



9111-97

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2617-18; DHS Docket No. USCIS-2018-0001]

RIN 1615-AC19

Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765

Employment Authorization Applications

AGENCY: U.S. Citizenship and Immigration Services, DHS

ACTION: Notice of proposed rulemaking

SUMMARY: The Department of Homeland Security (DHS) proposes to remove a regulatory provision stating that U.S. Citizenship and Immigration Services (USCIS) has 30 days from the date an asylum applicant files the initial Form I-765, Application for Employment Authorization (EAD application) to grant or deny that initial employment authorization application. DHS also proposes to remove the provision requiring that the application for renewal must be received by USCIS 90 days prior to the expiration of the employment authorization.

DATES: Written comments and related material must be submitted on or before [Insert date 60 days from the date of publication in the Federal Register].

ADDRESSES: You may submit comments on the entirety of this proposed rule package, to include any proposed information collection requirements, which is identified as DHS Docket No. **USCIS-2018-0001**, by any one of the following methods:

- Federal eRulemaking Portal (preferred): <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- Mail: Samantha Deshommès, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW, Mailstop #2140, Washington, DC 20529-2140. To ensure proper handling, please reference DHS Docket No. **USCIS-2018-0001** in your correspondence. Mail must be postmarked by the comment submission deadline. Please note that USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept mailed comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives.

FOR FURTHER INFORMATION CONTACT: Daniel Kane, Branch Chief, Service Center Operations, U.S. Citizenship and Immigration Services (USCIS), DHS, 20 Massachusetts NW, Washington, DC 20529-2140; telephone: 202-272-8377.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. **Public Participation**
- II. **Executive Summary**
 - A. Purpose of the Regulatory Action
 - B. Legal Authority
 - C. Costs and Benefits
- III. **Background and Discussion of Proposed Rule**
 - Processing of Applications for Employment Authorization Documents
 - 1. Elimination of 30-Day Processing Timeframe
 - 2. Removal of the 90-Day Filing Requirement
 - 3. Corresponding U.S. Department of Justice (DOJ) Regulations
- IV. **Statutory and Regulatory Requirements**
 - A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)
 - 1. Summary
 - 2. Background and Purpose of the Proposed Rule
 - 3. Population
 - 4. Transfers, Costs and Benefits of this Proposed Rule
 - B. Regulatory Flexibility Act
 - C. Congressional Review Act
 - D. Unfunded Mandates Reform Act of 1995

- E. Executive Order 13132 ((Federalism)
 - F. Executive Order 12988 (Civil Justice Reform)
 - G. Paperwork Reduction Act
 - H. Family Assessment
 - I. Executive Order 13175
 - J. National Environmental Policy Act (NEPA)
 - K. National Technology Transfer and Advancement Act
 - L. Executive Order 12630
 - M. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
 - N. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- V. **List of Subjects and Regulatory Amendments**

Table of Abbreviations

- BCU Background Check Unit
- CFDO Center Fraud Detection Operations
- CFR Code of Federal Regulations
- DHS Department of Homeland Security
- EAD Employment Authorization Document
- INA Immigration and Nationality Act
- HSA Homeland Security Act of 2002
- USCIS U.S. Citizenship and Immigration Services

I. Public Participation

DHS invites all interested parties to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such

recommended changes.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. **USCIS-2018-0001** for this rulemaking. Please note that DHS is also pursuing a separate rulemaking entitled “Asylum Application, Interview, and Employment Authorization for Applicants,” RIN 1615-AC27, DHS Docket No. USCIS-2019-0011 (“broader asylum EAD NPRM”), separate from this NPRM. The two rulemakings include distinct proposals. For this proposed rule, DHS will only consider comments submitted to Docket No. USCIS-2018-0001. Please ensure that you submit your comments to the correct docket.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and they will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission that you make to DHS. DHS may withhold information provided in comments from public viewing if it determines that it may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice, which is available at <http://www.regulations.gov>.

Docket: For access to the docket and to read background documents or comments received, go to <http://www.regulations.gov>, referencing DHS Docket No. **USCIS-2018-0001**. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

A. Purpose of the Regulatory Action

DHS is proposing to eliminate the regulation articulating a 30-day processing timeframe for USCIS to adjudicate initial Applications for Employment Authorization (Forms I-765 or EAD applications) for asylum applicants. This change is intended to ensure USCIS has sufficient time to receive, screen, and process applications for an initial grant of employment authorization based on a pending asylum application. This change will also reduce opportunities for fraud and protect the security-related processes undertaken for each EAD application. DHS is also proposing to remove the provision requiring that the application for renewal must be received by USCIS 90 days prior to the expiration of their employment authorization. This change is intended to align existing regulatory text with DHS policies implemented under the *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers* final rule, 82 FR 82398, 82457 (2017 AC21 Rule), which became effective January 17, 2017.

B. Legal Authority

The authority of the Secretary of Homeland Security (Secretary) for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. General authority for issuing the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and to establish such regulations as she deems necessary for carrying out such authority. Further authority for the regulatory amendment in the final rule is found in section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), which states an applicant for asylum is not entitled to employment authorization, and may not be granted asylum application-based employment authorization prior to 180 days after filing of the application for asylum, but

otherwise authorizes the Secretary to prescribe by regulation the terms and conditions of employment authorization for asylum applicants.

C. Costs and Benefits

DHS proposes to remove the requirement to adjudicate initial EAD applications for pending asylum applicants within 30 days. In FY 2017, prior to the *Rosario v. USCIS* court order, the adjudication processing times for initial Form I-765 under the Pending Asylum Applicant category exceeded the regulatory set timeframe of 30 days more than half the time. However, USCIS adjudicated approximately 78 percent of applications within 60 days. In response to the *Rosario v. USCIS* litigation and to comply with the court order, USCIS has dedicated as many resources as practicable to these adjudications, but continues to face a historic asylum application backlog, which in turn increases the numbers of applicants eligible for pending asylum EADs. However, USCIS does not want to continue this reallocation of resources as a long-term solution because it removes resources from other competing work priorities in other product lines and adds delays to other time-sensitive adjudication timeframes. USCIS could hire more officers, but has not estimated the costs of this and therefore has not estimated the hiring costs that might be avoided if this proposed rule were adopted. Hiring more officers would not immediately and in all cases shorten adjudication timeframes because (1) additional time would be required to onboard and train new employees, and (2) for certain applications, additional time is needed to fully vet an applicant, regardless of staffing levels.

In addition, USCIS has also not estimated the cost impacts that hiring additional officers could have on the agency's form fees. There is currently no fee for asylum applications or the

corresponding initial EAD applications,¹ and the cost to the agency for adjudication is covered by fees paid by other benefit requesters. USCIS is not certain of the actual cost impacts of hiring additional adjudicators to process these EAD applications at this time. USCIS expects that potentially higher fees might be avoidable if the proposed rule is adopted. As a primary goal, USCIS seeks to adequately vet applicants and adjudicate applications as quickly and efficiently as possible. This proposed rule may delay the ability for some initial applicants whose EAD processing is delayed beyond the 30-day regulatory timeframe to work.

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 proposed action. For this proposed action, USCIS assumes that in the absence of this proposed rule the baseline amount of time that USCIS would take to adjudicate would be 30 days. USCIS also assumes that if this proposed rule is adopted, adjudications will align with DHS processing times achieved in FY 2017 (before the *Rosario v. USCIS* court order). This is our best estimate of what would occur if the proposed rule is adopted. USCIS believes the FY 2017 timeframes are sustainable and USCIS intends to meet these timeframes if the proposed rule is adopted. Therefore, USCIS is analyzing the impacts of this rule by comparing the costs and benefits of adjudicating initial EAD applications for pending asylum applications within 30 days compared to the actual time it took to adjudicate these EAD applications in FY 2017.

¹ On April 29, 2019, President Trump directed DHS to propose regulations that would set a fee for an asylum application not to exceed the costs of adjudicating the application, as authorized by section 208(d)(3) of the INA (8 U.S.C. 1158(d)(3)) and other applicable statutes, and would set a fee for an initial application for employment authorization for the period an asylum claim is pending. See Presidential Memorandum for the Attorney General and Secretary of Homeland Security on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (Apr. 29, 2019), available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/> (last visited June 26, 2019). The implementation of the President's directive would take place via a separate rulemaking, but it is uncertain whether it would reduce the overall resource burden associated with the 30-day adjudication timeframe.

The impacts of this rule would include both distributional effects (which are transfers) and costs.² The distributional impacts would fall on the asylum applicants who would be delayed in entering the U.S. labor force. The distributional impacts (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 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 borne by companies that would have hired the asylum applicants had they been in the labor market earlier but were unable to find available workers. These companies would incur a cost, as they would be losing the productivity and potential profits the asylum applicant would have provided had the asylum applicant been in the labor force earlier. 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. USCIS does not know what this next best alternative may be for those companies. As a result, USCIS 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). USCIS acknowledges that there may be additional opportunity costs to employers such as additional search costs. However, 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. USCIS uses the lost compensation to asylum applicants as a measure of the overall impact of the rule – either as

² 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>

distributional impacts (transfers) or as a proxy for businesses' cost for lost productivity. It does not include additional costs to businesses for lost profits and opportunity costs or the distributional impacts for those in an applicant's support network.

The lost compensation to asylum applicants could range from \$255.88 million to \$774.76 million annually depending on the wages the asylum applicant would have earned. The ten-year total discounted lost compensation to asylum applicants at 3 percent could range from \$2,182.68 million to \$6,608.90 million and at 7 percent could range from \$1,797.17 million to \$5,441.62million (years 2019-2028). USCIS recognizes that the impacts of this proposed rule could be overstated if the provisions in the broader asylum EAD NPRM are finalized as proposed. Specifically, the broader asylum EAD NPRM would limit or delay eligibility for employment authorization for certain asylum applicants.³ Accordingly, if the population of aliens is less than estimated as a result of the broader asylum EAD rule, the estimated impacts of this rule could be overstated because the population affected may be lower than estimated in this rule.

