>199</sup> Conceptually, a fifth group, could be added, under for which asylum was adjudicated after 365 days but before the EAD approval. There would be no earnings impact as a result of this provision, but analysis reveals that no cases would fit this conceptual category.

statistically significant.<sup>200</sup> As a result the difference in day-impact between

Group C (151 days) and Group E (133 days) is 18 days, which is exactly the

difference in current wait times between the two, at 283 and 301, in order.

TABLE 13—NARROWED BASELINE OF EAD APPROVALS THAT COULD BE ANALYZED

Group	Population	Share (%)	Group description	Average days
Group A ..	3,852	11.0	DHS asylum adjudicated <365 days; EAD binding .....	53
Group B ..	3,327	9.5	DHS asylum adjudicated <365 days; EAD non-binding .....	0
Group C	981	2.8	DHS asylum adjudicated >434 days; EAD binding by definition .....	151
Group D	806	2.3	DHS asylum adjudicated between 365–434 days; EAD currently binding .....	130
Group E ..	26,056	74.4	DHS referrals to DOJ–EOIR .....	133

DHS notes that while working with averages makes the analysis tractable and clearer, a caveat is that we rely on the assumption that the (c)(8) I–765 processing time is the same as the average from FY 2014 to FY 2018 (*i.e.* before), and after this rule.<sup>201</sup> In a sense too, we assume that the I–589 processing times, when we benchmark

to the LIFO protocol, will be the same as well. If either change, the costs developed in Table 14 could vary. There could be two sources of such variation in the monetized costs. First, the populations of the subgroups could change, and, second, the day impacts could also change.

Table 14 (A and B) breaks out the cost for each group presented in Table 13.

The population germane to each group is repeated, as is the day impact. The following three columns translate the information into quantified costs. The data presented are undiscounted, with the low wage estimates provided in Table 14(A) and the upper bound wage estimates provided in Table 14(B).

TABLE 14(A)—365-DAY EAD FILING WAIT COST PROJECTIONS BASED ON THE LOWER WAGE BOUND  
[Undiscounted, annual]

Group	Population	Day impact	Costs per person (day impact × \$58.83)	Costs (population × costs per person)	Tax impacts (costs × 15.3%)
	3,852	53	\$3,648	\$14,053,590	\$2,150,199
	3,327	0	0	0	0
	981	151	10,393	10,191,866	1,559,355
	806	130	8,948	7,207,587	1,102,761
	26,056	133	9,154	238,530,155	36,495,114
Subtotals .....	.....	.....	.....	269,983,197	41,307,429
Minus: Net costs-savings = .....	.....	.....	.....	473,588	.....
Equals: Grand total = .....	.....	.....	.....	269,509,609	41,307,429

TABLE 14(B)—365-DAY EAD FILING WAIT COST PROJECTIONS BASED ON THE UPPER BOUND WAGE BOUND  
[Undiscounted, annual]

Group	Population	Day impact	Costs per person (day impact × \$208.32)	Costs (population × costs per person)	Tax impacts (costs × 15.3%)
A. ....	3,852	53	\$11,041	\$42,534,415	\$6,507,766
B. ....	3,327	0	0	0	0
C. ....	981	151	31,456	30,846,571	4,719,525
D. ....	806	130	27,082	21,814,391	3,337,602
E. ....	26,056	133	27,707	721,932,323	110,455,645
Subtotals .....	.....	.....	.....	817,127,700	125,020,538
Minus: Net costs-savings = .....	.....	.....	.....	1,173,454	.....
Equals: Grand total = .....	.....	.....	.....	815,954,246	125,020,538

<sup>200</sup> The tests of significance for differences in the means for the global population and Group C population report exact probability values (p-values) of .124 and .179, allowing determination that the minute differences are not significant at the 95 percent level of confidence. The p-value for the difference in the mean of 301 for DHS referrals is

.042, allowing determination that it is significantly different than the global of 283.

<sup>201</sup> DHS also separately published an NPRM entitled “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications,” DHS Docket No. USCIS–2018–0001. If adopted as a Final Rule, that rule would affect current EAD processing

times under the *Rosario v. DHS* court order. However, based on USCIS’s best estimate of what will occur after the 30-day rule becomes effective (as discussed in that rule), USCIS does not expect average processing times would meaningfully differ from the historical average processing times relied upon in this analysis.

Subtracting the net cost-savings from the subtotals yields the total costs of the rule in terms of lost or delayed earnings from the 365-day wait for 39,000 of the 153,381 EADs affected annually, which DHS estimates could range from \$269.5 million to \$816.0 million annually, depending on the wage of the asylum worker. Similarly, the reduction in tax transfer payments from employers and employees to the federal government could range from \$41.3 million to \$125.0 million annually, depending on the wage and if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided.<sup>202</sup> The annual midrange for costs and taxes are \$542.7 million and \$83.2 million annually, in order. However, DHS notes that the lack of data about DHS referrals precluded our ability to parse out potentially lower cost segments of the 26,056 annual affirmative cases referred to DOJ–EOIR, as we were able to do with DHS-adjudicated asylum applications. This inability likely results in a dual effect. First, for some segments, the day gap would be lower than the average 133 days, thus reducing deferred or lost wages and tax transfers. In addition, there would be cost savings that would accrue to forgone filings as some might not need to file a (c)(8) I–765. As it relates to defensively-filed asylum cases, as was seen in groups A–D of affirmative cases, there could be cost-savings from no longer filing an I–765, and for cases in which the EAD was filed after 365 days, this rule will not have an impact.

In the above section, DHS analyzes 39,000 of the 153,381 affected EAD approvals for which DHS could obtain specific data to assess the impacts of the 365-day EAD filing wait time. In this section, DHS analyzes the remaining 114,381, the “residual” population, which contains three groups of EAD cases linked to asylum: (i) What is likely a small number of DHS affirmative cases for which viable data could not be ascertained; (ii) DHS affirmative asylum cases in which the asylum claim was pending; and (iii) defensive cases. Since we have incomplete data on this population, DHS estimates the day-impact as the difference between the future projected 434 days and the global

current average of 283 days (EAD wait time), or 151 days.

For the residual population, the cost impact at the low wage bound is \$10,393 each (151 days multiplied by \$68.83), which, at a population of 114,381, generates \$1.189 billion in lost earnings and, if companies cannot find reasonable substitutes for the labor the asylum applicant could have provided, could generate a reduction of \$181.9 million in taxes transferred from employers and employees to the federal government annually. The cost impact at the upper wage bound is \$31,456 each (151 days multiplied by \$208.32), which, at a population of 114,381, generates \$3.598 billion in lost earnings and an associated potential \$550.5 million reduction in tax transfers annually.

The costs reported above represent a maximum estimate of the potential impact for this residual population. This is because DHS lacks data on the how many days after filing for asylum these applicants apply for an EAD and how many days after filing for an EAD these applicants receive an asylum decision, which would allow DHS to parse the lower cost segments. Specifically, there may be a portion of the residual population that currently waits more than 365-days to apply for an EAD. The estimated 151-day delay would be overstated for this group and would decrease the above estimated impact. Additionally, there may be a portion of the residual population that would receive an asylum decision in less than 434 days. The estimated 151-day impact would also be overstated for this group. Furthermore, aliens who receive an asylum decision in less than 434 days would not have to file for an EAD under this rule, resulting in cost savings for forgone future filings. However, DHS notes that a large number of defensive cases are unlikely to be adjudicated before 434 days. Although DHS does not have the information to map defensive asylum cases to the associated EADs, DHS was able to obtain data on defensive asylum claims that captured the date the asylum case was received, and the completion date. Our analysis reveals that for FY 2014–2018 the average time interval between the two days was 624 days. Since defensive asylum processing times have been on average (over the studied period) greater than 434 days, relying on the 151-day impact period is a reasonable estimate. Nevertheless, because 151 days is by definition the maximum impact allowable in our impact setup, the estimates are still overstated because at least some of the defensive cases (and the DHS affirmative cases not included

in the 39,000 batch with analyzable information) would invoke asylum decisions less than 434 days. As a result, the true day-impact for some of the residual population would be strictly less than 151 days.

This rule incorporates a biometrics requirement into the employment authorization process for asylum seekers. Specifically, aliens will be required to appear at an ASC for biometrics collection and pay a biometrics services fee. The biometrics requirement will apply to (c)(8) I–765 filers, for both initial and renewal EAD applications. Biometrics are currently collected for all (both affirmative and defensive) Form I–589 applicants, and they are exempt from paying the \$85 biometric services fee. However, biometrics are not currently collected when asylum applicants apply for employment authorization. This rule will not impact the asylum filing biometrics protocol, but would require biometrics collection at the EAD filing stage for (c)(8) I–765 applicants, as well as payment of the biometric services fee, which is currently \$85.

