



January 13, 2020

U.S. Citizenship and Immigration Services, Department of Homeland Security
Regulatory Coordination Division, Office of Policy and Strategy,
Via electronic submission

Re: Asylum Application, Interview, and Employment Authorization for Applicants
CIS No. 2648-19
DHS Docket No. USCIS-2019-0011

The City of New York (“the City”) submits this comment to oppose the Department of Homeland Security’s (“DHS”) Proposed Rule entitled “Asylum Application, Interview, and Employment Authorization for Applicants,” which was published in the Federal Register on November 14, 2019 (“Proposed Rule”).¹ The Mayor’s Office of Immigrant Affairs (“MOIA”), the Department of Social Services (“DSS”), and the Commission on Human Rights (“CCHR”) contributed to this comment.

The Proposed Rule joins a slew of attacks on the asylum application process, such as the Migrant Protection Protocol (“MPP”) and the Third Country Transit Bar, among others.² This latest Proposed Rule would create new, inappropriate obstacles to asylum seekers’ ability to gain work authorization. When taken together, these proposed changes would do great damage to an already vulnerable population by impeding their ability to achieve financial stability through gainful employment. This Proposed Rule would harm asylum seekers as well as their families—including U.S. citizens—and their local communities. The Proposed Rule violates the Administrative Procedure Act and would significantly harm immigrant New Yorkers and, with them, the social and economic well-being of New York City. For these reasons, the City strongly opposes the Proposed Rule and calls upon DHS to withdraw it in its entirety.

1. The Proposed Rule is an attack on the asylum process, which harms the City’s economic and social well-being.

New York City is the ultimate city of immigrants, with immigrants making up almost 40% of its population, or over 3.2 million people. This immigrant population is deeply tied to the City as a whole, with nearly 60% of New Yorkers living in households that have at least one

¹ Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (proposed Nov. 14, 2019).

² See comment in opposition to Asylum Eligibility and Procedural Modifications (Aug. 15, 2019); 83 Fed. Reg. 55934 (Nov. 9, 2019); 84 Fed. Reg. 62280 (Nov. 14, 2019), 84 Fed. Reg. 67243 (Dec. 9, 2019); *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019) available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

immigrant.³ In particular, asylum seekers are a vulnerable population having often made the perilous journey to the United States to flee persecution in their home countries or who have a well-founded fear of future persecution. This Proposed Rule would unduly burden those immigrant New Yorkers who are asylum seekers by creating additional obstacles to qualify for, obtain, and maintain work authorization. Inexplicably, rather than working to make the asylum process more efficient and effective for those fearing persecution, the current federal administration continues to attack the process that gives these people a pathway towards safety and stability. The Proposed Rule comes at a time when immigrants passing through third countries are being denied the ability to apply for asylum regardless of the merits of their claims, and where asylum seekers are being forced to wait in Mexico while their asylum applications are processed,⁴ where many have been targeted for theft, violence, and other harms.⁵ This Proposed Rule would further contribute to the already hostile environment for immigrants of color, particularly those applying for asylum.⁶

Generally, when a person files for asylum affirmatively, USCIS has jurisdiction in the first instance over the application. However, if USCIS does not grant the application and refers the case to removal proceedings, or when a person files defensively for the first time in the context of removal proceedings, the Executive Office for Immigration Review (“EOIR”) has jurisdiction.⁷ Currently, an individual applying for asylum in either posture may submit an initial EAD application at any point after 150 days have elapsed since the date either USCIS or EOIR received their asylum application, if no delays have been caused by the applicant.⁸ USCIS must then adjudicate the EAD application within 30 days of the date of filing.⁹ The current rule recognizes the economic hardship faced by asylum seekers during the asylum application process, and it enables them to work lawfully while they wait for their cases to be decided, if their cases are delayed more than 180 days through no fault of their own.¹⁰

³ *New York City Mayor’s Office of Immigrant Affairs, State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018, 11*, available at https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

⁴ *See* Asylum Eligibility and Procedural Modifications, EOIR Docket No. 19–0504; A.G. Order No. 4488–2019 (7/16/2019); Migrant Protection Protocols Implementation Memo, https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf, (1/25/2019).