In instances where a company cannot hire replacement labor for the position the asylum applicant would have filled, USCIS acknowledges that such delays may result in tax losses to the government. It is difficult to quantify income tax losses because individual tax situations vary

³ Among other proposed changes, the broader asylum EAD NPRM would implement a Presidential directive related to employment authorization for asylum applicants. On April 29, 2019, President Trump directed DHS to propose regulations that would bar aliens who have entered or attempted to enter the United States unlawfully from receiving employment authorization before any applicable application for relief or protection from removal has been granted, and to ensure immediate revocation of employment authorization for aliens who are denied asylum or become subject to a final order of removal. *See* Presidential Memorandum for the Attorney General and Secretary of Homeland Security on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (Apr. 29, 2019), available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/> (last visited June 26, 2019). *See also* Unified Agenda of Regulatory and Deregulatory Actions, RIN 1615-AC27 (Spring 2019), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1615-AC27> (last visited Aug. 7, 2019) (“The Department of Homeland Security (DHS) plans to propose regulatory amendments intended to promote greater accountability in the application process for requesting employment authorization and to deter the fraudulent filing of asylum applications for the purpose of obtaining Employment Authorization Documents (EADs).”).

widely⁴ but USCIS estimates the potential loss to other employment tax programs, namely Medicare and social security which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).⁵ With both the employee and employer not paying their respective portion of Medicare and social security taxes, the total estimated tax loss for Medicare and social security is 15.3 percent.⁶ Lost wages ranging from \$255.88 million to \$774.76 million would result in employment tax losses to the government ranging from \$39.15 million to \$118.54 million.⁷ Again, depending on the circumstances of the employee, there could be additional federal income tax losses not estimated here. There may also be state and local income tax losses that would vary according to the jurisdiction.

This proposed rule would result in reduced opportunity costs to the Federal Government. Since *Rosario* compelled USCIS to comply with the 30-day provision in FY 2018, USCIS has redistributed its adjudication resources to work up to full compliance. If the 30-day timeframe is removed, these redistributed resources could be reallocated, potentially reducing delays in processing of other applications, and avoiding costs associated with hiring additional employees. USCIS has not estimated these avoided costs. Additionally, USCIS does not anticipate that removing the separate 90-day EAD filing requirement would result in any costs to the Federal Government.

⁴ 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>.

⁵ 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.

⁶ Calculation: (6.2 percent social security + 1.45 percent Medicare) x 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

⁷ Calculations: Lower bound lost wages \$255.88 million x 15.3 percent estimated tax rate = \$39.15 million. Upper bound lost wages \$774.76 million x 15.3 percent estimated tax rate = \$118.54 million.

The proposed rule would benefit USCIS by allowing it to operate under long-term, sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identity verification. Applicants would rely on up-to-date processing times, which provide accurate expectations of adjudication times.

The proposed technical change to remove the 90-day filing requirement would reduce confusion regarding EAD renewal requirements for pending asylum applicants and ensure the regulatory text reflects current DHS policy and regulations under DHS’s final 2017 AC21 Rule.⁸

Table 1 provides a detailed summary of the regulatory changes and the expected impacts of this proposed rule.

Table 1: Summary of Proposed Provisions and Impacts			
Current Provision	Proposed Change to Provision	Expected Costs and Transfers from Proposed Provision	Expected Benefits from Proposed Provision
USCIS has a 30-day EAD adjudication timeframe for applicants who have pending asylum applications.	USCIS proposes to eliminate the provisions for the 30-day adjudication timeframe and issuance of EADs for pending asylum applicants.	Quantitative: This provision could delay the ability of some initial applicants to work. A portion of the impacts of the rule would be the lost compensation transferred from asylum applicants to others currently in the workforce, possibly in the form of additional work hours or overtime pay. A portion of the impacts of the rule would be lost productivity costs to companies that would have hired asylum applicants had they been in the labor market, but who were unable to find available workers. USCIS uses the lost compensation to asylum applicants as a measure of these	Quantitative: Not estimated.

⁸In the 2017 AC21 final rule, 81 FR 82398, USCIS amended 8 CFR 274a.13 to allow for the automatic extension of existing, valid EADs for up to 180 days for renewal applicants falling within certain EAD categories as described in the regulation and designated on the USCIS website. *See* 8 CFR 274a.13(d). Among those categories is asylum applicants. To benefit from the automatic extension, an applicant falling within an eligible category must (1) properly file his or her renewal request for employment authorization before its expiration date, (2) request renewal based on the same employment authorization category under which the expiring EAD was granted, and (3) will continue to be authorized for employment based on his or her status, even after the EAD expires and is applying for renewal under a category that does not first require USCIS to adjudicate an underlying application, petition, or request.

		<p>distributional impacts (transfers) and as a proxy for businesses' cost for lost productivity. The lost compensation due to processing delays could range from \$255.88 million to \$774.76 million annually. The total ten-year discounted lost compensation for years 2019-2028 averages \$4,395.79 million and \$3,619.40 million at discount rates of 3 and 7 percent, respectively. USCIS does not know the portion of overall impacts of this rule that are transfers or costs. Lost wages ranging from \$255.88 million to \$774.76 million would result in employment tax losses to the government ranging from \$39.15 million to \$118.54 million.</p>	
		<p>Qualitative: There may also be additional distributional impacts for those in an applicant's support network—if applicants are unable to work legally, they may need to rely on resources from family members, friends, non-profits, or government entities for support.</p>	<p>Qualitative: DHS would be able to operate under long-term sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identity verification without having to add any resources.</p> <p>This rule would result in reduced opportunity costs to the Federal Government. If the 30-day timeframe is removed, USCIS could reallocate the resources it redistributed to comply with the 30-day provision, potentially reducing delays in processing of other applications</p>

			and avoiding costs associated with hiring additional employees.
Applicants can currently submit a renewal EAD application 90 days before the expiration of their current EAD.	USCIS proposes to remove the 90-day submission requirement for renewal EAD applications.	Quantitative: None.	Quantitative: None.
		Qualitative: None.	Qualitative: Applicants – <ul style="list-style-type: none"> • Reduces confusion regarding EAD renewal requirements. Some confusion may nonetheless remain if applicants consult outdated versions of regulations or inapplicable DOJ regulations. DHS/USCIS – <ul style="list-style-type: none"> • The DHS regulations would be updated to match those of other EAD categories.

As previously discussed, USCIS does not know the portion of overall impacts of this rule that are transfers or costs, but estimates that the maximum monetized impact of this rule from lost compensation is \$774.76 million annually. 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 \$774.76 million 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 \$774.76 million 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. USCIS estimates \$118.54 million as the maximum decrease in employment tax transfers from companies and employees to the Federal Government. The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from this rule, and are summarized in Table 2 below.

Table 2: Summary of Range of Monetized Annual Impacts						
Category	Description	Scenario: No Replacement Labor found for Asylum Applicants		Scenario: All Asylum Applicants Replaced with Other Workers		Primary (half of the highest high for each row)
		Low Wage	High Wage	Low Wage	High Wage	
Cost	Lost compensation used as proxy for lost productivity to companies	\$255.88	\$774.76	\$0.00	\$0.00	\$387.38
Transfer	Compensation transferred from asylum applicants to other workers	\$0.00	\$0.00	\$255.88	\$774.76	\$387.38
Transfer	Lost employment taxes paid to the Federal Government	\$39.15	\$118.54	\$0.00	\$0.00	\$59.27

As required by OMB Circular A-4, Table 3 presents the prepared A-4 accounting statement showing the costs and transfers associated with this proposed regulation. For the purposes of the A-4 accounting statement below, USCIS uses the mid-point as the primary estimate for both costs and transfers because the total monetized impact of the rule from lost

compensation cannot exceed \$774.76 million and as described, USCIS is unable to apportion the impacts between costs and transfers. Likewise, USCIS uses a mid-point for the reduction in employment tax transfers from companies and employees to the Federal Government when companies are unable to easily find replacement workers. USCIS notes that there may be some unmonetized costs such as additional opportunity costs to employers that would not be captured in these monetized estimates.

Table 3. OMB A-4 Accounting Statement (\$ millions, 2017)					
Period of analysis: 2019 – 2028					
Category	Primary Estimate		Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS					
Monetized Benefits	(7%)	N/A	N/A	N/A	RIA
	(3%)	N/A	N/A	N/A	
Annualized quantified, but unmonetized, benefits	N/A		N/A	N/A	RIA
Unquantified Benefits	Applicants would benefit from reduced confusion over renewal requirements. DHS would be able to operate under sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identity verification.				RIA
COSTS					
Annualized monetized costs (discount rate in parenthesis)	(7%)	\$387.38	\$0	\$774.76	RIA
	(3%)	\$387.38	\$0	\$774.76	RIA
Annualized quantified, but unmonetized, 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.				RIA

TRANSFERS					
Annualized monetized transfers: “on budget”	(7%)	\$0	\$0	\$0	RIA
	(3%)	\$0	\$0	\$0	
From whom to whom?	N/A				N/A
Annualized monetized transfers: “off-budget”	(7%)	\$387.38	\$0	\$774.76	RIA
	(3%)	\$387.38	\$0	\$774.76	
From whom to whom?	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.				RIA
Annualized monetized transfers: “off-budget”	(7%)	\$59.27	\$0	\$118.54	RIA
	(3%)	\$59.27	\$0	\$118.54	
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.				
Category	Effects				Source Citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments	None; no significant impacts to national labor force or to the labor force of individual states is expected. Possible loss of tax revenue.				RIA
Effects on small businesses	None.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

III. Background and Discussion of Proposed Rule

Processing of Applications for Employment Authorization Documents

1. Elimination of 30-Day Processing Timeframe

Pursuant to 8 CFR 208.7, 274a.12(c)(8), and 274a.13(a)(2), pending asylum applicants may request an EAD by filing an EAD application using Form I-765. Under current regulations at 8 CFR 208.7(a)(1), USCIS must adjudicate initial employment authorization requests under the (c)(8) category within 30 days of when the applicant files the Form I-765.⁹ The 30-day

⁹ The regulations at 8 CFR 208.7(a)(1) currently provide that if the asylum application is not denied, USCIS will have 30 days from the date of filing of the request for employment authorization to grant or deny the employment authorization request. Certain events may suspend or restart the 30-day adjudication period. For instance, the time

timeframe in 8 CFR 208.7(a)(1) was established more than 20 years ago,¹⁰ when the former Immigration and Naturalization Service (INS) adjudicated EAD applications at local INS offices. EAD applications are now adjudicated at USCIS Service Centers. As discussed below, DHS believes that the 30-day timeframe is outdated, does not account for the current volume of applications and no longer reflects current operational realities.¹¹ Increases in EAD applications for pending asylum applicants have outpaced Service Center Operations resources over the last twenty years. Additionally, the level of fraud sophistication and the threat immigration-related national security concerns posed today are more complex than they were 20 years ago. Furthermore, changes in intake and document production to reduce fraud and address threats to national security, as well as necessary vetting to address such concerns, are not reflected in the current regulatory timeframe. Thus, DHS proposes to remove this provision. *See* proposed 8 CFR 208.7(a)(1). This change is intended to ensure USCIS has sufficient time to receive, screen, and process applications for an initial grant of employment authorization, based on a pending asylum application. This change would also reduce opportunities for fraud and protect the

between the issuance of a request for evidence and the receipt of the response, or a delay requested or caused by the applicant, is not counted as part of the 30-day period. 8 CFR 208.7(a)(2).