To estimate the cost of this biometrics requirement, we begin with the population of 290,094, which, tallied earlier, comprises the initial, renewal, and potential (c)(11) transfer populations. Biometrics are also not currently collected for (c)(11) I–765 filers and thus would also be a new requirement for these 13,000 annual filers. First, as the analysis for the 365-day filing wait period demonstrated, a portion of filers, Groups A and B from above (20.5 percent), would potentially not file under the rule because the asylum decision would precede the EAD approval under this rule (under the LIFO protocol). We scale the population by this percentage to yield an adjusted population of 230,625 ( $290,094 \times ((1 - 0.205))$ ). Even under broad current or planned biometrics collection, there are often cases in which some individuals do not submit biometrics or pay the \$85 biometric services fee. This section develops proxy metrics to allow for equitable estimations to populations not yet existent, in context. Therefore, the second stages of the population adjustment require a more detailed, technical approach. This approach is developed next.

When an alien appears at a DHS–USCIS ASC for a biometric collection appointment, their biometrics are digitally collected and stored in the Customer Profile Management System (CPMS) database, which is the USCIS data repository for biometrics submissions. DHS obtained biometric submission data from CPMS for the five-

<sup>202</sup> The calculations for the tax impacts are conducted as follows. For the lower wage bound, the aggregated income tax rate of 15.3 percent multiplied by the cost sub-total of low end of \$269,983,197 yields \$41,307,429. For the upper wage bound, the aggregated income tax rate of 15.3 percent multiplied by the cost sub-total of low end of \$817,127,700 yields \$125,020,538.

year period 2013–2017. The five-year average across all USCIS immigration forms was 3,619,794. Detailed analysis of the biometrics submissions data reveals that a small group of nine forms accounted for the vast majority, 90.5 percent, of the average biometrics submissions. These forms are: (1) Form N–400, Application for Naturalization; (2) Form I–90, Application to Replace Permanent Resident Card; (3) Form I–765, Application for Employment

Authorization; (4) Form I–485, Application to Register Permanent Residence or Adjust Status; (5) Form I–589, Application for Asylum and Withholding of Removal; (6) Form I–821D, Consideration of Deferred Action for Childhood Arrivals; (7) Form I–131, Application for Travel Document; (8) Form I–751, Petition to Remove the Conditions on Residence; and (9) Form I–601A, Application for Provisional Unlawful Presence Waiver (noted here

are that two of the forms, I–765 and I–589 are involved in this rule). The remainder majority of forms are characterized by very small populations, very few biometrics submissions (for which many accounted for zero submissions in terms of percentage and number), and unspecified form types. The biometrics volumes for the prevalent group of nine forms (“PREV–9”) are presented in Table 15.

TABLE 15—BIOMETRIC SUBMISSIONS BY FORM GROUPING [FY 2013–FY 2017]

Form	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	5-Year Avg.	Share
<i>PREV–9</i>							
N–400 .....	778,172	779,221	772,648	961,092	1,013,252	860,877	23.78
I–90 .....	554,918	790,069	780,050	743,589	770,552	727,836	20.11
I–765 .....	421,011	391,650	800,711	489,553	588,008	538,187	14.87
I–485 .....	459,298	506,991	494,664	500,369	547,755	501,815	13.86
I–589 .....	95,938	116,668	173,248	230,900	304,308	184,212	5.09
I–821D .....	350,339	102,192	242,101	125,489	224,899	209,004	5.77
I–131 .....	89,146	87,012	87,755	88,977	86,299	87,838	2.43
I–751 .....	185,587	172,478	93,359	71,823	83,417	121,333	3.35
I–601A .....	16,381	37,293	48,978	52,654	67,494	44,560	1.23
<i>PREV–9</i> (all) .....	2,950,790	2,983,574	3,493,514	3,264,446	3,685,984	3,275,662	90.5%
Other Forms .....	241,605	198,537	709,577	328,339	242,604	344,132	9.5%
Total .....	3,192,395	3,182,111	4,203,091	3,592,785	3,928,588	3,619,794	100%

The remaining 88 percent of forms comprise less than 10 percent of average biometrics submissions. The future population for biometrics submission under this rule does not yet exist, in context. To estimate the future population, a method needs to be developed to extrapolate functional conditions from the existing state of affairs. To accomplish this, a biometrics collection rate (BCR), a formula estimating the proportion of biometric submissions out of the total age-eligible

population within a form type, is developed. The BCR formula is below (Formula 1):

**Formula 1: Biometrics Collection Rate (BCR)**

$$BCR = \frac{BI}{P}$$

Where BCR represents the Biometrics Collection Rate for a specific form type,

BI represents “intensity,” the average number of aliens who currently submit biometrics by that form type in a fiscal year, and P represents the volume of age-eligible benefit requests associated with a form type by fiscal year. The calculations for the BCR for PREV–9 are shown in Table 16. The average biometrics submissions are repeated from Table 15 as the five-year average, and the average age eligible population is also the five-year average. The results in Table 16 call for explanation.

TABLE 16—BIOMETRICS COLLECTION RATE BY FORM GROUPING [FY 2013–FY 2017]

	Average biometrics submissions	Average age eligible filing population	BCR
<i>PREV–9</i> set			
I–765 .....	538,187	1,892,366	0.284
I–131 .....	87,838	409,699	0.214
N–400 .....	860,877	839,601	1.025
I–90 .....	727,836	703,707	0.985
I–485 .....	501,815	612,148	0.820
I–821D .....	209,004	370,838	0.564
I–589 .....	184,212	127,499	1.445
I–751 .....	121,333	164,441	0.738
I–601A .....	44,560	45,633	0.976
Two added forms			
I–918 .....	43,235	52,805	.819
I–914 .....	1,907	2004	.952
Raw BCR for regrouped set .....			.8363

The BCR for different form types varies due to the eligibility categories and age characteristics of the filers and

dependents. For the Forms N–400 and I–589, the BCR is higher than unity. The reason is that biometrics are currently

routinely collected on all principal applicants for these forms as well as derivative family members who

generally submit biometrics alongside the principal applicant. Two forms, the I-131 and I-765, have low BCRs, even though biometrics are routinely collected for these forms. But these BCRs are “artificially” low because of concurrent filings; in many cases biometrics are submitted via a concurrent form. As has been stated earlier, the goal is to broadly collect biometrics from (c)(8) I-765 filers, but there will be exemptions and waivers (that have nothing to do with this rule).<sup>203</sup> Hence, a proxy for BCR estimation should be less than unity, but be positive and relatively high, and while some analyst subjectivity is involved in our methodology, given the unknowns, it is a rational approach. The BCRs for the four forms in PREV-9 not discounted immediately above due to “artificially” high/low BCRs are assessed to be reasonable and have a good deal of range, from .564 to .985. Since it is desirable to have as many relevant forms as possible in the proxy collection, we examined the BCRs for the remaining [specific] forms and proceeded to add two, which are the only forms external to PREV-9 that have high BCRs: Form I-914, Application for T Nonimmigrant Status, and Form I-918, Petition for U Nonimmigrant Status. The respective BCRs for these two additional forms, in order, are .952 and .819, as is shown in Table 15. Recalibrating, this rebranded group of 7 forms represent just 9 percent of the form captures under CPMS (including the non-specific types) but nearly half

(46 percent) of average biometrics submissions.

For the seven proper forms, we obtain the unweighted average BCR of 83.63 percent. We do not have *a priori* information on which specific forms (or a subgroup of them) would have a BCR closest to the not yet existing, in context, rule population. Similarly, there is no “target” or desired BCR that we seek to impugn to this population under this rule. Hence, we use the raw average as opposed to a weighted one, because the former weights each BCR in the group equally. Scaling the adjusted population of 230,625 baseline biometrics by .8363 yields a projected biometrics submitting population (BSP) of 192,871.

Before estimating the costs of the biometrics requirement, another proxy metric is needed, and hence another formula is required. Not all of the biometrics submissions will involve the \$85 biometric services fee, as there may be applicable exemptions and waivers (that have nothing to do with this rule). To estimate the fee paying population, DHS uses the total volume of biometric services fee payments and the overall volume of biometric submissions to derive a biometrics fee ratio (BFR), a formula identifying the portion of aliens who pay the \$85 biometric services fee out of the total population of those submitting biometrics who may be required to pay the fee (for example, excluding I-589 applicants because they are not required to pay the corresponding biometrics fee).

