THE CITY OF NEW YORK

OFFICE OF THE MAYOR

NEW YORK, N.Y. 10007

BITTA MOSTOFI
COMMISSIONER
OFFICE OF IMMIGRANT AFFAIRS

November 8, 2019

Via electronic submission

RE: Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 CIS No. 2617-18; DHS Docket No. USCIS-2018-0001

Dear Chief Samantha Deshommes,

The City of New York ("the City") through its Mayor's Office of Immigrant Affairs ("MOIA") and Department of Social Services (DSS) submits this comment to oppose the Department of Homeland Security's ("DHS") proposed rule entitled "Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765," which was published in the Federal Register on September 9, 2019 ("Proposed Rule").[1] The Proposed Rule joins a slew of attacks on the asylum application process, such as the Migrant Protection Protocol and the Third Country Transit Bar.[2] The Proposed Rule would remove the regulation that requires USCIS to adjudicate initial work authorization applications filed by individuals with pending asylum applications within 30 days. In so doing, the rule would further disadvantage an already vulnerable population, and would create an economic ripple effect that would harm families, employers, and businesses. This would result in severe negative consequences for asylum seekers in New York City – not only for them, but also for their families, including U.S. citizen children. As a result, the rule will significantly harm the social and economic wellbeing of the City.

When a person files an I-589 application for asylum and withholding of removal, the pending application confers eligibility to apply for an employment authorization document

[1] Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765, 84 Fed. Reg. 47148 (proposed Sept. 9, 2019).
[2] *See c*omment in opposition to Asylum Eligibility and Procedural Modifications (8/15/2019).

("EAD"), ie. a work permit, following a 150 day waiting period.[3] Under the current regulatory framework, after the person waits 150 days and files for the work permit, USCIS generally has an additional 30 days to adjudicate the application, and since July 2018, USCIS has been under court order to comply with this 30 day deadline.[4] Eligibility for employment authorization is essential to an asylum seeker's economic self-sufficiency because asylum seekers often wait months or years for adjudication of their asylum cases. The current requirement that USCIS adjudicate work authorization applications in 30 days is intended to limit the amount of time asylum seekers are delayed from obtaining work authorization and achieving economic stability.

Removing the 30-day processing provision for those with pending asylum applications would delay adjudications of work authorization applications. While currently, an individual seeking asylum has to wait a total of 180 days to obtain work authorization, DHS anticipates that under the Proposed Rule, USCIS adjudication processing times would be roughly equivalent to those in FY 2017. DHS reported that in FY 2017 less than 50% of applications were adjudicated within the 30-day timeframe and 22% of applications were not adjudicated within 60 days.[5] Authorizing a return to these types of delays will exacerbate the already dire financial circumstances facing many seeking asylum. For example, in some cases, City residents could be left with no means of supporting themselves for more than 210 days. This would be a drastic departure from longstanding policy and the recent court order in *Rosario v. USCIS*.[6]

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 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 would further delay their eligibility to enter the work force and may necessitate further reliance on the emergency social safety net the City provides.

The City may also suffer a loss in tax revenue as a result of the implementation of the Proposed Rule. DHS's own estimate is that the nationwide effect of lost compensation to asylum applicants could be significant—between $255.88 million and $774.76 million. The loss of compensation to asylum-seekers who are delayed in entering the job market may translate into lost income tax and other revenue to local governments like New York City.

For these reasons, the City strongly opposes the Proposed Rule, and calls upon DHS to withdraw it.

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

On September 9, 2019, DHS published the Proposed Rule in the Federal Register. The Proposed rule would amend regulations to remove the requirement of USCIS to adjudicate initial EAD applications for pending asylum applicants within 30 days. Generally, when a person files for asylum affirmatively, USCIS has jurisdiction over the application, and when a person files defensively in the context of removal proceedings, EOIR has jurisdiction.[7] Currently, an

[3] 8 USC § 1158(d)(2); 8 CFR § 208.7(a)(1); 8 CFR § 274a.12(c)(8); 8 CFR § 274a.13(d).
[4] *Rosario v. USCIS*, No. 2:15-cv-00813-JLR (W.D. Wash.), appeal pending, *NWIRP v. USCIS*, No. 18-35806 (9th Cir.).
[5] These adjudication processing delays would be on top of the 150 waiting period to seek work authorization.
[6] Id.
[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

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]

For context, prior to 1994, asylum applicants could apply for an EAD at the same time they applied for asylum. 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."[11] 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."[12] In this version of the rule, a provision was made for an interim EAD if an adjudication was not made within 30 days.[13] However, in 1997, the agency removed the provision that permitted interim EADs if an application was not adjudicated within 30 days.[14] 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,"[15] 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."[16] 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.[17]

The rationale of the then-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

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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 CFR § 208.7(a)(1).