⁵ *See* <https://www.pbs.org/newshour/show/asylum-seekers-forced-to-remain-in-mexico-face-daily-threat-of-violence>

⁶ According to the most recent USCIS data, the top ten leading nationalities for asylum applications filed with USCIS were, 1) Venezuela, 2) China, 3) Guatemala, 4) Honduras, 5) El Salvador, 6) Mexico, 7) Nigeria, 8) India, 9) Haiti, 10) Colombia. This data is based on March 2019 asylum applications. *Available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf.

⁷ 8 C.F.R. § 208.2; *see also* USCIS Affirmative Asylum Procedures Manual (2016) at 68 (“The USCIS Asylum Division has jurisdiction to adjudicate the asylum application filed by an alien physically present in the U.S., unless and until a charging document has been served on the applicant and filed with EOIR, placing the applicant under the jurisdiction of Immigration Court.”) (emphasis added); *id.* at 69 (“Jurisdiction remains with EOIR until proceedings have been terminated or the applicant departs from the U.S.”).

⁸ 8 C.F.R. § 208.7(a)(1).

⁹ 8 C.F.R. § 208.7(a)(1); *see* 8 U.S.C. § 1158(d)(2).

¹⁰ 8 C.F.R. § 208.7(a)(1), 1208.7(a)(1); *see also* 8 U.S.C. § 1158(d)(2).

The Proposed Rule inexplicably reverses this well-informed practice and undermines its intention in several ways. First, the United States Citizenship and Immigration Services (“USCIS”) seeks to revise eligibility for employment authorization for asylum-seekers in certain circumstances, including if they entered the United States somewhere other than an official port of entry, if they are filing for asylum more than one year after their last entry to the United States, expand the list of criminal and driving offenses which allow USCIS to deny an employment authorization application in their discretion. Second, USCIS proposes further delay in the ability to obtain employment authorization for asylum-seekers during vulnerable periods of instability – specifically, the Proposed Rule would: extend the waiting period to apply for a category (c)(8) Employment Authorization Documents (“EAD”)¹¹ from the current required period of 150 days to 365 days.¹² Finally, once an EAD is obtained, the Proposed Rule seeks to curtail its benefits, namely by limiting the validity period from the existing two years to shorter validity periods set in USCIS’s discretion. Shorter validity periods would mean that applicants would need to renew sooner, which in turn is likely to mean more fees spent altogether over the period of time that an asylum seeker is waiting for their case to be adjudicated.

In addition to these employment authorization related policy changes, the Proposed Rule would also make changes to the process of adjudicating asylum applications – namely, by eliminating the issuance of recommended approvals for a grant of affirmative asylum.¹³ Such approval notices are for those who the asylum officer has found to be eligible for asylum, but where additional time is needed for mandatory security checks. These notices are critical, both for applicants who are entitled to know the outcome of their interviews, and because such notices indicate that the applicant continues to be eligible for work authorization.

The City has long recognized that policies that welcome immigrants lead to stronger and more prosperous communities. As such, the City has taken great strides to welcome those fleeing persecution and provide them with a safe home.¹⁴ In addition, the City has invested in immigration legal services, so that immigrants—including those fleeing persecution—are provided with much needed support as they rebuild their lives here. Efforts advanced by this federal administration to create additional barriers for asylum seekers not only undermines the City’s commitment to immigrants, but are also inconsistent with our City’s core values. This Proposed Rule states that its goal is to decrease the number of frivolous, fraudulent, or otherwise non-meritorious asylum applications, but it acknowledges that in doing so, it will also negatively impact—and thus discourage—applicants with meritorious claims. Despite this acknowledgment, the text of the rule fails to explain how the rule will decrease the *rate* of frivolous, fraudulent, or otherwise non-meritorious asylum applications, rather than simply

¹¹ 8 CFR 274a.12(c)(8) (hereinafter “(c)(8) EAD”).

¹² Currently, a person seeking asylum may not apply for work authorization by filing an I-765 until 150 days have passed since the date that they filed for asylum (filed an I-589). This rule would increase that waiting period from 150 days to 365 days.

¹³ Currently, asylum officers make preliminary determinations to grant asylum while they await the results of mandatory, confidential investigation of the individual’s identity and background. The Proposed Rule would do away with the practice of USCIS issuing such recommended approvals for asylum.