The formula for the BFR calculation is provided below (Formula 2):

**Formula 2: Biometrics Fee Ratio**

$$BFR = \frac{F}{BI}$$

Where BFR represents the Biometrics Fee Ratio, F is the estimated number of aliens who pay the biometric services fee in a fiscal year and BI represents the number of biometrics submissions in a given fiscal year, which was initialized above in the BCR setup. The fee-paying volume for biometrics services is available from FY 2015 to FY 2017 only. The BFR is calculated by comparing the biometric fee paying volumes to total biometrics submissions. In FY 2017, for example, a BFR of 0.77 results by dividing a volume of 2.80 million biometric services fee payments by a total of 3.62 million biometrics submissions.<sup>204</sup> Stated somewhat differently, for every known non-exempt benefit request with a biometrics submission, DHS estimates that about 77 percent of aliens pay the biometric services fee while the remaining 23 percent of aliens receive a fee exemption, a biometric services fee waiver, or fall outside of the current age restrictions for submitting the \$85 biometric services fee. Table 17 provides the BFR calculations for each fiscal year, including the total and three-year average. The generalized BFR that obtains is .755, which is weighted for the volume size each year, since it is derived from the total that will be used for subsequent calculations.<sup>205</sup>

TABLE 17—BIOMETRIC FEE RATIO, ALL FORMS [FY 2015–FY 2017]

Fiscal year	Fee-paying volume	Biometric submissions (excludes Form I-589)	Biometrics fee rate (BFR)
FY 2015 .....	2,765,927	4,029,843	0.686
FY 2016 .....	2,746,261	3,361,885	0.817
FY 2017 .....	2,801,648	3,624,280	0.773
Total .....	8,313,836	11,016,008	.....
Average .....	2,771,279	3,672,003	0.755

Applying the average BFR of .755 to the BSP biometrics population of 192,871 yields an estimated 145,618 biometric services fee payments (BFP) annually.

Having undertaken several steps to develop the appropriate BSP and ensuing BFP, the costs germane to the biometrics requirement can be developed. The submission of

biometrics would require that aliens travel to an ASC for the biometric

<sup>203</sup> Waivers are limited and would apply when there the applicant is unable to provide fingerprints because of a medical condition.

<sup>204</sup> Calculation: 2,801,648 fee-paying volume for FY 2017/(3,928,588 total biometrics collection

volume for FY 2017—304,308 Form I-589 biometrics collection volume for FY 2017) = 0.77. The Form I-589 is excluded in the BFR calculations because there is no fee associated with this form.

<sup>205</sup> Calculation: 2,771,279 average Fee-Paying Volume/3,672,003 average biometric collection volume exclusive of Form I-589 biometric submissions = 0.75 (rounded).

services appointment.<sup>206</sup> In past rulemakings, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.<sup>207</sup> The cost of travel also includes a mileage charge based on the estimated 50 mile round trip at the 2019 General Services Administration (GSA) rate of \$0.58 per mile.<sup>208</sup> Because an individual alien would spend 1 hour and 10 minutes (1.17 hours) at an ASC to submit biometrics, summing the ASC time and travel time yields 3.67 hours. At this point we will also incorporate the added time burden of 15 minutes (.25 hours), that asylum applicants will spend answering additional Form I-765 questions and reading the associated instructions, in order to consolidate the costs. The total time is therefore 3.92 hours. At the low and high wage bounds, the opportunity costs of time

are \$47.24 and \$142.96. The travel cost is \$29, which is the per mileage reimbursement rate of .58 multiplied by 50 mile travel distance. Summing the time-related and travel costs generates a per person biometrics submission cost of \$76.24, at the low wage bound and \$171.96 at the high wage bound.

The total annual cost for the BSP would be \$14,703,739 at the low end and \$33,166,617 at the high end. Multiplying the estimated BFP by the \$85 fee yields \$12,377,518 annual biometric services fee costs.<sup>209</sup>

Combining the costs to the BSP and fee payments for the BFP, at the low and high wage, in order, are estimated at \$27,081,256 and \$45,544,134, annually.

DHS will also eliminate the recommended approvals for asylum, under which an asylum applicant can file an EAD request upon initial favorable review by an asylum officer,

prior to completion of all background, security, and related checks. No alien having already benefitted from the preferential treatment would be adversely impacted. However, DHS must treat the earnings from recommended approvals that would have occurred in the future as costs because the final rule would eliminate these earnings. For the average 3,072 annual recommended approvals, not all applied for EADs, and not all of those that applied were granted EADs. The data reveal that the share of recommended approvals that eventually were approved for EADs was 62.8 percent, yielding 1,930 annual cases. The data was organized by fiscal year and the requisite time interval was calculated by subtracting the date of the associated asylum filing from the EAD approval date. The results are presented in Table 18:

TABLE 18—IMPACT OF RECOMMENDED APPROVALS (FY 2014–2018)

Fiscal year	Average calendar days from asylum filing to EAD approval		Day difference
	No recommended approval	Recommended approval	
2014 .....	330	246	83
2015 .....	317	262	56
2016 .....	305	264	41
2017 .....	310	268	42
2018 .....	234	193	40
2014–2018 average .....	.....	.....	52

As Table 18 reveals, recommended approvals have benefited by having EADs commence validity an average of 52 days sooner than others. This 52-day raw average day tally translates into a scaled impact of \$3,579 per person at the low wage and (52-day impact × \$68.83), and \$10,833 at the high wage (52-day impact × \$208.32). Multiplying these costs by 1,930 annual cases yields a total labor income impact of \$6,907,779 and \$20,906,995, in order. Similarly, the reduction in tax transfer payments from employers and employees to the government could range from \$1,056,890 to \$3,198,770 annually, depending on the wage and if

companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. The midpoint of the range for costs and taxes are \$13,907,387 and \$2,127,830, in order.

DHS is revising its regulations prescribing when employment authorization terminates following the denial of an asylum application. Under the baseline, DHS affirmative-asylum denials have concomitant approved EADs terminated within 60 days after the adverse asylum decision or on the date of the expiration of the EAD, whichever is longer. Under this rule employment authorization would be

terminated effective on the date the affirmative asylum application is denied. However, if DHS refers the case to DOJ-EOIR, employment authorization will be available to the alien while in removal proceedings. DHS analysis of the data reveals that 360 EADs associated with a denied DHS Affirmative asylum application are currently valid that could be terminated earlier than they otherwise would, when the rule goes into effect. In addition to the costs of potentially terminated EADs in the first year, the analysis reveals about 215 EADs have been issued to concomitant asylum denials annually.

<sup>206</sup> DHS expects the majority of biometrics appointments to occur in the United States at an ASC. However, in certain instances aliens may submit biometrics at an overseas USCIS office or DOS Embassy or consulate. However, because DHS does not currently have data tracking the specific number of biometric appointments that occur overseas, it uses the cost and travel time estimates for submitting biometrics at an ASC as an approximate estimate for all populations submitting biometrics in support of a benefit request.

<sup>207</sup> See DHS Final Rule, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 FR 535 (Jan. 3, 2013).

<sup>208</sup> The General Services Administration mileage rate of \$0.58, effective January 1, 2019, available at: <https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates>.

<sup>209</sup> DHS is currently finalizing a comprehensive fee rule. DHS did not incorporate the anticipated costs of providing biometrics services for (c)(8) I-765 applicants into the cost projections for

providing biometric services used in the fee rule because this rule was not final at the time DHS developed the USCIS fee schedule. Therefore, DHS was unable to incorporate the cost of biometrics services for the (c)(8) EAD population into the underlying form fee, as it did for most other applications. DHS expects that, as of the effective date of the fee rule, (c)(8) EAD applicants will not pay more than the \$85 for the biometrics services fee; thus, the costs related to biometrics reported herein may overstate the actual costs in the future.

For the pool of 360 current EADs, the time remaining between the present date of analysis (a proxy for the rule becoming effective) and the time left on each EAD was calculated. As stated above, under the baseline, the EADs linked to these DHS affirmative-asylum would end within 60 days after the adverse asylum decision, or, on the date of the expiration of the EAD, whichever is longer. For the cases with less than 60 days left, calculating the precise cost of the rule to these cases would require a complex analysis of the interaction between two variables, the asylum decision date and the EAD validity period, as well as the rule proxy date. To make the analysis tractable, we assign these cases the 60-day period, noting that this assignment would likely somewhat overstate the costs to these cases. After the recalibration to 60 days for the cases in with less than 60 days remaining, the average time left on the EADs is 356 days. For the annual flow of 290 EADs, the cost basis is the day-time difference between the adverse asylum decision and the end of the EAD validity. For these cases the average impact is 471 days.

The costs of the provision to end some EADs early can now be tallied, since the appropriate impact metrics have been calculated. For the existing EADs, the cost impact at the low wage bound is \$24,503 each (356 days multiplied by \$68.83), which is \$8,821,253 in lost earnings and generates a potential \$1,349,652 reduction in employment taxes transferred from employers and employees to the federal government if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. The cost impact at the upper wage bound is \$74,162 each (356 days multiplied by

\$208.32), which is \$26,698,291 in lost earnings and generates a potential \$4,084,839 reduction in tax transfers. These specific costs and tax transfer impacts would be incurred the first year the rule takes effect.