¹⁰ *See Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 FR 62284 (Dec. 5, 1994); *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR 10312, 10337 (Mar. 6, 1997).

¹¹ DHS recognizes the regulatory history for originally promulgating this provision. *See* 62 FR at 10318 (one of the chief purposes of the deadline was “to ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible.”); *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 FR 14779, 14780 (Mar. 30, 1994) (proposed rule) (the imposition of a 150-day waiting period before an asylum seeker may submit an initial EAD application – 30 days before the 180 asylum clock runs – was done with an understanding that “[i]deally . . . few applicants would ever reach the 150-day point.”); *id.* (discussing selection of 150 days 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.”); *see also* 59 FR at 62290-91 (final rule) (weighing competing considerations, including, among other things, ensuring the availability of work authorization to legitimate applicants and limiting the burden of the employment authorization process on overall adjudication workloads); 62 FR 10337 (Mar. 6, 1997) (retaining the 30-day timeframe following enactment of the 180-day statutory waiting period). The existing 30-day timeframe has become untenable notwithstanding its humanitarian goals. However, for the reasons explained elsewhere in this preamble, DHS believes it continues to meet the goals of the underlying statutory scheme, such as by its return to processing affirmative asylum applications on a “last in, first out” (LIFO) basis.

security-related processes undertaken for each EAD application.¹²

In addition, 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. USCIS is working towards compliance with the court order. Compliance with the court order places an extraordinary strain on already strained agency resources, and USCIS will not be able to sustain such a burden in the long-term without adding additional agency resources. Thus, USCIS reiterates that it cannot sustainably meet the 30-day timeframe for the reasons outlined below, and is proposing removal of this provision.

DHS intends to grandfather into the 30-day adjudication timeframe those class members who filed their EAD applications prior to the effective date of any final rule that changes the 30-day adjudication timeline.

Growth of Receipts and Backlog

The growth of asylum receipts along with the growing asylum backlog has contributed to an increase in EAD applications for pending asylum applicants that has surpassed available Service Center Operations resources. As of March 12, 2018, the affirmative asylum backlog stood at 317,395 applications¹³ and has been growing for several years. In part, this is due to a continued growth in affirmative asylum filings and historic increases in protection screenings at the border to which significant resources had to be diverted. Two main factors contributing to this backlog include: the diversion of resources away from the affirmative asylum caseload to

¹² DHS also proposes a technical change to this paragraph and paragraph (c)(3), which would replace a reference to the former INS with a reference to USCIS.

¹³ An affirmative asylum application filed by a principal asylum applicant may include a dependent spouse and children, who may also file their own EAD applications based on the pending asylum application.

protection screening of border arrivals, including credible fear and reasonable fear screenings, and a subsequent increase in asylum application filings, especially by Venezuelans, Central Americans, and unaccompanied alien children. For instance, credible fear screening for aliens apprehended at or near the U.S. border, *see* 8 CFR 208.30, increased to over 94,000 in fiscal year (FY) 2016 from 36,000 in FY 2013. Asylum applications increased to over 100,000 in FY 2017 for the first time in 20 years.¹⁴ The USCIS Asylum Division received 44,453 affirmative asylum applications in FY 2013, 56,912 in FY 2014, 84,236 in FY 2015, 115,888 in FY 2016, and 142,760 in FY 2017.¹⁵ The 221.15 percent increase of affirmative asylum receipts over the span of five years has directly contributed to the increase in (c)(8) EAD receipts. USCIS received 41,021 initial EAD applications from individuals with pending asylum applications in FY 2013, 62,169 in FY 2014, 106,030 in FY 2015, 169,970 in FY 2016, and 261,782 in FY 2017. USCIS also received 37,861 renewal EAD applications from individuals with pending asylum applications in FY 2013, 47,103 in FY 2014, 72,559 in FY 2015, 128,610 in FY 2016, and 212,255 in FY 2017. The increase in both initial and renewal EAD applications coupled with the growing asylum backlog has grossly outpaced Service Center Operations resources, specifically because USCIS has had to reallocate resources from other product lines to adjudicate these EAD applications.¹⁶ Thus, as demonstrated in Section IV below, the increase in both asylum

¹⁴ The USCIS Refugee, Asylum, and International Operations Parole System provided this data on March 15, 2018.

¹⁵ These numbers only address the affirmative asylum applications that fall under the jurisdiction of USCIS' Asylum Division. Defensive asylum applications, filed with the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) are also eligible for (c)(8) EADs. There is an ongoing backlog of pending defensive asylum cases at EOIR, which as of late 2017 had approximately 650,000 cases pending. *See* Memorandum from Attorney General Jefferson B. Sessions III to the Executive Office for Immigration Review, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017). The defensive asylum backlog at EOIR also contributes to an increase in both initial and renewal (c)(8) EAD applications.

¹⁶ In response to the growing backlog and court-ordered requirements in *Rosario v. USCIS*, No. C15-0813JLR (W.D. Wash. July 26, 2018), Service Center Operations re-allocated available officer resources to try to meet the 30-day processing time for initial EAD applications, causing a strain across other Service Center Operations product lines.

applications and EAD applications for those with pending asylum applications has added to the backlog and led to a delay in adjudication times.

Changes in Intake and Document Production

Additionally, at the time the 30-day timeframe was established, EADs, which were formerly known as Forms I-688B, were produced by local offices that were equipped with stand-alone machines for such purposes. While decentralized card production resulted in immediate and customized adjudications for the public, the cards produced did not contain state-of-the-art security features, and they were susceptible to tampering and counterfeiting. Such deficiencies became increasingly apparent as the United States faced new and increasing threats to national security and public safety.

In response to these concerns, the former INS and DHS made considerable efforts to upgrade application procedures and leverage technology in order to enhance integrity, security, and efficiency in all aspects of the immigration process. For example, to combat the document security problem discussed above, the former INS took steps to centralize application filing locations and card production. By 2006, DHS fully implemented these centralization efforts.¹⁷

In general, DHS now requires applicants to file Applications for Employment Authorization at a USCIS Lockbox,¹⁸ which is a Post Office box used to accelerate the processing of applications by electronically capturing data and receiving and depositing fees.¹⁹

¹⁷ See USCIS Memorandum from Michael Aytes, *Elimination of Form I-688B, Employment Authorization Card* (Aug. 18, 2006). In January 1997, the former INS began issuing new, more secure EADs from a centralized location, and assigned a new form number (I-766) to distinguish it from the less secure, locally produced EADs (Forms I-688B). DHS stopped issuing Form I-688B EADs from local offices altogether in 2006.

¹⁸ Asylum applicants, however, make their request for employment authorization directly on the Application for Asylum and Withholding of Removal, Form I-589, and need not file a separate Application for Employment Authorization following a grant of asylum. If they are requesting employment authorization based on their pending asylum application, they must file a separate request for employment authorization on Form I-765.

¹⁹ USCIS, *Field Office FAQs* (May 2, 2013), <https://www.uscis.gov/about-us/find-uscis-office/field-offices/field-office-faqs/faq/what-lockbox>.

If DHS ultimately approves the application, a card order is sent to a card production facility, where a tamper-resistant card reflecting the specific employment authorized category is produced and then mailed to the applicant. While the 30-day timeframe may have made sense when local offices processed applications and produced the cards, DHS believes that the intervening changes discussed above now mean that a 30-day timeframe is not reflective of current processes.

Fraud, Criminality, and National Security Considerations

DHS has been unable to meet the 30-day processing timeframe in certain cases due to changes to the agency's vetting procedures and increased background checks, which resulted from the Government's response to September 11, 2001 terror attacks ("9/11"). Information obtained from such checks may affect eligibility for an initial EAD based on a pending asylum application. Specifically, the Immigration and Naturalization Service (INS), followed by U.S. Citizenship and Immigration Services (USCIS), made multiple changes to enhance the coverage of security checks, detect applicants who pose risks to national security and public safety, deter benefits fraud, and ensure that benefits are granted only to eligible applicants, in response to 9/11.

These changes included the creation of the Application Support Centers to collect applicant fingerprints, IBIS checks for all applications and FBI name check screening. In May 2004, USCIS created the Office of Fraud Detection and National Security (FDNS) to provide centralized support and policy guidance for security checks and anti-fraud operations.²⁰ In

²⁰ In 2010, FDNS was promoted to a Directorate, which elevated the profile and brought operational improvements to this important work. See USCIS, Fraud Detection and National Security Directorate, <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/fraud-detection-and-national-security-directorate>.

August 2004, the Homeland Security Presidential Directive (HSPD) 11, *Comprehensive Terrorist-Related Screening Procedures*,²¹ directed DHS to

incorporate security features ... that resist circumvention to the greatest extent possible [and consider] information individuals must present, including, as appropriate, the type of biometric identifier[s] or other form of identification or identifying information to be presented, at particular screening opportunities.

Since 9/11, USCIS implemented changes in the collection of biographic and biometric information for document production related to immigration benefits, including the Application for Employment Authorization (Form I-765). As part of the Employment Authorization benefit adjudications process since the inception of FDNS, USCIS must verify the identity of the individual applying for an EAD and determine whether any criminal, national security or fraud concerns exist. Under the current national security and fraud vetting guidelines, when an adjudicator determines that a criminal, national security and/or fraud concern exists, the case is forwarded to the Background Check Unit (BCU) or Center Fraud Detection Office (CFDO) for additional vetting.²² Once the vetting is completed and a finding is made, the adjudicator uses the information provided from BCU and/or CFDO to determine whether the individual is eligible to receive the requested benefit.

These security procedures implemented post 9/11 and well after the establishment of the 30-day adjudication timeframe in 1994, coupled with sudden increases in applications, have extended adjudication and processing times for cases with potential eligibility issues discovered during background checks outside of the current regulatory 30-day timeframe. It would be

²¹ HSPD11, *Comprehensive Terrorist-Related Screening Procedures* (Aug. 27, 2004), available at <https://fas.org/irp/offdocs/nspd/hspd-11.html>.

²² USCIS conducts background checks on individuals applying for an immigration benefit because United States immigration laws and regulations preclude USCIS from granting immigration benefits to individuals with certain criminal or administrative violations. *See, e.g.*, 8 CFR 208.7(a)(1) (aggravated felony bar to employment authorization for asylum applicants).

contrary to USCIS' core missions and undermine the integrity of the documents issued if USCIS were to reduce or eliminate vetting procedures solely to meet a 30-day deadline established decades ago.