¹⁴ See e.g., <https://www.nbcnewyork.com/news/local/syria-refugee-new-york-mayor-bill-de-blasio-immigrant/1274304/>; <https://www.nytimes.com/2016/09/20/opinion/our-immigrants-our-strength.html>.

decrease the total number of applications altogether. This Proposed Rule does nothing to enhance the integrity of the asylum process, but rather, is a thinly veiled effort to curtail asylum applications in totality, representing an abandonment of this country's legal and moral commitment to protect those who are fleeing persecution. This is especially clear given the slew of recent regulations proposed by DHS, as well as the recent reporting regarding the White House's Senior Policy Advisor, Stephen Miller, whose recently exposed emails reveal a hatred for immigrants and a desire to reshape the country's immigration policy.¹⁵

In creating more barriers for asylum seekers, the Proposed Rule continues the federal administration's trend of making the United States a hostile place for immigrants to the detriment of everyone in our communities. It is well documented that hostile climates for immigrants make the City less safe¹⁶ and less prosperous.¹⁷ As the City's Comptroller stated, "when immigrants are threatened, when their ability to live, work, and raise their families is compromised—our entire City pays a costly price."¹⁸ "The Proposed Rule would also have a negative impact on the City economy due to the EAD delays. Such delays may prevent workers from entering the workforce for an additional 185 days, which would in turn inhibit the potential of the economy's growth during this time. In addition, extending the waiting period for asylum applicants to apply for employment authorization may increase the burden on the City to provide basic services for those who cannot legally provide for themselves through employment. For example, asylum-seekers who have not obtained employment authorization may be more vulnerable to relying on emergency shelter.

2. The Proposed Rule does not accomplish DHS's stated purposes.

DHS states that its primary purpose for the Proposed Rule is to reduce incentives for individuals who "file frivolous, fraudulent, or otherwise non-meritorious asylum applications in

¹⁵ See <https://www.splcenter.org/hatewatch/2019/11/14/emails-detail-millers-ties-group-touted-white-nationalist-writers> (containing descriptions of emails sent by Stephen Miller); <https://www.buzzfeednews.com/article/hamedaleziz/stephen-miller-emails-dhs-officials-react-racism> (quoting a DHS official saying, "It's sickening to know that someone with these viewpoints held a position of trust for a United States Senator and now in the White House. Not that it wasn't clear before — these emails just confirm what we all know. I'm disgusted that my venerable agency has turned into his personal tool for hate.").

¹⁶ Mike Males, *White Residents of Urban Sanctuary Counties are Safer From Deadly Violence Than White Residents in Non-Sanctuary Counties*, http://www.cjcj.org/uploads/cjcj/documents/white_residents_of_urban_sanctuary_counties.pdf?utm_content=%7BURIENCODE%5bFIRST_NAME%5d%7D&utm_source=VerticalResponse&utm_medium=Email&utm_term=CJCJ%27s%20report&utm_campaign=New%20Report%3A%20Sanctuary%20Counties%20Safer%20for%20White%20Residents (2017); see TCR Staff, *You're Safer in a 'Sanctuary City,' says New Study*, <https://thecrimereport.org/2017/12/13/youre-safer-in-a-sanctuary-city-says-new-study/> (2017); Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, <https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> (2017).

¹⁷ See <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>; <https://research.newamericaneconomy.org/report/from-struggle-to-resilience-the-economic-impact-of-refugees-in-america/>.

¹⁸ Scott Stringer, *Immigrant Population Helps Power NYC Economy*, (Jan. 11, 2017) available at <https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-analysis-immigrant-population-helps-power-nyc-economy/>.

order to obtain employment authorization,” alleging that immigrants purposefully delay adjudication of their asylum applications in order to continue benefiting from EADs. DHS alleges that the benefits derived from the Proposed Rule will not only help USCIS, but that it will make the U.S. safer, and in particular, that it will protect U.S. workers.