For the annual flow of 215 annual EADs, the cost impact at the low wage bound is \$32,149 each (471 days multiplied by 68.83), which is \$6,970,070 in lost earnings and generates a potential \$1,066,421 reduction in employment taxes transferred from employers and employees to the federal government if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. For the annual flow of 215 EADs, the cost impact at the upper wage bound is \$98,119 each (471 days multiplied by 208.32), which is \$21,095,525 in lost earnings and a potential \$3,227,616 reduction in tax transfers. These costs and tax transfer impacts would be incurred annually.

Adding up the costs and transfers for both the existing and future EADs that could be impacted the costs would be \$15,791,323 at the lower wage bound and \$47,793,816 at the upper wage bound for the first year the rule is in effect. Similarly, the potential reduction in employment taxes would range from \$2,416,072 to \$7,312,454. The midpoint estimate for total costs and taxes, in order, are \$31,792,569, and \$4,864,263.

Having estimated the costs and tax transfers for the provisions in which costs and transfers could be quantified, we now tally them and present the total quantified costs and transfers of the final rule. There are essentially three quantified modules. First is the flow volume of costs that will be incurred in each of ten years. As was shown above, for the biometrics requirement, costs

were allotted to the time-related opportunity costs associated with submitting biometrics, the cost of travel, a form burden increase, and the biometrics service fee payments. For the proposal to eliminate recommended approvals, costs were developed as delayed earnings of labor. For the proposal to end some EADs early, cost flows are attributed to forgone future earnings (for DHS affirmative cases only). For the 365-day EAD filing waiting period, costs were assigned to forgone or delayed earnings as well. For this provision, a robust analysis was offered for the 39,000 DHS affirmative asylum cases that could be analyzed, and a slightly less robust analysis was presented for DHS referrals to DOJ–EOIR, due to data constraints. Lastly, a maximum estimate of forgone earnings was estimated for the residual population under the 365-day filing waiting period. There is also a net cost-savings due to the potential that some current filers may not need to file for an EAD in the future.

Second, with the exception of the biometrics proposal, the other provisions for which quantified cost flows are allocated, above, also incur a reduction in tax transfer payments from employers and employees to the government if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. As a third module, there could be a first year added cost and also a tax transfer applicable to the existing pool of 360 EADs that could be ended early. Table 19 presents the flow costs for the relevant provisions, undiscounted and in order of the low (A) and high wage (B) bounds relied upon. The cost figures for the 365-day EAD wait include the net cost-savings.

TABLE 19 (A)—ANNUAL FLOW COSTS FOR PROVISIONS OF THE RULE IN WHICH COSTS COULD BE MONETIZED—LOW WAGE BOUND  
[Undiscounted, 2020–2029]

Year	365 day EAD filing	Biometrics	End some EADs early	Eliminate recommended approvals	Residual (365 day EAD filing)	Annual total
1	\$269,509,609	\$27,081,256	\$15,791,323	\$6,907,779	\$1,188,761,733	\$1,508,051,700
2	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
3	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
4	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
5	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
6	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
7	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
8	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
9	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
10	269,509,609	27,081,256	6,970,070	6,907,779	1,188,761,733	1,499,230,447
10-year total	2,695,096,090	270,812,561	78,521,953	69,077,790	11,887,617,330	15,001,125,724

**TABLE 19 (B)—ANNUAL FLOW COSTS FOR PROVISIONS OF THE RULE IN WHICH COSTS COULD BE MONETIZED—UPPER WAGE BOUND**  
[Undiscounted, 2020–2029]

Year	365 day EAD filing	Biometrics	End some EADs early	Eliminate recommended approvals	Residual (365 day EAD filing)	Annual total
1	\$815,954,246	\$45,544,134	\$47,793,816	\$20,906,995	\$3,597,968,736	\$4,528,167,927
2	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
3	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
4	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
5	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
6	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
7	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
8	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
9	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
10	815,954,246	45,544,134	21,095,525	20,906,995	3,597,968,736	4,501,469,636
10-year total	8,159,542,460	455,441,341	237,653,541	209,069,950	35,979,687,360	45,041,394,652

The data in Table 19 are utilized to attain the discounted costs of the rule. The total ten-year present values at the low wage bound in order of 3 and 7 percent rates of discount, are \$12.80 billion and \$10.54 billion. Since the first year of the rule’s effects will include the additional costs applicable to ending some EADs early, the annual effect is

not constant across all ten years is not the same, and therefore, the average annualized equivalence costs are very slightly different across interest rates. At the low end wage the average annualized equivalence cost is \$1.50 billion (at both interest rates). At the upper wage bound, the total ten-year present values, in order of 3 and 7

percent rates of discount, are \$38.42 billion and \$31.64 billion. The average annualized equivalence costs are \$4.50 billion and 4.51 billion, in order.

Table 20 reports the total quantified tax transfers for the rule, based on the provisions for which quantification is possible.

**TABLE 20—ANNUAL TAX TRANSFERS FOR PROVISIONS UNDER WHICH TAXES COULD BE ESTIMATED AND MONETIZED**  
[Undiscounted]

Provision	Low wage bound	Upper wage bound
365 day EAD filing wait	\$41,307,429	\$125,020,538
Biometrics	0	0
End Some EADs early	1,066,421	3,227,615
Eliminate Recommended Approvals	1,056,890	3,198,770
Residual 365-day filing wait	181,880,545	550,489,217
Subtotal annual tax transfers	225,311,285	681,936,140
Plus: First year added tax of ending some EADs early	1,349,652	4,084,839
Equals: Total tax transfers in first year	226,660,937	686,020,979

Finally, this section concludes with Table 21, which collates the monetized impacts of the rule, in terms of both

costs (A) and taxes (B), and provides the midrange of them.

**TABLE 21(A)—MONETIZED COSTS OF THE RULE**  
[Discounted, \$ billions, 2020–2029]

	Low wage	Upper range	Range midpoint
3 percent discount (ten-year PV)	\$12.80	\$38.42	\$25.61
7 percent discount (ten-year PV)	10.54	31.64	21.09
3 percent discount (average annual equivalence)	1.50	4.50	3.00
7 percent discount (average annual equivalence)	1.50	4.51	3.00

**TABLE 21(B)—MONETIZED TAX TRANSFERS OF THE RULE**  
[\$ billions, 2020–2029]

	Low wage	Upper range	Range midpoint
3 percent discount (ten-year)	\$1.92	\$5.82	\$3.87
7 percent discount (ten-year)	1.58	4.79	3.19
3 percent discount (average annual equivalence)	0.23	0.68	0.45



TABLE 21(B)—MONETIZED TAX TRANSFERS OF THE RULE—Continued  
 [\$ billions, 2020–2029]

	Low wage	Upper range	Range midpoint
7 percent discount (average annual equivalence) .....	0.23	0.68	0.45

In concluding this section, this final rule is considered an E.O. 13771 regulatory action. DHS estimates the total cost of this rule is \$1.678 billion, based on the midpoint of the costs annualized using a 7 percent discount rate over an infinite time horizon, in 2016 dollars, and discounted back to 2016 for E.O. 13771 accounting purposes.

Module 3. Unquantified Costs and Transfers

In this section, DHS addresses impacts of the rule that DHS has considered, but is unable to quantify. First, DHS recognizes that there may be costs to asylum applicants, legal organizations that assist asylum applicants, and others for spending time becoming familiar with this rule. In addition, there are several provisions of the rule that will result in costs or distributional impacts, but for which DHS is unable to measure the size of the population and/or the possible costs and transfer payments in a quantitative fashion. For each of the provisions described below that impact asylum applicants' employment authorization, the resulting lost compensation will either represent transfers from asylum applicants to other available labor or serve a proxy for lost productivity, depending on if the business is able to find replacement labor for the job the asylum applicant would have filled. If businesses are unable to find replacement labor, it would both result in a loss of business productivity and also in a reduction in taxes transferred from asylum applicants and employers to Federal, state and local governments. As developed previously, DHS estimates per person per day lost earnings as between \$68.83 and \$208.32, depending on the wage the asylum applicant would have earned. And, if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided, the lost earnings correspond to a reduction between \$10.53 and \$31.87 per person per day in taxes transferred from employers and employees to the federal government, depending on the wage. DHS addresses each of the remaining provision below.

DHS will exclude, with certain exceptions, aliens who entered or attempted to enter the United States

other than lawfully through a U.S. port of entry on or after the effective date of the rule from eligibility for (c)(8) employment authorization. The rule will also exclude from eligibility for (c)(8) employment authorization aliens who have been convicted of an aggravated felony at any time, or has been convicted on or after the effective date of this final rule of a particularly serious crime or committed a serious non-political crime outside of the United States, or any alien who fails to establish that he or she is not subject to a mandatory denial of asylum due to any regulatory criminal grounds under 8 CFR 208.13(c). DHS is unable to estimate the population of aliens with pending asylum applications that would be impacted by the provisions dealing with illegal entry and criminality. These unknown persons will be precluded from obtaining an EAD until their asylum cases have been adjudicated. The length of time during which they will lose work authorization will depend on a number of factors, including if the asylum case will be affirmatively or defensively adjudicated and if the decision will be appealed.