In sum, DHS is proposing to eliminate the 30-day processing provision at 8 CFR 208.7(a)(1) because of the increased volume of affirmative asylum applications and accompanying Applications for Employment Authorization, over two decades of changes in intake and EAD document production, and the need to appropriately vet applicants for fraud and national security concerns. DHS believes that the 30-day timeframe described in 8 CFR 208.7(a)(1) does not provide sufficient flexibility for DHS to meet its core missions of enforcing and administering our immigration laws and enhancing security.

Case processing time information may be found at <https://egov.uscis.gov/processing-times/>, and asylum applicants can access the webpage for realistic processing times as USCIS regularly updates this information.

DHS welcomes public comment on all aspects of this proposal, including alternate suggestions for regulatory amendments to the 30-day processing timeframe not already discussed.

2. Removal of the 90-Day Filing Requirement

DHS proposes to remove 8 CFR 208.7(d), because 8 CFR 274a.13(d), as amended in 2017, serves the same policy purpose as 8 CFR 208.7(d), and is arguably at cross-purposes with such provision. Under the 2017 AC21 Rule, certain individuals eligible for employment authorization under designated categories may have the validity of their EADs extended for up to 180 days from the document's expiration date if they file an application to renew their EAD before the EAD's expiration date. *See* 8 CFR 274a.13(d)(1). Specifically, the 2017 AC21 Rule

automatically extends the EADs falling within the designated categories as long as (1) the individual filed the request to renew his or her EAD before its expiration date, (2) the individual is requesting renewal based on the same employment authorization category under which the expiring EAD was granted, and (3) the individual's request for renewal is based on a class of aliens whose eligibility to apply for employment authorization continues even after the EAD expires, and is based on an employment authorization category that does not first require USCIS to adjudicate an underlying application, petition, or request. *Id.* As noted in the preamble to the 2017 AC21 Rule, and as currently reflected on the USCIS website, the automatic extension amendment applies to individuals who have properly filed applications for asylum. *See id.*; 8 CFR 274a.12(c)(8); 81 FR 82398 at 82455-56 n.98.²³

Because the 2017 AC21 Rule effectively prevents gaps in work authorization for asylum applicants with expiring EADs, DHS finds it unnecessary to continue to require that pending asylum applicants file for EAD renewal at least 90 days before the EAD's scheduled expiration. The 2017 AC21 Rule amendment significantly mitigates the risk of gaps in employment authorization and required documentation for eligible individuals, providing consistency for employers who are responsible for verifying employment authorization. An additional 90-day requirement is unnecessary.

DHS implemented the 180-day automatic extension for eligible individuals, including pending asylum applicants for renewal EADs, in accordance with the 2017 AC21 Rule. As a result, the subject EADs are already automatically extended, even if the renewal EAD application has not been submitted at least 90 days in advance of its expiration. DHS therefore proposes to make a clarifying amendment to delete subsection (d) from 8 CFR 208.7. Under this

²³ *See also* USCIS, Automatic Employment Authorization Document (EAD) Extension, <https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension..>

change, pending asylum applicants would not need to submit Form I-765 renewal applications at least 90 days prior to the employment authorization expiration in order for the employment authorization to be renewed. Pending asylum applicants would be able to submit Form I-765 renewal applications up to 180 days prior to the employment authorization expiration, as recommended by USCIS on its website, and the EAD would be automatically extended for up to 180 days from the date of expiration.²⁴ This proposed change would reduce confusion regarding EAD renewal application requirements for pending asylum applicants and ensure the regulatory text reflects current DHS policy and regulations under the 2017 AC21 Rule. DHS welcomes public comment on all aspects of this proposal.

3. Corresponding U.S. Department of Justice (DOJ) Regulations

This proposed rule would remove (1) the 30-day processing provision for initial employment authorization applications for those with pending asylum applications, and (2) the 90-day timeframe for receipt of an application to renew employment authorization. See 8 CFR 208(a)(1), and (d).

Currently, these provisions can be found in two parallel sets of regulations: Regulations under the authority of DHS are contained in 8 CFR part 208; and regulations under the authority of the Department of Justice (DOJ) are contained in 8 CFR part 1208. Each set of regulations contains substantially similar provisions regarding employment authorization, and each

²⁴ See 2017 AC21 Rule, 81 FR at 82401 (“Specifically, the rule automatically extends the employment authorization and validity of existing EADs issued to certain employment-eligible individuals for up to 180 days from the date of expiration, as long as: (1) A renewal application is filed based on the same employment authorization category as the previously issued EAD (or the renewal application is for an individual approved for Temporary Protected Status (TPS) whose EAD was issued under 8 CFR 274a.12(c)(19)); (2) the renewal application is timely filed prior to the expiration of the EAD (or, in accordance with an applicable Federal Register notice regarding procedures for renewing TPS-related employment documentation) and remains pending; and (3) the individual’s eligibility for employment authorization continues beyond the expiration of the EAD and an independent adjudication of the underlying eligibility is not a prerequisite to the extension of employment authorization”); USCIS, Employment Authorization Document, <https://www.uscis.gov/greencard/employment-authorization-document> (“Generally, you should not file for a renewal EAD more than 180 days before your original EAD expires.”).

articulates both the 30-day provision for DHS adjudications and the 90-day timeframe for renewal applications before DHS. *Compare* 8 CFR 208.7(a)(1) and (d), *with* 8 CFR 1208.7(a)(1) and (d).

This proposed rule would revise only the DHS regulations at 8 CFR 208.7.

Notwithstanding the language of the parallel DOJ regulations in 8 CFR 1208.7, as of the effective date of a final rule, the revised language of 8 CFR 208.7(a)(1) and removal of 8 CFR 208.7(d) would be binding on DHS and its adjudications. DHS would not be bound by the 30-day provision of the DOJ regulations at 8 CFR 1208.7(a)(1). DOJ has no authority to adjudicate employment authorization applications. DHS has been in consultation with DOJ on this proposed rule, and DOJ may issue conforming changes at a later date. DHS welcomes public comment on this matter.

IV. 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 proposed rule has been designated as a “significant regulatory action” and it is economically significant, since it meets the \$100 million threshold under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this proposed regulation.

1. Summary

DHS proposes to remove the requirement to adjudicate initial EAD applications for pending asylum applicants within 30 days. In FY 2017, prior to the *Rosario v. USCIS* court order, the adjudication processing times for initial Form I-765 under the Pending Asylum Applicant category exceeded the regulatory set timeframe of 30 days more than half the time. However, USCIS adjudicated approximately 78 percent of applications within 60 days. In response to the *Rosario v. USCIS* litigation and to comply with the court order, USCIS continues to resource the adjudication of pending asylum EAD applications. USCIS has dedicated as many resources as practicable to these adjudications, but continues to face an asylum application backlog, which in turn increases the numbers of applicants eligible for pending asylum EADs. However, this reallocation of resources is not a long-term sustainable solution because USCIS has many competing priorities and many time-sensitive adjudication timeframes. Reallocating resources in the long-term is not sustainable due to work priorities in other product lines. USCIS could hire more officers, but that would not immediately and in all cases shorten adjudication timeframes because (1) additional time would be required to onboard and train new employees, and (2) for certain applications, additional time is needed to fully vet an applicant, regardless of staffing levels. In addition, there is currently no fee for asylum applications or the corresponding initial EAD applications, and the cost of adjudication is covered by fees paid by other benefit requesters. USCIS is uncertain of the actual cost impacts of hiring additional adjudicators to process these EAD applications at this time. If the backlog dissipates in the future, USCIS may seek to redistribute adjudication resources.

As a primary goal, USCIS seeks to adequately vet applicants and adjudicate applications as quickly and efficiently as possible. This proposed rule may delay the ability for some initial applicants whose EAD processing is delayed beyond the 30-day regulatory timeframe to work.

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 proposed action. For this proposed action, USCIS assumes that in the absence of this proposed rule the baseline amount of time that USCIS would take to adjudicate would be 30 days. USCIS also assumes that if this proposed rule is adopted, adjudications will align with DHS processing times achieved in FY 2017 (before the *Rosario v. USCIS* court order). This is our best estimate of what would occur if the proposed rule is adopted. USCIS believes the FY 2017 timeframes are sustainable and USCIS intends to meet these timeframes if the proposed rule is adopted. Therefore, USCIS is analyzing the impacts of this rule by comparing the costs and benefits of adjudicating initial EAD applications for pending asylum applicants within 30 days compared to the actual time it took to adjudicate these EAD applications in FY 2017.

The impacts of this rule would include both distributional effects (which are transfers) and costs.²⁵ The distributional impacts would fall on the asylum applicants who would be delayed in entering the U.S. labor force. The distributional impacts (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 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 borne by companies that would have hired the asylum applicants had they been in the labor market

²⁵ 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>

earlier but were unable to find available workers. These companies would incur a cost, as they would be losing the productivity and potential profits the asylum applicant would have provided had the asylum applicant been in the labor force earlier. 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. USCIS does not know what this next best alternative may be for those companies. As a result, USCIS 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). USCIS acknowledges that there may be additional opportunity costs to employers such as additional search costs. However, 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. USCIS uses the lost compensation to asylum applicants as a measure of the overall impact of the rule – either as distributional impacts (transfers) or as a proxy for businesses’ cost for lost productivity. It does not include additional costs to businesses for lost profits and opportunity costs or the distributional impacts for those in an applicant’s support network. The lost compensation to asylum applicants could range from \$255.88 million to \$774.76 million annually depending on the wages the asylum applicant would have earned. The ten-year total discounted lost compensation to asylum applicants at 3 percent could range from \$2,182.68 million to \$6,608.90 million and at 7 percent could range from \$1,797.17 million to \$5,441.62 million (years 2019-2028). USCIS recognizes that the impacts of this proposed rule could be overstated if the provisions in the broader asylum EAD NPRM are finalized as proposed. Specifically, the

broader asylum EAD NPRM would limit or delay eligibility for employment authorization for certain asylum applicants. Accordingly, if the population of aliens is less than estimated as a result of the broader asylum EAD rule, the estimated impacts of this rule could be overstated because the population affected may be lower than estimated in this rule.