Both the reasons for the Proposed Rule and the supposed benefits that come from it are entirely speculative. DHS states that the vast majority of asylum claims are not motivated by persecution under the five protected grounds. But here, DHS errs by equating success rates of merits hearings with the rate of non-frivolous applications filed. Not only does the Proposed Rule fail to cite any evidence supporting this claim, it is a claim premised on an inaccurate depiction of how asylum litigation proceedings work. DHS ignores that good faith asylum applications may not succeed at an initial hearing for myriad reasons, despite being filed with legitimate grounds and based on undeniable fear of persecution. Decisions in asylum cases draw on a distinct set of laws, regulations and jurisprudence, as well as precedent of the Board of Immigration Appeals and decisions of the Court of Appeals within the relevant Circuit. Immigration Judges make factual and credibility determinations and their decisions are appealable. Respondents pursuing asylum have no right to counsel and when filing defensively before the Immigration Court, will often continue to seek counsel after submission of their initial. Success rates in individual merits hearings, simply may not be tied to the rate of frivolous filings. This demonstrates that DHS’s methods for establishing the existence of non-meritorious asylum applications are unreliable and misrepresent the reality of the asylum system. In short, DHS has issued a Proposed Rule to solve a problem that does not exist. For these reasons, the Proposed Rule is arbitrary and capricious.

3. The Proposed Rule departs from prior agency policy without reasonable basis.

For additional context, prior to 1994, asylum applicants could apply for an EAD and apply for asylum simultaneously. In 1994, the then-Immigration and Naturalization Service (“INS”) promulgated a regulation to “streamline the adjudication of asylum applicants” and also “restrict employment authorization to applicants for asylum . . . whose claims have been pending more than 150 days.”¹⁹ This rule provided that asylum applicants could apply for work authorization after their applications were pending for 150 days and that the INS would adjudicate those applications within 30 days. In making this change, the agency was aware that “applicants with pending asylum claims will wait longer than required at present to receive employment authorization” and envisioned that “few applicants would ever reach the 150-day point.”²⁰ In this version of the rule, a provision was made for an interim EAD if an adjudication was not made within 30 days.²¹ However, in 1997, the agency removed the provision that

¹⁹ Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization (Proposed Rule), 59 Fed. Reg. 14,779, 14,779 (Mar. 30, 1994); *see also* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization (Final Rule), 59 Fed. Reg. 62,284 (Dec. 5, 1994).

²⁰ 59 Fed. Reg. at 14,780.

²¹ 59 Fed. Reg. at 14,785.

permitted interim EADs if an application was not adjudicated within 30 days.²² One of the “chief purposes” of the 30-day deadline, as part of the larger regulatory amendments issued in January 1995, was “to ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible,”²³ The focus on expediency was reinforced by how the agency described the Proposed Rule: “The INS will adjudicate these applications for work authorization within 30 days of receipt, regardless of the merits of the underlying asylum claim.”²⁴ Courts have interpreted this elevation of the 30-day deadline above the merits of the underlying asylum claim to reflect that the balance of equities has been struck in favor of adhering to the deadline so that applicants can obtain employment authorization.²⁵

The rationale of the INS in selecting 150 days was because it was a period “beyond which it would not be appropriate to deny work authorization to a person whose claim has not been adjudicated.”²⁶ The purpose of promulgating the 30-day deadline on top of that 150-day waiting period was to cabin what was already—in the agency’s view—an extraordinary amount of time to wait for work authorization. Despite the clear position of the INS at that time, that 180 days was already an “extraordinary” amount of time to wait for work authorization. Recognizing that there would be situations where USCIS would be unable to comply with the regulatory timeframe through no fault of its own, measures were put in place to ensure that where USCIS could not control delays, those delays were not counted against the agency. When USCIS issues a Request for Evidence (“RFE”) the regulatory clock counting the 30 days stops for that application, meaning that the time from when the RFE is issued until the time USCIS receives the additional information is not counted towards the 30-day timeframe.²⁷ The same type of clock-stopping measure exists for other delays caused by the applicant.