Under current protocol, asylum applicants are currently allowed to renew their (c)(8) EADs while their cases are under review in Federal court. This rule will allow for Termination of EAD after Asylum Denial Affirmed by the BIA. Employment authorization would not be granted after the BIA affirms a denial of the asylum application and while the case is under review in Federal court, unless the case is remanded to DOJ–EOIR for a new decision. Some aliens may experience lost or deferred income due to this change in protocol. For aliens who file their asylum application on or after the effective date of this rule, DHS will deny (c)(8) EAD applications if such aliens have failed to file for asylum within one year of their last arrival in the United States, as required by law, unless and until an asylum officer or IJ determines that an exception to the one-year filing bar applies. DHS makes about 8,326 such referrals to DOJ–EOIR each year (Table 12). DHS has no data that would enable estimation of these effects as a result of the one-year filing bar provision. Specifically, while DHS does have data on the filing bar referrals and

the associated I–765s, we do not have data on the outcome of these filing bar referrals. EADs linked to defensive asylum cases would also be impacted by the filing bar conditions being finalized but DHS does not have data to estimate the number of defensively filed cases affected. DHS recognizes that the one-year filing deadline exception is determined at the time of the asylum adjudication. Thus, aliens granted an exception to the bar by an asylum officer or IJ, would likely face deferred earnings and lost taxes while awaiting the decision. Aliens not granted an exception to the bar would likely not be granted an EAD and would lose earnings altogether. DHS does not have data to determine for how long these applicants may lose earnings.

DHS will apply the changes made by this rule to all initial and renewal applications for employment authorization filed on or after the effective date of the final rule, with limited exceptions. DHS cannot quantify how many of the 104,511 annual renewals would be subject to the criminal provisions when the rule goes into effect or how many would be precluded from obtaining an EAD.

As discussed previously, DHS is also revising its regulations prescribing when employment authorization terminates following the denial of an asylum application. In the above quantified analysis DHS estimates the cost of these changes for asylum cases denied by an asylum officer. DHS discusses here the impacts for asylum cases denied by an IJ. Under the baseline, when an IJ denies an asylum application, the EAD terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review. This rule provides that for cases USCIS refers to DOJ–EOIR and cases defensively filed with DOJ–EOIR, employment authorization would continue for 30 days following the date that the IJ denies the asylum application to account for a possible appeal of the denial to the BIA. If the alien files a timely appeal, employment authorization would continue, and the alien would be able to file a renewal EAD application. As shown in Table 9, from 2014–2018 DOJ–EOIR denied an average of 14,820 asylum applications annually. However, the data available to

DHS does not map DOJ–EOIR case dispositions to DHS employment authorizations, and thus we cannot estimate how many denied or dismissed asylum claims by an IJ or BIA are connected to authorized EADs, either on an annualized flow or current pool basis. For DHS affirmative asylum, the populations (215 and 360, in order) were small. The numbers are likely to be higher for DOJ–EOIR, since DHS makes so many referrals to them, and, since DOJ–EOIR solely handles defensive cases. Aliens with an EAD who are denied asylum would eventually be out of the labor force even without this rule. Therefore, the cost for an employer to replace the employee (turnover cost) is not a cost of this rule. However, this rule would impact the timing of when such workers would be separated, which could vary. This rule would result in employers incurring such turnover costs earlier than without this rule.

This seeks to clarify that aliens with a positive credible fear finding are not eligible to seek immediate employment authorization under 8 CFR 274a.12(c)(11), although, historically USCIS has granted many of these requests, an average of approximately 13,000 annually. Such aliens would still be eligible to apply for a (c)(8) employment authorization to become employment authorized subject to the eligibility changes in this rule, including the 365-day waiting period. Accordingly, applicants that apply for an EAD from the current (c)(11) category may experience a delay in earnings. It is possible that some of the applicants under this scenario would have their asylum decision within 365 days and thus would potentially not file for an EAD. It is recalled that an adjustment was made for this possibility in the development of the biometrics requirement provision costs. It is also possible that some may not file as transfers for other reasons. As a result, the actual affected population would most likely be below 13,000. DHS is unable to develop a cost of lost or delayed earnings for this group because it does not have the related asylum information, so DHS does not have the data necessary to correctly segment the costs.

While the purpose of the rule is to generate disincentives to applicants to prolong the adjudication of their asylum application, it establishes that any delay requested or caused by the applicant that is outstanding or has not been remedied by the time aliens files their initial (c)(8) EAD applications will result in denial of the EAD application. Any delays in receiving an EAD could

generate economic hardship to aliens in terms of costs associated with reapplication for the EAD and delayed or lost earnings could be considered a cost. The rule amends existing language to clarify that an applicant's failure to appear to receive and acknowledge receipt of the decision following an interview and a request for an extension to submit additional evidence will be considered applicant-caused delays for purposes of eligibility for employment authorization. Any documentary evidence submitted fewer than 14 calendar days before the asylum interview (with allowance for a brief extension to submit additional evidence as a matter of discretion) may result in an applicant-caused delay if it delays the adjudication of the asylum application. The purpose of this provision is to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview. The purpose of the rule is to generate disincentives to applicants to cause any delays in the adjudication of their asylum application. While DHS has no way of predicting how the disincentives might take effect, in some cases, the changes in protocol could result in applicant-caused delays in receiving an EAD, and therefore could impose costs.

In addition to the major provisions, there are numerous technical changes, clarifications to existing language, and amendments to existing language. This rule clarifies how an asylum applicant's failure to appear for an asylum interview or biometric services appointment will affect his or her eligibility for asylum or employment authorization and provides a new timeframe and standard for rescheduling an asylum interview for the asylum application. In addition, DHS clarifies that USCIS is not obligated to send any notice to the applicant about his or her failure to appear at a scheduled biometric services appointment or an asylum interview as a prerequisite to denying the asylum application or referring it to an IJ. These amendments are intended to facilitate more timely and efficient case processing when applicants fail to appear for essential appointments. Finally, the amendments replace references to fingerprint processing and fingerprint appointment with the presently employed "biometric services appointment."

This rule also removes the language providing that an application for asylum will automatically be deemed "complete" if USCIS fails to return the incomplete application to the applicant

within a 30-day period. There is no impact from this change because USCIS is already returning incomplete applications, and this rule would remove outdated regulatory text that no longer applies.

The rule also codifies certain protocols related to the length of EAD validity and DHS authorities in the asylum process. These amendments and technical codifications outlined above and discussed in more detail in the preamble could impact the specific protocol, timing, and variations in which applicants interact with DHS over the asylum and concomitant EAD process.

Finally, DHS acknowledges a number of additional distributional impacts from provisions that will impact employment authorization for asylum applicants. DHS recognizes that without employment authorization, asylum applicants will depend on support networks such as family, state-funded and other public agencies, and non-profit organizations. The longer an asylum applicant is without employment authorization, the longer the applicant's support network is providing assistance to the applicant. In addition, without employment authorization, potentially, there could also be a reduction in some applicants' decision to seek medical care. Some aliens may be able to obtain health insurance even without an employer and some health care costs related to these effects would potentially be incurred by the support networks and/or public assistance programs.

Any earnings loss or deferment could impact the applicants' support network including, but not limited to, family members, private and public charities and non-profit organizations, non-governmental organizations (NGOs), attorneys, and state and local governments.

## 2. Benefits

It is not possible to monetize the benefits of this rule and thus DHS describes them qualitatively. This rule will reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization, allowing aliens with bona fide asylum claims to be prioritized. A streamlined system for employment authorizations for asylum seekers would reduce fraud and improve overall integrity and operational efficiency, thereby benefiting the U.S. Government and the public. For example, USCIS currently reviews an asylum application issued a recommended approval twice: First to

determine if it is initially approvable as a “recommended approval,” and then again after a recommended approval notice has been issued to the applicant to ensure that the applicant remains eligible for asylum based on the results of the background and security checks. Eliminating recommended approvals remove duplicative case processing tasks thereby enhancing USCIS efficiency.

These changes will remove incentives for aliens to enter the United States illegally for economic reasons and allow DHS to process bona fide asylum seekers who present themselves at the U.S. ports of entry in an expedited manner. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States, which will reduce injuries and deaths that occur during dangerous illegal entries, and reduce expenditures by government agencies that are charged with enforcing the immigration laws of the United States. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large.