In instances where a company cannot transfer additional work onto current employees and cannot hire replacement labor for the position the asylum applicant would have filled, USCIS acknowledges that delays may result in tax losses to the government. It is difficult to quantify income tax losses because individual tax situations vary widely²⁶ but USCIS estimates the potential loss to other employment tax programs, namely Medicare and social security which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).²⁷ With both the employee and employer not paying their respective portion of Medicare and social security taxes, the total estimated tax loss for Medicare and social security is 15.3 percent.²⁸ Lost wages ranging from \$255.88 million to \$774.76 million would result in employment tax losses to the government ranging from \$39.15 million to \$118.54 million.²⁹ Adding the lost compensation to the tax losses provide total monetized estimates of this proposed rule that range from \$275.46 million to \$834.03 million annually in instances where a company cannot hire replacement labor for the position the asylum applicant would have filled.³⁰ Again, depending

²⁶ 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>.

²⁷ 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.

²⁸ Calculation: (6.2 percent social security + 1.45 percent Medicare) x 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

²⁹ Calculations: Lower bound lost wages \$255.88 million x 15.3 percent estimated tax rate = \$39.15 million. Upper bound lost wages \$774.76 million x 15.3 percent estimated tax rate = \$118.54 million.

³⁰ Calculation: Lower bound lost wages \$255.88 million + lower bound tax losses \$19.58 million = total lower bound cost \$275.46 million.

on the circumstances of the employee, there could be additional federal income tax losses not estimated here. There may also be state and local income tax losses that would vary according to the jurisdiction.

This proposed rule would result in reduced opportunity costs to the Federal Government. Since *Rosario* compelled USCIS to comply with the 30-day provision in FY 2018, USCIS has redistributed its adjudication resources to work up to full compliance. If the 30-day timeframe is removed, these redistributed resources could be reallocated, potentially reducing delays in processing of other applications and avoiding costs associated with hiring additional employees. USCIS has not estimated these avoided costs. Additionally, USCIS does not anticipate that removing the separate 90-day EAD filing requirement would result in any costs to the Federal Government.

The proposed rule would benefit USCIS by allowing it to operate under long-term sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identify verification. Applicants would rely on up-to-date processing times, which will provide accurate expectations of adjudication times. The technical change to remove the 90-day filing requirement would reduce confusion regarding EAD renewal requirements for pending asylum applicants and ensure the regulatory text reflects current DHS policy and regulations under DHS's final 2017 AC21 Rule.³¹

Upper bound lost wages \$774.76 million + upper bound tax losses \$59.27 million= total upper bound cost \$834.03 million.

³¹ In the 2017 AC21 final rule, 81 FR 82398, USCIS amended 8 CFR 274a.13 to allow for the automatic extension of existing, valid EADs for up to 180 days for renewal applicants falling within certain EAD categories as described in the regulation and designated on the USCIS website. *See* 8 CFR 274a.13(d). Among those categories is asylum applicants. To benefit from the automatic extension, an applicant falling within an eligible category must (1) properly file his or her renewal request for employment authorization before its expiration date, (2) request renewal based on the same employment authorization category under which the expiring EAD was granted, and (3) will

Table 4 provides a detailed summary of the regulatory changes and the expected impacts of this proposed rule.

Table 4: Summary of Proposed Provisions and Impacts			
Current Provision	Proposed Change to Provision	Expected Costs and Transfers from Proposed Provision	Expected Benefits from Proposed Provision
USCIS has a 30-day EAD adjudication timeframe for applicants who have pending asylum applications.	USCIS proposes to eliminate the provisions for the 30-day adjudication timeframe and issuance of EADs for pending asylum applicants.	<p>Quantitative: This provision could delay the ability of some initial applicants to work. A portion of the impacts of the rule would be the lost compensation transferred from asylum applicants to others currently in the workforce, possibly in the form of additional work hours or overtime pay. A portion of the impacts of the rule would be lost productivity costs to companies that would have hired asylum applicants had they been in the labor market, but who were unable to find available workers. USCIS uses the lost compensation to asylum applicants as a measure of these distributional impacts (transfers) and as a proxy for businesses' cost for lost productivity. The lost compensation due to processing delays could range from \$255.88 million to \$774.76 million annually. The total ten-year discounted lost compensation for years 2019-2028 averages \$4,395.79 million and \$3,619.40 million at discount rates of 3 and 7 percent, respectively. USCIS does not know the portion of overall impacts of this rule that are transfers or costs. Lost wages ranging from \$255.88 million to \$774.76 million would result in employment tax losses to the government ranging from \$39.15 million to \$118.54 million.</p>	<p>Quantitative: Not estimated.</p>

continue to be authorized for employment based on his or her status, even after the EAD expires, and is applying for renewal under a category that does not first require USCIS to adjudicate an underlying application, petition, or request.

		<p>Qualitative: There may also be additional distributional impacts for those in an applicant’s support network—if applicants are unable to work legally, they may need to rely on resources from family members, friends, non-profits, or government entities for support.</p>	<p>Qualitative: DHS would be able to operate under long-term sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identity verification without having to add any resources.</p> <p>This rule would result in reduced opportunity costs to the Federal Government. If the 30-day timeframe is removed, USCIS could reallocate the resources it redistributed to comply with the 30-day provision, potentially reducing delays in processing of other applications and avoiding costs associated with hiring additional employees.</p>
<p>Applicants can currently submit a renewal EAD application 90 days before the expiration of their current EAD.</p>	<p>USCIS proposes to remove the 90-day submission requirement for renewal EAD applications.</p>	<p>Quantitative: None.</p>	<p>Quantitative: None.</p>
		<p>Qualitative: None.</p>	<p>Qualitative: Applicants –</p> <ul style="list-style-type: none"> Reduces confusion regarding EAD renewal requirements. Some confusion may nonetheless remain if applicants consult outdated versions of regulations or inapplicable DOJ regulations. <p>DHS/USCIS –</p> <ul style="list-style-type: none"> The regulations would be updated to match those of other EAD categories.

As previously discussed, USCIS does not know the portion of overall impacts of this rule that are transfers or costs, but estimates that the maximum monetized impact of this rule from lost compensation is \$774.76 million annually. If all companies are able to easily find

reasonable labor substitutes for the positions the asylum applicants would have filled, they will bear little or no costs, so \$774.76 million 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 \$774.76 million 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. USCIS estimates \$118.54 million as the maximum decrease in employment tax transfers from companies and employees to the Federal Government. The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from this rule, and are summarized in Table 5 below.

Table 5: Summary of Range of Monetized Impacts						
Category	Description	Scenario: No Replacement Labor found for Asylum Applicants		Scenario: All Asylum Applicants Replaced with Other Workers		Primary (half of the highest high for each row)
		Low Wage	High Wage	Low Wage	High Wage	
Cost	Lost compensation used as proxy for lost productivity to companies	\$255.88	\$774.76	\$0.00	\$0.00	\$387.38
Transfer	Compensation transferred from asylum applicants to other workers	\$0.00	\$0.00	\$255.88	\$774.76	\$387.38
Transfer	Lost employment taxes paid to the Federal Government	\$39.15	\$118.54	\$0.00	\$0.00	\$59.27

As required by OMB Circular A-4, Table 6 presents the prepared A-4 accounting statement showing the costs and transfers associated with this proposed regulation. For the

purposes of the A-4 accounting statement below, USCIS uses the mid-point as the primary estimate for both costs and transfers because the total monetized impact of the rule from lost compensation cannot exceed \$774.76 million and as described, USCIS is unable to apportion the impacts between costs and transfers. Likewise, USCIS uses a mid-point for the reduction in employment tax transfers from companies and employees to the Federal Government when companies are unable to easily find replacement workers. USCIS notes that there may be some unmonetized costs such as additional opportunity costs to employers that would not be captured in these monetized estimates.

Table 6. OMB A-4 Accounting Statement (\$ millions, 2017)					
Period of analysis: 2019 – 2028					
Category	Primary Estimate		Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS					
Monetized Benefits	(7%)	N/A	N/A	N/A	RIA
	(3%)	N/A	N/A	N/A	RIA
Annualized quantified, but un-monetized, benefits		0	0	0	RIA
Unquantified Benefits	Applicants would benefit from reduced confusion over renewal requirements. DHS would be able to operate under sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identity verification.				RIA
COSTS					
Annualized monetized costs (discount rate in parenthesis)	(7%)	\$387.38	\$0	\$774.76	RIA
	(3%)	\$387.38	\$0	\$774.76	RIA
Annualized quantified, but	N/A		N/A	N/A	RIA

un-monetized, costs					
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 additional search costs.				RIA
TRANSFERS					
Annualized monetized transfers: "on budget"	(7%)	\$0	\$0	\$0	RIA
	(3%)	\$0	\$0	\$0	
From whom to whom?	N/A				N/A
Annualized monetized transfers: "off-budget"	(7%)	\$387.38	\$0	\$774.76	RIA
	(3%)	\$387.38	\$0	\$774.76	
From whom to whom?	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.				RIA
Annualized monetized transfers: "off-budget"	(7%)	\$59.27	\$0	\$118.54	RIA
	(3%)	\$59.27	\$0	\$118.54	
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.				
Category	Effects				Source Citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments	None; no significant impacts to national labor force or to the labor force of individual states is expected. Possible loss of tax revenue.				RIA
Effects on small businesses	None.				RFA
Effects on wages	None.				RIA
Effects on growth	None				RIA

2. Background and Purpose of the Proposed Rule

Aliens who are arriving or physically present in the United States generally may apply for asylum in the United States irrespective of their immigration status. To establish eligibility for asylum, an applicant must demonstrate, among other things, that they have suffered past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Applicants, with limited exceptions, are required to apply for asylum within one year of their last arrival in the United States. USCIS does not currently charge filing fees for certain humanitarian benefits, including asylum applications and applications concurrently filed with asylum applications. Asylum applicants whose cases remain pending without a decision for at least 150 days are eligible to apply for employment authorization, unless any delays are caused by the applicant (such as a request to reschedule an interview). 8 CFR 208.7, 274a.12(c)(8), 274a.13(a)(2). Applicants who are granted asylum (“asylees”) may work immediately. *See* INA 208(c)(1)(B), 8 U.S.C. 1158(c)(1)(B). An asylee may choose to obtain an EAD for convenience or identification purposes, but this documentation is not necessary for an asylee to work. 8 CFR 274a.12(a)(5).

Currently, DHS regulations at 8 CFR 208.7(a)(1) provide that USCIS adjudicates a Form I-765 within 30 days of receiving a properly filed application from a pending asylum applicant. Asylum applicants must wait 150 days from the time of filing the asylum application before they can file a Form I-765. USCIS cannot grant employment authorization until the applicant has accumulated a total of 180 days, not including any delays caused or requested by the applicant, meaning the applicant’s asylum case has been pending for a total of 180 days. 8 CFR 208.7(a)(1)-(2). This is known as the 180-Day Asylum EAD clock.³² If USCIS approves the

³² *See* The 180-Day Asylum EAD Clock Notice (May 9, 2017) https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf.