[9] 8 CFR § 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). (CHECK CITES)

[11] 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).

[12] 59 Fed. Reg. at 14,780.

[13] 59 Fed. Reg. at 14,785.

[14] 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)

[15] *See Rosario* (citing 62 Fed. Reg. at 10,318 (1997)).

[16] *See Rosario* (citing 50 Fed. Reg. at 14,780 (1994)).

[17] *See Rosario* (citing 50 Fed. Reg. at 14,780 (1994)).

been adjudicated."[18] 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 then-INS, that 180 days was already an "extraordinary" amount of time to wait for work authorization, DHS now states that this Proposed Rule is necessary because they allege that the 30-day adjudicatory timeframe is no longer realistic or feasible. Capitulating to USCIS' supposed inability to comply with the 30-day adjudicatory timeframe is not only contrary to the clear purpose of the regulation's creation, it is also not accurate. In 2018, the United States District Court of the Western District of Washington ruled in favor of a class of immigrants and ordered USCIS to comply with their 30-day adjudicatory timeframe.[19] Since the *Rosario* Court ordered USCIS to comply with the 30-day adjudicatory timeframe, DHS reports that over 99% of the work authorizations for individuals with pending asylum applications have been processed within the 30-day timeline.[20] This demonstrates that USCIS is more than capable of processing these applications within the regulatory timeframe. DHS argues that USCIS should not have to comply with this timeframe and should be allowed to process applications in a timeframe closer to its Fiscal Year 2017 rates, which DHS states, is the "baseline" for USCIS' performance. In FY 2017 (the year prior to *Rosario*), USCIS, by its own admission, adjudicated less than 50% of work authorization applications within 30 days.

DHS argues that those adjudication timeframes are an accurate depiction of the time USCIS needs to adjudicate EAD applications because of the need for additional vetting of applications that raise security and fraud concerns. However, according to the text of the Proposed Rule, in FY 2017, 53% of applications were not adjudicated within the 30-day timeframe, but only 19% of the total number of applications required "additional vetting." In addition, 3% of the total number of applications required additional vetting and were still processed in 30 days. That means that at most, only 16% of the total number of applications that were not adjudicated within 30 days were the result of "additional vetting," leaving the other 37% of applications not adjudicated within the 30-day timeframe unexplained. Furthermore, DHS defines "additional vetting" as cases that either needed to be sent to the Background Check Unit (BCU) and the Center Fraud Detection Operations (CFDO) or where USCIS sent out a request for more evidence (RFE). When USCIS issues an 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.[21]

2. DHS's own Ombudsman provides alternative recommendations

Asylum seekers are a vulnerable population having fled persecution in their home countries, and having made the perilous journey to the United States to seek refuge. Inexplicably, rather than working to make the asylum process more efficient and effective for those fleeing persecution, our federal government continues to attack the process that gives these people a

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[18] 50 Fed. Reg. at 14,780.

[19] *Rosario v. USCIS*, No. 2:15-cv-00813-JLR (W.D. Wash.), appeal pending, *NWIRP v. USCIS*, No. 18-35806 (9th Cir.).

[20] https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/nirp_v_uscis_defendants_july_2019_compliance_report.pdf.

[21] 8 C.F.R. § 103.2(b)(10)(i).

pathway towards safety and stability. This 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.[22] This Proposed Rule would further contribute to the already hostile environment for immigrants, particularly those applying for asylum. While the administration has claimed these changes are necessary due to limited resources, this justification does 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 around USCIS compliance with the 30-day time frame.

DHS's 2019 annual report outlines three main challenges with initial EAD application processing times: increased filing volume, technological challenges, and insufficient staffing.[23] 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.[24] 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."[25] The City believes that in lieu of the Proposed Rule, that DHS should take the advice of its own Ombudsman and make the changes outlined above. Furthermore, it should be noted that in FY 2018, EAD receipts filed by individuals who were granted or were seeking asylum accounted for only 18% of the total number of EAD receipts. [26] USCIS' inability to adequately adjudicate work authorization applications is not created by the batch of work authorizations addressed by the Proposed Rule, and as such, this problem will not be solved by delaying these adjudications further. DHS should continue to work with USCIS to make their adjudicatory process more efficient, so that work authorizations across all categories, including those coming from individuals with pending asylum applications, can be adjudicated within the regulatory guidelines set out by DHS.

3. Conclusion

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.

Sincerely,

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[22] *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).

[23] https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf

[24] https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf

[25] https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf

[26] USCIS annual report

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