The rule is also beneficial in the context that providing employment authorization to inadmissible and removable aliens undermines the removal scheme created by Congress and incentivizes such aliens to come to and remain in the United States.<sup>210</sup> Doing so also undermines the Administration’s goals of strengthening protections for U.S. workers in the labor market.<sup>211</sup> Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions

<sup>210</sup> In a few limited circumstances, Congress has authorized the Secretary to grant employment authorization, as a matter of discretion, to aliens who are inadmissible or deportable and even when they have a final order of removal from the United States. *See, e.g.*, INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3) (discretionary employment authorization for inadmissible or removable aliens with pending removal proceedings); INA sec. 241(a)(7), 8 U.S.C. 1231(a)(7) (discretionary employment authorization for certain aliens with final orders of removal).

<sup>211</sup> Aliens who file adjustment of status applications even if they do not ultimately qualify for adjustment of status to permanent residence and aliens who are temporarily placed in deferred action, are allowed to apply for EADs. If DHS approves the application for employment authorization, these aliens receive “open market” EADs—meaning that they may accept employment in any field and may be hired by any U.S. employer without the U.S. employer having to demonstrate that there were no available U.S. workers or guarantee that that it will pay the prevailing wage or maintain certain work conditions. As a result, such aliens are more likely to directly compete with U.S. workers for employment.

before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD program.

The biometrics requirement would provide a benefit to the U.S. Government by enabling DHS to know with greater certainty the identity of aliens seeking (c)(8) EADs and more easily vet those aliens for benefit eligibility. This would also provide DHS with the ability to limit identity fraud because biometrics are unique physical characteristics that are difficult to falsify and do not change over time.

### 3. Impact to Labor Force and Taxes

The rule, when finalized, is not expected to have a significant impact on states or the national labor force. The national civilian labor force is 164,546,000, for which the rule’s maximum population of about 290,434 (first year) would represent just 0.18 percent of the labor force. DHS received some public comments expressing that the relative concentration of asylum seekers in certain areas could affect the labor market of those states. DHS obtained the civilian labor force figures by state (including the District of Columbia) for the most recent final data, applicable to February 2020.<sup>212</sup> DHS also obtained data on the number of approved initial and renewal EADs for 2019. DHS then divided the latter by the former to calculate the ratio of EAD holders to the labor force by state. Our analysis shows that there is a high degree of correlation between size of the labor force and number of asylum-related EADs—the Pearson correlation coefficient is .82. Almost three-quarters (73 percent) of States exhibited a ratio lower than the general average of .18, and the raw (unweighted) average for these 37 states was .07%. No state had a ratio above 1 percent, and the raw average of the states above the general ratio was .39. This higher tier can be grouped into three segments. Florida and New York had higher ratios of .94 and .70, in order. Next, seven states grouped in the range of .33 to .42, and the rest fell between .21 and .26. In summary, even though the highest state, Florida, showed a ratio of .94, which is more than five times greater than the general average (.18), it is still does not reach the 1 percent level. As such, we think it is reasonable to determine that

<sup>212</sup> Relevant calculations  $290,434$  for first year/ $164,546,000 = .001765$ , which is rounded and multiplied by 100 to equal .18 percent. The national labor force figure represents the civilian labor force, seasonally adjusted, for February 2020, and is found in “Labor Force Statistics from the Current Population Survey,” at <https://www.bls.gov/cps/cpsatabs.htm>. The statewide figures are obtained from the Local Area Unemployment Statistics,” at <https://www.bls.gov/lau/#data>.

impacts accruing to the EAD holders germane to this rule will not impact the national labor force or that of individual states.<sup>213</sup>

This rule will generate costs and distributional impacts in the form of deferred and lost compensation. Additionally, if companies are unable to fill the labor the asylum applicants would have performed, some states and local governments would experience a decrease in tax transfers. DHS estimates that if all companies are unable to fill the labor the asylum applicants would have performed, the total reduction in employment taxes transferred from employers and employees to the Federal Government could range from \$225.5 million to \$682.5 million annually (annualized at 7%). There could also be a reduction in income tax transfers that could impact individual states and localities.

In addition, DHS recognizes there may be additional distributional impacts on states, such as for assistance from state-funded agencies and for healthcare from state-funded hospitals.

### B. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.<sup>214</sup>

This rule makes changes to the process by which aliens seeking asylum in the United States can apply for EADs while their asylum claims are pending either with DHS or DOJ–EOIR. DHS estimates that rule will apply to a maximum population of about 290,000, and with smaller sub-populations applicable to specific, individual provisions (which are encompassed in the maximum). This rule directly regulates individuals who are not, for purposes of the RFA, within the

<sup>213</sup> It is noted that the state relevant to the EADs reflects the address the alien provided on their application. It does not necessarily mean that the EAD holder is actually employed in that same state.

<sup>214</sup> A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

definition of small entities established by 5 U.S.C. 601(6).

As previously explained, several of the provisions being adopted may result in deferred or forgone labor earnings compensation for asylum applicants. In addition, some aliens would not be able to obtain an EAD in the future that otherwise could currently. However, these provisions do not directly regulate employers.

Although this rule does not directly regulate or directly burden small entities, DHS is unable to identify the next best alternative to hiring a pending asylum applicant and is therefore unable to reliably estimate the potential indirect costs to small entities from this rule. A final regulatory flexibility analysis (FRFA) follows.

*1. A statement of the need for, and objectives of the rule.*

The rule is being finalized in order to reform the asylum application and associated employment authorization application process in order to prioritize bona fide claims and reduce frivolous and non-meritorious asylum filings. The rule is necessary because it has been a long time since significant statutory changes have been made to the asylum provisions that would effectively address the current aspects of the immigration laws that incentivize illegal immigration and frivolous asylum filings. Furthermore, the rule could address several of the “pull” factors that encourage aliens to enter the United States without being inspected and admitted or paroled and to file non-meritorious asylum claims to obtain employment authorization or other non-asylum based forms of relief from removal. These “pull” factors have led, in part, to a significant increase in illegal immigration and in asylum filings, which has generated a severe backlog of cases and an overwhelming volume of non-meritorious cases.

*2. A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.*

One public comment referenced small entities (businesses).

*Comment:* A commenter claimed that the provision to end some EADs early makes the rule unworkable and that it poses costs to employers, including small business. The commenter noted that when an EAD is ended early, E-Verify would not be updated at the time of denial, and that there is no other central database in which the employer could check for an update. If the asylum

seeker does not divulge information about a denial to an employer, the latter is exposed to liability for hiring an unauthorized noncitizen. If the denial is divulged, automatic termination of an employee creates logistical difficulties and costs on employers whose staffing on a daily basis is integral to output. The resultant financial and logistical burden is not aligned with the DHS determination that there will be no “direct costs on small entities.” The commenter says agency should be required to justify all of the above costs and logistical difficulties created by the rule for employers.

*Response:* DHS appreciates the commenters concerns regarding logistical burdens to employers, including small businesses, due to the provision to end some EADs early. However, this rule making is not imposing new obligations or conditions on employers, so DHS disagrees that this rule directly impacts small entities. Additionally, DHS notes that fewer than 30 percent of asylum seekers are found eligible for asylum, so employers who choose to employ asylum seekers already have to account for the eventual termination of most of these workers when the alien’s asylum claim is denied.

*3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.*

DHS did not receive comments on this rule from Chief Counsel for Advocacy of the Small Business Administration.

*4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.*

This rule directly regulates pending asylum applicants, or individuals, applying for employment authorization. However, DHS presents this FRFA as the rule may indirectly impact small entities who incur opportunity costs by having to choose the next best alternative to immediately filling the job the asylum applicant would have filled. In addition, some employers, potentially including small entities, might face labor turnover costs earlier than they otherwise would under the rule’s provision to end some EADs before their validity date expires. DHS cannot reliably estimate how many small entities may be indirectly impacted as a result of this rule because DHS does not have employment information for asylum applicants who are issued EADs,

but DHS believes the number of small entities directly regulated by this rule is zero.

*5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.*

This rule would not directly impose any reporting, recordkeeping, or other compliance requirements on small entities. Additionally, this rule would not require any additional professional skills.

*6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.*

DHS is not aware of any alternatives to the rule that accomplish the stated objectives and that would minimize the economic impact of the rule on small entities, as this rule imposes no direct costs on small entities.

*C. Congressional Review Act*

This rule is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the final rule’s publication, whichever is later.

*D. Unfunded Mandates Reform Act of 1995 (UMRA)*

The Unfunded Mandates Reform Act of 1995 (UMRA) requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of \$100 million in 1995, adjusted for inflation to 2020 levels by

the Consumer Price Index Inflation Calculator, is \$172 million.<sup>215</sup>

Because this rulemaking does not impose any Federal mandates on State, local, or tribal governments, in the aggregate, or the private sector, this rulemaking does not contain such a written statement.