Form I-765, USCIS mails an EAD according to the mailing preferences indicated by the applicant. If USCIS denies the Form I-765, the agency sends a written notice to the applicant explaining the basis for denial.

However, if USCIS requires additional documentation from the applicant before a decision can be made, USCIS sends a request for evidence (RFE) and the 30-day processing timeframe for processing a Form I-765 is paused until additional documentation is received. Once USCIS receives all requested information in response to the RFE, the 30-day timeframe continues from the point at which it stopped. In some instances, applications may require additional vetting by the Background Check Unit (BCU) and the Center Fraud Detection Operations (CFDO), for instance, to verify an applicant's identity. The 30-day timeframe does not stop in these situations, though these cases may take longer than 30 days to process. USCIS would make a decision only after all eligibility and background checks relating to the EAD application have been completed.

DHS considers the 30-day adjudication timeframe to be outdated, as it no longer reflects current DHS operational realities. In the 20-plus years since the timeframe was established, there has been a shift to centralized processing as well as increased security measures, such as the creation of tamper-resistant EAD cards. These measures reduce opportunities for fraud but can require additional processing time, especially as filing volumes remain high. By eliminating the 30-day provision, DHS would be able to maintain accurate case processing times for initial EAD applications for pending asylum applicants since, prior to the *Rosario v. USCIS* court order, it was not meeting the 30-day regulatory timeframe most of the time (53 percent), to address national security and fraud concerns for those applications that require additional vetting through RFEs or referrals to BCU and/or CFDO, and to maintain technological advances in document

production and identity verification that USCIS must fulfill as a part of its core mission within DHS such as the centralized production and creation of tamper-resistant cards.

As noted above, the need for this rule results in part from the resource burden associated with adjudicating, within the 30-day adjudication timeframe, a large number of initial Forms I-765 under the Pending Asylum Applicant category. The large number of applications results from a range of factors, such as recent growth in USCIS's asylum backlog, which USCIS continues to address through a number of different measures.

For example, in an effort to stem the growth of the agency's asylum backlog, USCIS returned to processing affirmative asylum applications on a "last in, first out" (LIFO) basis. Starting January 29, 2018, USCIS began prioritizing the most recently filed affirmative asylum applications when scheduling asylum interviews. The former INS first established this interview scheduling approach as part of asylum reforms implemented in January 1995 and it remained in place until December 2014. USCIS has returned to this approach in order to deter individuals from using asylum backlogs solely as a means to obtain employment authorization by filing frivolous, fraudulent or otherwise non-meritorious asylum applications. Giving priority to recent filings allows USCIS to promptly adjudicate asylum applications.³³

Another possible effect of reinstating LIFO is that in the future, fewer affirmative asylum applications would remain pending before USCIS for 150 days. However, the majority of asylum applications filed with USCIS have been referred to the Department of Justice Executive Office for Immigration Review (EOIR) for consideration of the asylum application by an

³³ USCIS now schedules asylum interviews based on three priority levels. First priority: applications scheduled for an interview, but the interview had to be rescheduled at the applicant's request or the needs of USCIS. Second priority: applications pending 21 days or less. Third priority: all other pending affirmative asylum applications, which will be scheduled for interviews starting with newer filings and working back towards older filings. *See* Affirmative Asylum Interview Scheduling (Jan. 26, 2018), available at <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-interview-scheduling>.

immigration judge. In FY 2017, 53 percent of asylum filings processed by USCIS resulted in a referral to an immigration judge.³⁴ These applicants may be eligible to apply for an initial EAD under the (c)(8) category once the Asylum EAD Clock reaches 150 days. USCIS anticipates updating its data in the analysis accompanying the final rule. If this and other reforms are successful, such updated data may reflect a relative reduction in application volumes.

In the end, however, USCIS cannot predict with certainty how LIFO and other administrative measures, as well as external factors such as immigration court backlogs and changes in country conditions, will ultimately affect total application volumes and the attendant resource burdens on USCIS. In addition, in light of the need to accommodate existing vetting requirements and to maintain flexibility should trends change, USCIS believes that even if it could reliably project a reduction in total application volume, such reduction would not, on its own, serve as a sufficient basis to leave the 30-day adjudication timeframe in place.

Finally, once an EAD is approved under the (c)(8) Pending Asylum Applicant category, it is valid for two years and requires renewal to extend an applicant's employment authorization if the underlying asylum application remains pending.³⁵ Currently, DHS regulations at 8 CFR 208.7(d) require that USCIS must receive renewal applications at least 90 days prior to the employment authorization expiration.³⁶ Removing the 90-day requirement would bring 8 CFR 208.7(d) in line with 8 CFR 274a.13(d), as amended in 2017; such amendments automatically extend renewal applications for up to 180 days. Additionally, under the 2017 AC21 Rule,

³⁴See Notes from Previous Engagements, Asylum Division Quarterly Stakeholder Meeting (Feb. 7, May 2, Aug. 11, and Nov. 3, 2017), https://www.uscis.gov/outreach/notes-previous-engagements?topic_id=9213&field_release_date_value%5Bvalue%5D%5Bmonth%5D=&field_release_date_value_1%5Bvalue%5D%5Byear%5D=&multiple=&items_per_page=10.

³⁵ EADs issued prior to October 5, 2016 had a validity period of one year. See USCIS Increases Validity of Work Permits to Two Years for Asylum Applicants (Oct. 6, 2016), available at <https://www.uscis.gov/news/alerts/uscis-increases-validity-work-permits-two-years-asylum-applicants>.

³⁶ For renewal applications, a properly filed application for pending asylum applicants is one that is complete, signed, accompanied by all necessary documentation and the current filing fee of \$410.

applicants eligible for employment authorization can have the validity of their EADs automatically extended for up to 180 days from the document’s expiration date, if they (1) file before its expiration date, (2) are requesting renewal based on the same employment authorization category under which the expiring EAD was granted, and (3) will continue to be authorized for employment based on their status, even after the EAD expires and are applying for renewal under a category that does not first require USCIS to adjudicate an underlying application, petition, or request.

3. Population

In FY 2017, USCIS received a total of 142,760 affirmative filings of Form I-589 applications for asylum. The number of total receipts for asylum applicants has risen sharply over the last five years, increasing over 221 percent from FY 2013 to FY 2017 (Table 7). As the number of asylum applicants increases, the backlog continues to grow,³⁷ resulting in a greater number of people who are eligible to apply for EADs while they await adjudication of their asylum application.

Fiscal Year	Total Receipts
2013	44,453
2014	56,912
2015	84,236
2016	115,888
2017	142,760
Source: All USCIS Application and Petition Form Types, All Form Types Performance Data (Fiscal Year 2013-2017,	

³⁷ As of June 2018, the asylum backlog was still increasing, but its growth rate has begun to stabilize.

³⁸ These numbers only address the affirmative asylum applications that fall under the jurisdiction of USCIS’ Asylum Division. Defensive asylum applications, filed with the Department of Justice’s Executive Office for Immigration Review (EOIR) are also eligible for (c)(8) EADs. There is an ongoing backlog of pending defensive asylum cases at EOIR, which has approximately 650,000 cases pending. *See* Memorandum from Jeff Sessions, Attorney General, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017). The defensive asylum backlog at EOIR also contributes to an increase in both initial and renewal (c)(8) EAD applications.

4th Qtr), <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-all-uscis-application-and-petition-form-types>.

This larger number of applications strains resources, which leads to longer processing times for Form I-765 adjudication. Table 8 shows the total, initial, and renewal applications received for Form I-765 for asylum applicants for FYs 2013 to 2017.³⁹

Table 8: Total Annual Form I-765 Receipts Received From Pending Asylum Applicants			
Fiscal Year	Total Receipts*	Total Initial Receipts	Total Renewal Receipts
2013	79,571	41,021	37,861
2014	110,210	62,169	47,103
2015	180,196	106,030	72,559
2016	300,855	169,970	128,610
2017	478,721	261,782	212,255
Average	229,911	128,194	99,678
Source: USCIS, Office of Performance and Quality			
*Total receipts do not include replacement receipts. Therefore, initial and renewal receipts will not equal to total receipts.			
Note: This data includes receipts received from both affirmative and defensive pending asylum applicants.			

In FY 2017, USCIS received a total of 478,721 applications for Form I-765 from pending asylum applicants, with more than half as initial applications (261,782 or 54.7 percent). There were 212,255 renewal applications (44.3 percent) in FY 2017. This trend is similar across all five fiscal years. The five-year average of total applications received was 229,911, with five-year averages of 128,194 initial applications and 99,678 renewal applications.

For this analysis, USCIS does not use a trend line to forecast future projected applications because various factors outside of this rulemaking may result in either a decline or, conversely, a continued rise of applications received. For example, while the number of initial applicants and

³⁹ Since LIFO was reinstated at the end of January 2018, there is not yet enough data currently available to determine the impact on asylum applications or initial EAD applications. USCIS anticipates updating its data in the analysis accompanying the final rule. If this and other reforms are successful, such updated data may reflect a relative reduction in application volumes.

renewals has risen sharply over the last five years, DHS assumes the increase in initial EAD applications has some correlation with the increase in applications for asylum. As pending asylum applications increase, the length of time it takes to adjudicate those applications increases, and it is reasonable to assume that the number of applicants who seek employment authorization on the basis of that underlying asylum application would also rise. On the other hand, initial EAD applications may decline. For instance, USCIS' return to a LIFO interview schedule to process affirmative asylum applications, may help stem the growth of the agency's asylum backlog, and may result in fewer pending asylum applicants applying for an EAD. But USCIS cannot predict such an outcome with certainty at this time. Therefore, since DHS anticipates similar outcomes to those achieved in FY 2017, USCIS anticipates receiving approximately 478,721 Form I-765 applications annually from pending asylum applicants, with an estimated 261,782 initial applications and 212,255 renewal applications.

In order to analyze USCIS processing times for Form I-765, USCIS obtained data on completed initial applications, which included the length of time to complete adjudication and information on investigative factors that may prolong the adjudication process. Table 9 differentiates between initial applications that USCIS adjudicated within the 30-day timeframe in FY 2017 and those that it did not. The table also includes the initial applications that were adjudicated within a 60-day timeframe in FY 2017, along with the corresponding initial applications that required additional vetting. This additional vetting includes the issuance of RFEs and referrals for identity verification by the BCU and the CFDO, which can cause delays in processing. DHS notes that the 30-day timeframe pauses for RFEs but does not pause for BCU or CFDO checks. Delays could also be caused by rescheduled fingerprinting.