The Proposed Rule would increase the mandatory waiting period to 365 days, more than double the current wait time for initial applicants—a time already described as “extraordinary.” In addition, the agency’s underlying motivations are contrary to the interpretation of the role of work authorization contemplated by the then-INS. This Proposed Rule attempts to merge work authorization with the merits of the underlying asylum claim in a manner that was explicitly rejected by the then-INS. The then-INS believed that work authorization should become available “regardless of the merits of the underlying asylum claim” after 150 days. This demonstrates, not only the view that 150 days was a long time to wait for work authorization, but also a clearly contemplated separation between work authorization and the merits of the asylum application. The Proposed Rule blurs the lines between the adjudicators considering the merits of the asylum application, and the agencies’ use of work authorization as a means of providing an addition layer of vetting for the asylum process. This use of work authorization was never intended for this purpose and is a radical departure from the agency’s precedent which places a

²² Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures (Proposed Rule), 62 Fed. Reg. 444, 464 (Jan. 3, 1997); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures (Interim Rule), 62 Fed. Reg. 10,312, 10,340 (Mar. 6, 1997)

²³ See *Rosario* (citing 62 Fed. Reg. at 10,318 (1997)).

²⁴ See *Rosario* (citing 50 Fed. Reg. at 14,780 (1994)).

²⁵ See *Rosario* (citing 50 Fed. Reg. at 14,780 (1994)).

²⁶ 50 Fed. Reg. at 14,780.

²⁷ 8 C.F.R. § 103.2(b)(10)(i).

significant strain on the most economically vulnerably asylum seekers. Additionally, changes to the employment authorization adjudication process do not address the problem that DHS purports exists – EADs have no bearing on the merits of the underlying asylum case. Therefore, the Proposed Rule is arbitrary and capricious.

4. DHS should pursue alternative measures in pursuit of its stated goals.

While the administration has claimed the Proposed Rule is necessary, its justifications do not withstand scrutiny. Rather than continuing to create barriers for asylum applicants, DHS should follow the advice of its own Ombudsman, who provided a number of viable solutions to DHS’ concerns with USCIS’s handling of initial EAD applications.

DHS’s 2019 annual report outlines three main challenges with initial EAD application adjudications: increased filing volume; technological challenges; and insufficient staffing.²⁸ USCIS reports that technology problems significantly hampered EAD processing times. Between approximately September 2017 and February 2018, the data management system the NBC uses to process EADs (CLAIMS 3) operated more slowly than usual.²⁹ The DHS Ombudsman recommended that USCIS: hire more staff; accelerate the incorporation of the Form I-765 into eProcessing; implement a public education campaign; and improve the process around resubmissions of Form I-765 due to “service error.”³⁰ The City believes that in lieu of the Proposed Rule, DHS should take the advice of its own Ombudsman and make the changes outlined above.

Given that this most recent Proposed Rule comes on the heels of a problematic rule relating to the fee schedule, the City also strongly encourages DHS to withdraw the Proposed Rule entitled *U.S. Citizenship and Immigration Services Fee Schedule*. In addition to raising fees for a number of applications and doing away with the fee waiver in all cases that are not statutorily required, this Proposed Rule would transfer USCIS funding to ICE.³¹ Many of the goals DHS seeks to accomplish through this Proposed Rule could be addressed through alternative and less harmful means if USCIS has an additional \$112 million. With that money, USCIS could hire more employees to streamline the application process, address the growing backlog of applications, and enhance the integrity of the application process. Similarly, the City calls for an end to MPP. Ending MPP would encourage immigrants to enter at ports of entry rather than crossings between ports of entry in order to avoid being forced to remain in Mexico.

5. Conclusion

New York City is proud to be a city that so many immigrants call home and recognizes that asylum-seekers awaiting employment authorization may be in need of support from the

²⁸ https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf

²⁹ https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf

³⁰ https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf

³¹ See 84 FR 62280 (Nov. 14, 2019), 84 FR 67243 (Dec. 9, 2019).

social safety net in the form of emergency food and shelter. Instead of working to expedite the process, so that asylum-seekers can support themselves and their family members, the Proposed Rule intentionally delays their eligibility to enter the work force and would be a drastic departure from longstanding policy and the recent court order in *Rosario v. USCIS*.³²

For the reasons articulated above, we call upon DHS to withdraw the Proposed Rule and continue to work towards compliance with its 30-day adjudicatory timeframe.

³² *Rosario v. USCIS*, No. 2:15-cv-00813-JLR (W.D. Wash.), appeal pending, *NWIRP v. USCIS*, No. 18-35806 (9th Cir.) (holding that USCIS must comply with the 30-day adjudicatory timeframe).