Under this rule, some private sector entities may incur a cost, as they could be losing the productivity and potential profits the asylum applicant could have provided. Entities may also incur opportunity costs by having to choose the next best alternative to immediately filling the job the asylum applicant would have filled. In such instances, DHS does not know if or to what extent this would impact the private sector, but assesses that such impacts would result indirectly from delays in or loss of employment authorization, and would not be a consequence of an enforceable duty. As a result, such costs would not be attributable to a mandate under UMRA. See 2 U.S.C. 658(6), (7) (defining a federal private sector mandate as, *inter alia*, a regulation that imposes an enforceable duty upon the private sector except for a duty arising from participation in a voluntary Federal program); 2 U.S.C. 1502(1). Similarly, any costs or transfer effects on state and local governments would not result from a mandate under UMRA. See 2 U.S.C. 658 (5), (6) (defining a federal intergovernmental mandate as, *inter alia*, a regulation that imposes an enforceable duty upon State, local, or tribal governments, except for a duty arising from participation in a voluntary Federal program); 2 U.S.C. 1502(1).

#### E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### H. Family Assessment

DHS has assessed this action in accordance with section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277, Div. A. With respect to the criteria specified in section 654(c)(1), DHS has determined that the rule will delay the ability for initial applicants to work and limit or prohibit some from working based on criminal and immigration history, which will decrease disposable income of those applicants with families. A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. DHS does not know how many applicants contribute to family disposable income. The total lost compensation to the pool of potential asylum applicants could range from about \$1.5 billion to \$4.5 billion annually, depending on the wages the asylum applicant would have earned. For the reasons stated elsewhere in this preamble, however, DHS has determined that the benefits of the action justify the potential financial impact on the family.

#### I. National Environmental Policy Act (NEPA)

DHS analyzes actions to determine whether NEPA applies to them and if so what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 and Instruction (Inst.) 023–01–001 rev. 01 establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish, with CEQ review and

concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023–01–001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01–001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023–01–001 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023–01–001 Rev. 01 section V.B(1)–(3). This rule amends the administrative procedure for filing an affirmative asylum application in the United States, and strengthen eligibility requirements for employment authorization based on a pending asylum application.

DHS analyzed this action and has concluded that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis. Nevertheless, if NEPA did apply to this action, the action clearly would come within our categorical exclusion A.3(d) as set forth in DHS Inst. 023–01–001 Rev. 01, Appendix A, Table 1.

This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

#### J. National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standard bodies. This rule

<sup>215</sup> U.S. Bureau of Labor Statistics, *Consumer Price Index Inflation Calculator*, <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Feb. 26, 2020).

does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**K. Executive Order 12630 (Governmental Actions and Interference With Constitutionally Protected Property Rights)**

This rule will not cause the taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**L. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)**

Executive Order 13045 requires agencies to consider the impacts of environmental health risk or safety risk

that may disproportionately affect children. DHS has reviewed this rule and determined that this rule is not a covered regulatory action under Executive Order 13045. Although the rule is economically significant, it would not create an environmental risk to health or risk to safety that might disproportionately affect children. Therefore, DHS has not prepared a statement under this executive order.

**M. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)**

Executive Order 13211 requires agencies to consider the impact of rules that significantly impact the supply, distribution, and use of energy. DHS has reviewed this rule and determined that

this rule will not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, this rule does not require a Statement of Energy Effects under Executive Order 13211.

**N. Paperwork Reduction Act (PRA)**

Under the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. See Public Law 104–13, 109 Stat. 163 (May 22, 1995). This final rule makes revisions to existing information collections. Table 19 shows a summary of the forms that are part of this rulemaking.

TABLE 19—SUMMARY OF IMPACTS TO USCIS FORMS

Form	Form name	New or updated form	General purpose of form
I-589 .....	Application for Asylum and for Withholding of Removal.	Update—revises and adds instructions for employment authorization while asylum application is pending.	This form is used by applicants to apply for asylum or withholding of removal under the Act or the Convention Against Torture (CAT).
I-765 .....	Application for Employment Authorization	Update—revises and adds instructions and questions for aliens seeking employment authorization under the (c)(8) eligibility category.	This form is used by applicants to request employment authorization from USCIS.

**USCIS Form I-589**

**Overview of Information Collection**

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I-589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individual aliens and households. The data collected on this form will be used by USCIS to determine if the alien is eligible for asylum or withholding of removal.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I-589 is 114,000 and the estimated hour burden per response is 12 hours; the estimated total number of respondents for the information collection Biometrics is 110,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the*

*collection:* The total estimated annual hour burden associated with this collection is 1,496,700 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this information collection is \$46,968,000.

**USCIS Form I-765**

**Overview of Information Collection**

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I-765; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individual aliens and households. USCIS requires an alien seeking employment authorization to file the Form I-765. The data collected on this form will be used by USCIS to determine if the individual seeking employment authorization qualifies under the categories of aliens who may apply for employment authorization under 8 CFR 274a.12.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I-765 is 2,226,026 and the estimated hour burden per response is 4.75 hours; the estimated total number of respondents for the information collection biometrics is 592,286 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection Form I-765WS is 302,000 and the estimated hour burden per response is .50 hours; the estimated total number of respondents for the information collection passport-style photographs is 2,226,026 and the estimated hour burden per response is .50 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 12,530,611 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this information collection is \$732,362,554.

*O. Signature*

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

**List of Subjects***8 CFR Part 208*

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

*8 CFR Part 274a*

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS amends parts 208 and 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

**PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL**

■ 1. The authority citation for part 208 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

■ 2. Amend § 208.3 by revising paragraph (c)(3) to read as follows:

**§ 208.3 Form of application.**

\* \* \* \* \*

(c) \* \* \*

(3) An asylum application must be properly filed in accordance with 8 CFR part 103 and the filing instructions. Receipt of a properly filed asylum application will commence the 365-day period after which the applicant may file an application for employment authorization in accordance with § 208.7 and 8 CFR 274a.12 and 274a.13.

\* \* \* \* \*

■ 3. Amend § 208.4 by revising paragraph (c) to read as follows:

**§ 208.4 Filing the application.**

\* \* \* \* \*

(c) *Amending an application after filing.* Upon the request of the alien, and as a matter of discretion, the asylum officer or immigration judge with jurisdiction may permit an asylum applicant to amend or supplement the application. Any delay in adjudication or in proceedings caused by a request to amend or supplement the application will be treated as a delay caused by the

applicant for purposes of § 208.7 and 8 CFR 274a.12(c)(8).

■ 4. Revise § 208.7 to read as follows:

**§ 208.7 Employment authorization.**

(a) *Application and decision*—(1)(i) *In General.* Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, and except as otherwise provided in paragraphs (b) and (c) of this section, an applicant for asylum who is in the United States may apply for employment authorization pursuant to 8 CFR 274a.12(c)(8) and 274a.13(a)(2) of this chapter. The applicant must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions, and must submit biometrics at a scheduled biometrics services appointment. USCIS has exclusive jurisdiction over all applications for employment authorization and employment authorization documentation based on a pending application for asylum under 8 CFR 274a.12(c)(8), regardless of whether the asylum application is pending with USCIS or the Executive Office for Immigration Review. Employment authorization is not permitted during any period of judicial review of the asylum application, but may be requested if a Federal court remands the case to the Board of Immigration Appeals. USCIS may grant initial employment authorization under 8 CFR 274a.12(c)(8) for a period that USCIS determines is appropriate at its discretion, not to exceed increments of two years.

(ii) *Period for filing.* An applicant for asylum cannot apply for initial employment authorization earlier than 365 calendar days after the date USCIS or the immigration court receives the asylum application in accordance with 8 CFR part 103 or 8 CFR 1003.31, respectively, and the filing instructions on the application. If an asylum application is denied by USCIS before a decision on an initial or renewal application for employment authorization will be denied.

(iii) *Asylum applicants who are ineligible for employment authorization.* An applicant for asylum is not eligible for employment authorization if:

(A) The applicant was convicted at any time in the United States or abroad of any aggravated felony as described in section 101(a)(43) of the Act;

(B) The applicant was convicted on or after [effective date of final rule] of a particularly serious crime;

(C) There are serious reasons for believing that the applicant on or after

August 25, 2020 has committed a serious non-political crime outside the United States;

(D) The applicant fails to establish that he or she is not subject to a mandatory denial of asylum due to any regulatory criminal grounds under 8 CFR 208.13(c);

(E) An asylum officer or an immigration judge has denied the applicant's asylum application within the 365-day period or before the adjudication of the initial request for employment authorization;

(F) The applicant filed his or her asylum application on or after August 25, 2020 and filed the application after the one-year filing deadline, unless and until the asylum officer or immigration judge determines that the applicant meets an exception for late filing as provided in section 208(a)(2)(D) of the Act and 8 CFR 208.4 and 1208.4, or unless the applicant was an unaccompanied alien child on the date the asylum application was first filed.