Table 9: Percentage of Completions for Initial Form I-765 for Pending Asylum Applicants in FY 2017					
Number of Days the Initial Application was Pending	No Additional Vetting Required (Percent)		Additional Vetting Required (Percent)		Total (Percent)
	Approved Initial Applications	Denied Initial Applications	Approved Initial Applications	Denied Initial Applications	
0-30	42	2	3	0	47
31-60	22	2	6	1	31
Over 60	12	2	6	2	22
Total (Percent)	76	5	16	3	100
Source: USCIS, Office of Performance and Quality					
Note: Additional vetting includes the applications issued an RFE, referred to BCU/CFDO and both.					

In FY 2017, USCIS adjudicated within the 30-day timeframe just under half (47 percent) of all initial Form I-765 applications received. USCIS approved within 30 days 45 percent⁴⁰ of the initial applications received and denied 2 percent that did not require any additional vetting. Among the approved applications, only 3 percent of the total required additional vetting, while 42 percent did not. USCIS' completion rate within a 60-day timeframe increased to 78 percent overall, with 73 percent⁴¹ of applications approved and 5 percent⁴² denied. Only 10 percent⁴³ of

⁴⁰ Calculation of 30-day Approved: 42 (No Additional Vetting Percent Approved 0 – 30 days) + 3 (Additional Vetting Percent Approved 0 – 30 days) = 45 percent.

⁴¹ Calculation of 60-day Approved: 42 (No Additional Vetting Percent Approved 0 – 30 days) + 22 (No Additional Vetting Percent Approved 31-60 days) + 3 (Additional Vetting Percent Approved 0 – 30 days) + 6 (Additional Vetting Percent Approved 31-60 days) = 73 percent.

⁴² Calculation of 60-day Denied: 2 (No Additional Vetting Percent Denied 0 – 30 days) + 2 (No Additional Vetting Percent Denied 31-60 days) + 1 (Additional Vetting Percent Denied 31 – 60 days) = 5 percent.

⁴³ Calculation of 60-day Additional Vetting: 3 (Additional Vetting Percent Approved 0 – 30 days) + 6 (Additional Vetting Percent Approved 31-60 days) + 1 (Additional Vetting Percent Denied 31 – 60 days) = 10 percent.

applications adjudicated within 60 days required additional vetting, while the majority of approved applications did not (68 percent of the total)⁴⁴.

In FY 2017, prior to the *Rosario v. USCIS* court order, the majority of applications (53 percent) did not meet the required 30-day adjudication timeframe. In fact, it took up to 60 days for USCIS to adjudicate the majority of applications. For applications that require additional vetting, most applications took more than 30 days to adjudicate as well. “Additional vetting” cases include those where an RFE is issued, which pauses the regulatory processing time. The findings in Table 9 underscore that, while additional vetting and other delays may contribute to increased processing times, it may not be the only reason processing times have increased. It is likely that the increasing number of initial EAD applications is due to increasing asylum receipts, the asylum interview backlogs, and updated operations as outlined in the background of this proposed rule.

With the removal of the 30-day adjudication timeframe, DHS anticipates similar outcomes to those achieved in FY 2017. DHS’s primary goal is to adequately vet applicants and adjudicate cases as quickly and efficiently as possible. DHS welcomes public comment on the above analysis, including the methodology used for the population estimates of this proposed rule and the analysis of processing times.

4. Transfers, Costs and Benefits of this Proposed Rule

(1) Transfers and Costs

The proposed rule would remove the 30-day adjudication timeframe in order to better align with DHS processing times achieved in FY 2017. USCIS recognizes that removing the 30-

⁴⁴ Calculation of 60-day No Additional Vetting: 42 (No Additional Vetting Percent Approved 0 – 30 days) + 22 (No Additional Vetting Percent Approved 31-60 days) + 2 (No Additional Vetting Percent Denied 0 – 30 days) + 2 (No Additional Vetting Percent Denied 31-60 days) = 68 percent.

day regulatory timeframe could potentially result in longer processing times for some applicants and in such situations, this could lead to potential delays in employment authorization for some initial EAD applicants. As described above, these delays would have both distributional effects (which are transfers) and costs. Any delay beyond the regulatory 30-day timeframe would prevent an EAD applicant, if his or her application were approved, from earning wages and other benefits until authorization is obtained. A portion of this lost compensation would be a distributional impact and considered a transfer from asylum applicants to others that are currently in the U.S. labor force, possibly in the form of additional work hours or overtime pay. In cases where companies that would have hired asylum applicants had they been in the labor market earlier are not able to find available workers, the lost compensation to asylum workers would be considered a proxy for the cost of lost productivity to those companies. However, USCIS does not know the portion of the overall impacts of this rule that are transfers or costs. One reason USCIS is unable to apportion these impacts is because the industries in which asylum applicants will work with their employment authorization is unknown; companies' responses to such a situation will vary depending on the industry and location of the company (e.g. truck drivers are limited to the number of overtime hours they can work). Additional uncertainty in how companies will respond exists because while the official unemployment rate is low, there is still evidence of some labor market slack.⁴⁵ While USCIS is unable to apportion

⁴⁵ See Bureau of Labor Statistics, *Employment Situation News Release*, Nov. 2, 2018, https://www.bls.gov/news.release/archives/empsit_11022018.pdf.

It reports that “the number of persons employed part time for economic reasons (sometimes referred to as involuntary part-time workers) was essentially unchanged at 4.6 million in October. These individuals, who would have preferred full-time employment, were working part time because their hours had been reduced, or they were unable to find full-time jobs.” It reports also that “In October, 1.5 million persons were marginally attached to the labor force. . . These individuals were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months.”

these impacts between transfers and costs, USCIS does use the lost compensation to asylum applicants, as described below, as a measure of these total impacts.

In FY 2017, the processing times for initial Form I-765 under the Pending Asylum Applicant category exceeded the regulatory set timeframe of 30 days more than half the time. However, USCIS adjudicated approximately 78 percent of applications within 60 days. To estimate lost wages and other benefits, USCIS used FY 2017 daily processing data. In FY 2017, USCIS adjudicated 119,088 approved applications⁴⁶ past the regulatory set timeframe. USCIS recognizes that pending asylum EAD applicants do not currently participate in the U.S. labor market, and, as a result, are not represented in national average wage calculations. Further, USCIS recognizes that pending asylum applicants who obtain an EAD are not limited to certain types of employment or occupations nor does USCIS track the type of employment applicants obtain. Because the Form I-765(c8) does not include or legally require, at the initial or 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 involve such workers. In some DHS rulemakings, the estimates of distributional impacts and time-related opportunity costs are linked to the federal minimum wage for new entrants to the labor force. 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 proposed 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

⁴⁶ In FY 2017, USCIS adjudicated 15,860 denied (c)(8) EAD applications past the regulatory set timeframe. Since denied applicants would not obtain work authorization and would not lose working days, this population is not be impacted by this proposed rule and are therefore not included in the analysis for lost compensation.

states have their own minimum wage, and, even within states, there are multiple tiers.⁴⁷

Although the minimum wage could be considered a lower-end bound on true earnings, the prevailing minimum wage is fully loaded, at \$12.05, which 13.8 percent higher than the federal minimum wage.⁴⁸ DHS does not rule out the possibility that some portion of the population might earn wages at the average level for all occupations, but without solid a priori 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, USCIS uses both the prevailing minimum hourly wage rate of \$8.25 to estimate a lower bound and a national average wage rate of \$24.98⁴⁹ to take into consideration the variance in average wages across states as an upper bound.

In order to estimate the fully loaded wage rates, to include benefits such as paid leave, insurance, and retirement using the most recent Bureau of Labor Statistics (BLS) data, USCIS calculated a benefits-to-wage multiplier of 1.46⁵⁰ and multiplied it by the prevailing minimum hourly wage rate. The fully loaded per hour wage rate for someone earning the prevailing

⁴⁷ See *When it comes to the minimum wage, we cannot just 'leave it to the states'* (November 10, 2016) 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>.

⁴⁸ Calculations (1) for prevailing minimum wage: \$8.25 hourly wage x benefits burden of 1.46 = \$12.05; for federal minimum wage: \$7.25 hourly wage x benefits burden of 1.46 = \$10.59 See Minimum Wage, U.S. Department of Labor available at <https://www.dol.gov/general/topic/wages/minimumwage>; (2) (((\$12.05 wage-\$10.59 wage)/\$10.59)) wage = .1378, which rounded and multiplied by 100 = 13.8 percent.

⁴⁹ The wage update in April 2018 reflects the 2017 average for all occupations nationally. The data are found at the BLS Occupational Employment and Wage Estimates, United States, found at: https://www.bls.gov/oes/2018/may/oes_nat.htm#00-0000.

⁵⁰ The benefits-to-wage multiplier is calculated by the Bureau of Labor Statistics (BLS) as follows: (\$36.32 Total Employee Compensation per hour) / (\$24.91 Wages and Salaries per hour) = 1.458 (1.46 rounded). See U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, 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 (April 2019), available at https://www.bls.gov/news.release/archives/ecec_03192019.pdf.

minimum wage rate is \$12.05⁵¹ and \$36.47⁵² for someone earning the average wage rate.

Multiplying these fully loaded hourly wage rates by 8 to reflect an assumed 8-hour workday produces daily wage rates of \$96.36 and \$291.77⁵³, respectively. USCIS also assumes that EAD holders would work 5 out of every 7 days, or an average of 21 days per month.

Using FY 2017 data, USCIS estimates that the 119,088 approved EAD applicants experienced an estimated total 2,655,429 lost working days, and lost compensation could range from \$255.88 million to \$774.76 million.⁵⁴ USCIS understands that not all EAD recipients would work in minimum or average wage occupations, but provides these estimates as possible lower and upper bounds for approved applicants who would engage in full-time employment. Table 10 shows the number of applicants completed in a period longer than the 30-day regulatory timeframe in FY 2017, the associated number of lost working days, and an estimate of the resulting lost compensation. The two categories over 120 days show the declining number of applications that remain pending after 200 days and the maximum number of days it took to adjudicate an initial EAD completed in FY 2017, which was 810 calendar days.