(G) The applicant is an alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry on or after August 25, 2020, unless the alien demonstrates that he or she:

(1) Presented himself or herself without delay but no later than 48 hours after the entry or attempted entry to the Secretary of Homeland Security or his or her delegate;

(2) Indicated to the Secretary of Homeland Security or his or her delegate an intention to apply for asylum or expresses a fear of persecution or torture; and

(3) Has good cause for the illegal entry or attempted entry, provided such good cause does not include the evasion of U.S. immigration officers, convenience, or for the purpose of circumvention of the orderly processing of asylum seekers at a U.S. port of entry.

(iv) *Delay.* Any delay requested or caused by the applicant in the adjudication of the asylum application that is still outstanding or has not been remedied when the initial application for employment authorization under 8 CFR 274a.12(c)(8) is filed will result in a denial of such application. Examples of applicant-caused delays include, but are not limited to the list below:

(A) A request to amend or supplement an asylum application that causes a delay in its adjudication or in proceedings as described in 8 CFR 208.4(c);

(B) Failure to appear to receive and acknowledge receipt of the decision as specified in 8 CFR 208.9(d);

(C) A request for extension to submit additional evidence fewer than 14-days

prior to the interview date as described by 8 CFR 208.9(e);

(D) Failure to appear for an asylum interview, unless excused by USCIS as described in 8 CFR 208.10(b)(1) for the failure to appear;

(E) Failure to appear for scheduled biometrics collection on the asylum application;

(F) A request to reschedule an interview for a later date;

(G) A request to transfer a case to a new asylum office or interview location, including when the transfer is based on a new address;

(H) A request to provide additional evidence for an interview;

(I) Failure to provide a competent interpreter at an interview; and

(J) Failure to comply with any other request needed to determine asylum eligibility.

(b) *Renewal and termination*—(1) *Renewals.* USCIS may renew employment authorization under 8 CFR 274a.12(c)(8) in increments determined by USCIS in its discretion, but not to exceed increments of two years. Employment authorization is not permitted during any period of judicial review, but may be requested if a Federal court remands the case to the Board of Immigration Appeals. For employment authorization to be renewed under this section, the alien must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions. USCIS will require that an alien establish that he or she has continued to pursue an asylum application before USCIS, an immigration judge, or the Board of Immigration Appeals and that he or she continues to meet the eligibility criteria for employment authorization set forth in 8 CFR 208.7(a). For purposes of renewal of employment authorization, pursuit of an asylum application before an immigration judge or the Board of Immigration Appeals is established by submitting a copy of the referral notice or Notice to Appear placing the alien in proceedings, any hearing notices issued by the immigration court, evidence of a timely filed appeal if the alien appealed the denial of the asylum application to the Board of Immigration Appeals, or remand order to the immigration judge or Board of Immigration Appeals.

(i) *Referrals to an immigration judge.* Employment authorization granted after the required 365-day waiting period will continue for the remaining period authorized (unless otherwise terminated or revoked) if the asylum officer refers the alien's asylum application to an immigration judge. In accordance with 8 CFR 208.7(b)(1), the alien may be

granted renewals of employment authorization while under such review by the immigration judge.

(ii) *Appeals to the Board of Immigration Appeals.* If the immigration judge denies the alien's asylum application, any remaining period of employment authorization will continue for the period authorized (unless otherwise terminated or revoked) during the period for filing an appeal with the Board of Immigration Appeals under 8 CFR 1003.38(b) or, if an appeal is timely filed within such period, during the pendency of the appeal with the Board of Immigration Appeals. In accordance with 8 CFR 208.7(b)(1), the alien may be granted renewals of employment authorization during these periods while the appeal is under review by the Board of Immigration Appeals and any remand to the immigration judge.

(2) *Terminations.* The alien's employment authorization granted pursuant to 8 CFR 274a.12(c)(8) will automatically terminate effective on the date the asylum officer denies the asylum application, thirty days after an immigration judge denies the asylum application unless timely appealed to the Board of Immigration Appeals, or the Board of Immigration Appeals affirms or upholds a denial, regardless of whether any automatic extension period pursuant to 8 CFR 274a.13(d)(3) is in place.

(c) *Severability.* The provisions in this section are intended to be independent severable parts. In the event that any provision in this section is not implemented, DHS intends that the remaining provisions be implemented as an independent rule.

■ 5. Amend § 208.9 by revising paragraphs (d) and (e) to read as follows:

**§ 208.9 Procedure for interview before an asylum officer.**

\* \* \* \* \*

(d) *Completion of the interview.* Upon completion of the interview:

(1) The applicant or the applicant's representative will have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require its submission in writing.

(2) USCIS will inform the applicant that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision

will be treated as delay caused by the applicant for purposes of 8 CFR 208.7.

(e) *Extensions.* The asylum officer will consider evidence submitted by the applicant together with his or her asylum application. The applicant must submit any documentary evidence at least 14 calendar days in advance of the interview date. As a matter of discretion, the asylum officer may consider evidence submitted within the 14-day period prior to the interview date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence. Any such extension will be treated as a delay caused by the applicant for purposes of § 208.7.

\* \* \* \* \*

■ 6. Revise § 208.10 to read as follows:

**§ 208.10 Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application.**

(a) *Failure to appear for asylum interview or for a biometric services appointment.* (1) The failure to appear for an interview or biometric services appointment may result in:

(i) Waiver of the right to an interview or adjudication by an asylum officer;

(ii) Dismissal of the application for asylum;

(iii) Referral of the applicant to the immigration court; or,

(iv) Denial of employment authorization.

(2) There is no requirement for USCIS to send a notice to an applicant that he or she failed to appear for his or her asylum interview or biometrics services appointment prior to issuing a decision on the application. Any rescheduling request for the asylum interview that has not yet been fulfilled on the date the application for employment authorization is filed under 8 CFR 274a.12(c)(8) will be treated as an applicant-caused delay for purposes of 8 CFR 208.7.

(b) *Rescheduling missed appointments.* USCIS, in its sole discretion, may excuse the failure to appear for an interview or biometrics services appointment and reschedule the missed appointment as follows:

(1) *Asylum Interview.* If the applicant demonstrates that he or she was unable to make the appointment due to exceptional circumstances.

(2) *Biometrics services appointment.* USCIS may reschedule the biometrics services appointment as provided in 8 CFR part 103.



**PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

■ 7. The authority citation for part 274a is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 8. Amend § 274a.12 by:

■ a. In paragraph (c) introductory text, adding the phrase “, unless otherwise provided in this chapter” after the phrase “petition is pending”; and

■ b. Revising paragraphs (c)(8) and (11). The revisions read as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(c) \* \* \*

(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR parts 103 and 208, whose application has not been decided, and who is eligible to apply for employment authorization under 8 CFR 208.7 because the 365-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of 8 CFR 208.7 of this chapter in increments to be determined by USCIS but not to exceed increments of two years.

\* \* \* \* \*

(11) Except as provided in paragraphs (b)(37) and (c)(34) of this section, 8 CFR 212.19(h)(4), and except for aliens

paroled from custody after having established a credible fear or reasonable fear of persecution or torture under 8 CFR 208.30, an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.

\* \* \* \* \*

■ 9. Amend § 274a.13 by revising paragraphs (a)(1) and (2) and (d)(3) to read as follows:

**§ 274a.13 Application for employment authorization.**

(a) \* \* \*

(1) Aliens seeking initial or renewed employment authorization under 8 CFR 274a.12(c) must apply on the form designated by USCIS with prescribed fee(s) and in accordance with the form instructions. The approval of applications filed under 8 CFR 274a.12(c) is within the discretion of USCIS. Where economic necessity has been identified as a factor, the alien must provide information regarding his or her assets, income, and expenses.

(2) An initial employment authorization request for asylum applicants or for renewal or replacement of employment authorization submitted in relation to a pending claim for asylum, in accordance with 8 CFR 208.7 and 8 CFR 274a.12(c)(8), must be filed on the form designated by USCIS in accordance with the form instructions with prescribed fee(s).

\* \* \* \* \*

(d) \* \* \*

(3) *Termination.* Employment authorization automatically extended pursuant to paragraph (d)(1) of this section will automatically terminate the earlier of up to 180 days after the expiration date of the Employment Authorization Document (Form I–766), or on the date USCIS denies the request for renewal. Employment authorization granted under 8 CFR 274a.12(c)(8) and automatically extended pursuant to paragraph (d)(1) of this section is further subject to the termination provisions of 8 CFR 208.7(b)(2).

\* \* \* \* \*

■ 10. Amend § 274a.14 by:

■ (a) Removing “or” at the end of paragraph (a)(1)(ii);

■ (b) Removing the period and adding in its place “; or” at the end of paragraph (a)(1)(iii); and

■ (c) Adding paragraph (a)(1)(iv).

The addition reads as follows:

**§ 274a.14 Termination of employment authorization.**

(a) \* \* \*

(1) \* \* \*

(iv) Automatic termination is provided elsewhere in this chapter.

**Chad R. Mizelle,**

*Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.*

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**BILLING CODE 9111–97–P**