Table 10: Summary of Calculations for Initial Form I-765 for Pending Asylum Applicants in FY 2017						
	31-60 DAYS	61-90 DAYS	91-120 DAYS	121-200 DAYS	201-810 DAYS	Total
FY 2017 Completions	71,556	31,356	11,734	4,048	394	119,088
Lost Calendar Days	899,402	1,377,308	817,073	466,524	91,019	3,651,326
Lost Working Days	691,314	992,880	581,237	330,038	59,960	2,655,429

⁵¹ Calculation: \$8.25 x 1.46 = \$12.05 per hour.

⁵² Calculation: \$24.98 x 1.46 = \$36.47 per hour.

⁵³ Calculations: \$12.05 per hour x 8 hours = \$96.36 per day; \$36.47 per hour x 8 hours = \$291.77 per day.

⁵⁴ Calculations: 2,655,429 lost working days * (\$96.36 per day) = \$255.88 million; 2,655,429 lost working days * (\$291.77 per day) = \$774.76 million.

Lost Compensation (lower bound)	\$66,615,017	\$95,673,917	\$56,007,997	\$31,802,462	\$5,777,746	\$255,877,138
Lost Compensation (upper bound)	\$201,702,197	\$289,689,023	\$169,585,427	\$96,293,999	\$17,494,313	\$774,764,960
Source: USCIS analysis. Note: To calculate lost compensation USCIS uses the fully-loaded wages based on the prevailing minimum wage to calculate the lower bound and a national average wage to calculate the upper bound.						

If companies can find replacement labor for the position the asylum applicant would have filed, 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). USCIS acknowledges that there may be additional opportunity costs to employers such as additional search costs. However, 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. USCIS requests comments on how it can apportion these impacts between transfers and costs.

USCIS also recognizes that companies would incur additional costs not captured in the estimates of lost compensation above. 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.

USCIS continues to resource the adjudication of pending asylum EAD applications. In response to the *Rosario v. USCIS* litigation and to comply with the court order, USCIS has

dedicated as many resources as practicable to these adjudications but continues to face an increasing asylum application backlog, which in turn increases the numbers of applicants eligible for pending asylum EADs. However, this reallocation of resources is not a long-term sustainable solution because USCIS has many competing priorities and many time-sensitive adjudication timeframes. Reallocating resources in the long-term is not sustainable due to work priorities in other product lines. USCIS could hire more officers, but that would not immediately and in all cases shorten adjudication timeframes because (1) additional time would be required to onboard and train new employees and (2) for certain applications, additional time is needed to fully vet an applicant, regardless of staffing levels. In addition, there is currently no fee for asylum applications or the corresponding initial EAD applications, and the cost of adjudication is covered by fees paid by other benefit requesters. USCIS is uncertain of the actual cost impacts of hiring additional adjudicators to process these EAD applications at this time. If the backlog dissipates in the future, USCIS may seek to redistribute adjudication resources. USCIS may also redistribute adjudication resources for other operational needs.

This proposed rule may result in a delay for some applicants to earn compensation if EAD processing is delayed beyond the 30-day regulatory timeframe. The lost compensation to asylum applicants could range from \$255.88 million to \$774.76 million annually, depending on the wages the asylum applicant would have earned. The ten-year total discounted costs at 3 percent could range from \$2,182.68 million to \$6,608.90 million and at 7 percent could range from \$1,797.17 million to \$5,441.62 million (years 2019-2028). USCIS recognizes that the impacts of this proposed rule could be overstated if the provisions in the broader asylum EAD NPRM are finalized as proposed.

In instances where a company cannot hire replacement labor for the position the asylum applicant would have filled, USCIS acknowledges that delays may result in tax revenue losses to the government. It is difficult to quantify income tax losses because individual tax situations vary widely⁵⁵ but USCIS estimates the potential loss to other employment tax programs, namely Medicare and social security which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent respectively).⁵⁶ With both the employee and employer not paying their respective portion of Medicare and social security taxes, the total estimated tax loss for Medicare and social security is 15.3 percent.⁵⁷ Lost wages ranging from \$255.88 million to \$774.76 million would result in employment tax losses to the government ranging from \$39.15 million to \$118.54 million.⁵⁸ Again, depending on the circumstances of the employee, there could be additional federal income tax losses not estimated here. There may also be state and local income tax losses that would vary according to the jurisdiction.

In addition to taxes, USCIS also considered the effects of this rule on USCIS resources. In response to the *Rosario v. USCIS* litigation and to comply with the court order, USCIS has dedicated as many resources as practicable to adjudications of initial EAD applications for pending asylum applicants, but continues to face a historic asylum application backlog, which in turn increases the numbers of applicants eligible for pending asylum EADs. However, this reallocation of resources is not a long-term, sustainable solution because USCIS has many

⁵⁵ 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>.

⁵⁶ 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.

⁵⁷ Calculation: (6.2 percent social security + 1.45 percent Medicare) x 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

⁵⁸ Calculations: Lower bound lost wages \$255.88 million x 15.3 percent employee tax rate = \$39.15 million. Upper bound lost wages \$774.76 million x 15.3 percent employee tax rate = \$118.54 million.

competing priorities and many time-sensitive adjudication timeframes. Reallocating resources in the long-term is not sustainable due to work priorities in other product lines. Hiring more officers could bring improvements but that would not immediately shorten adjudication timeframes because additional time would be required to onboard new employees, and train them. In addition, there is currently no fee for asylum applications or the corresponding initial EAD applications, and the cost of adjudication is covered by fees paid by other benefit requesters. USCIS is uncertain of the actual cost impacts of hiring additional adjudicators to process these EAD applications at this time. Finally, USCIS has found that certain applications inherently cannot be processed in a specific number of days due to vetting procedures and background checks that simply require additional time (see Table 10 where processing days in FY 2017 reached a maximum 810 days). Therefore, meeting the 30-day timeframe does not solely depend on hiring more adjudication officers because for certain applications additional time is needed for processing. Thus, USCIS is proposing to remove the 30-day requirement rather than increasing the number of adjudication officers in the long-term.

This proposed rule would result in reduced opportunity costs to the Federal Government. Since *Rosario* compelled USCIS to comply with the 30-day provision in FY 2018, USCIS has redistributed its adjudication resources to work up to full compliance. If the 30-day timeframe is removed, these redistributed resources could be reallocated, potentially reducing delays in processing of other applications and avoiding costs associated with hiring additional employees. USCIS has not estimated these avoided costs.

DHS also acknowledges the distributional impacts associated with an applicant waiting for an EAD onto the applicant's support network. DHS assumes the longer an asylum applicant's EAD is delayed, the longer the applicant's support network is providing assistance to

the applicant. DHS cannot determine how much monetary or other assistance is provided to such applicants. DHS requests comments from the public on any data or sources that demonstrate the amount or level of assistance provided to asylum applicants who have pending EAD applications. DHS welcomes any comments from the public on costs to applicants from removing the 30-day adjudication timeframe.

USCIS does not anticipate that removing the separate 90-day EAD filing requirement would result in any costs to applicants or the Federal Government, as it makes a procedural change that benefits the applicant. DHS also welcomes public comments on any costs resulting from the removal of the 90-day renewal requirement.

(2) Benefits

By eliminating the 30-day provision, DHS would be able to operate under long-term sustainable case processing times for initial EAD applications for pending asylum applicants, to allow sufficient time to address national security and fraud concerns, and to maintain technological advances in document production and identity verification that USCIS must fulfill as a part of its core mission within DHS.

Applicants would rely on up-to-date processing times, which provide realistic expectations of adjudication times.

This rule would end future litigation over the 30-day adjudication timeframe, such as the litigation referenced above. Even applications that are not subject to a set timeframe, however, could in some cases be the subject of litigation on “unreasonable delay” theories. And more important, as indicated above, as a primary goal, USCIS seeks to adequately vet applicants and adjudicate applications as quickly and efficiently as possible. DHS welcomes any public comments on the benefits described for the removal of the 30-day adjudication timeframe.

USCIS would benefit from the removal of the 90-day renewal requirement, because regulations would be updated to match that of other EAD categories and it would ensure that the regulatory text reflects current DHS policy and regulations under DHS's 2017 AC21 Rule. USCIS welcomes any public comment on the benefits of the removal of the 90-day renewal requirement.

(3) Labor Market Overview

As discussed in the population section of this analysis, USCIS anticipates receiving approximately 478,721 Form I-765 applications annually from pending asylum applicants with an estimated 261,782 initial applications and 212,255 renewal applications. Since this proposed rule would only affect initial applicants who experience potential delays in processing, USCIS estimates the affected population to be approximately 119,088 applications.⁵⁹ The U.S. labor force consists of a total of 162,981,000 workers, according to the recent data (June 2019).⁶⁰ Therefore, the population affected by this proposed rule represents 0.07 percent of the U.S. labor force, suggesting that the number of potential workers no longer expecting a 30-day processing timeframe make up a very small percentage of the U.S. labor market.⁶¹ USCIS recognizes that unemployment rates have been historically low recently and the number of unemployed persons was 5,975,000 in June 2019, and so providing EADs to pending asylum applicants potentially

⁵⁹ In FY 2017, USCIS adjudicated 119,088 approved applications past the regulatory set timeframe.

⁶⁰ The BLS labor force data are found in Table A-1. Employment status of the civilian population by sex and age, seasonally adjusted, from the Current Population Survey July 2019 News Release: https://www.bls.gov/news.release/archives/empsit_07052019.pdf.

⁶¹ Calculation: (119,088 approximate initial applicants who could experience processing delays per year / 162,981,000 workers) *100 = 0.07 percent.

fills an economic need as discussed previously.⁶² However, USCIS must first be sufficiently assured of applicant eligibility and ensure all background and security checks are completed.

In any case, USCIS notes that this proposed rule does not introduce any newly eligible workers into the labor force, or permanently prevent any eligible workers from joining the labor force. This proposed rule only amends the processing of initial and renewal employment authorizations for pending asylum applicants. The ability of pending asylum applicants to be eligible for requesting employment authorization in certain circumstances is in existing regulations; this proposed rulemaking is not seeking to alter which pending asylum applicants are eligible to apply for employment authorization. Therefore, this proposed rule would not change the composition of the population of 229,911 estimated applicants who may apply for employment authorization or the number of workers entering the labor force; rather, this rule could delay 119,088 pending asylum applicants from entering the U.S. labor market by an average of approximately 31 days each, for a total of 3,651,326 days.⁶³ DHS welcomes public comment on this assessment of this proposed rule.

(4) Alternatives

(1) Alternative: 90-day Regulatory Timeframe

DHS considered an alternative to the proposed removal of the 30-day regulatory timeframe, to instead extend the regulatory timeframe to 90 days. Currently, under the *Rosario v. USCIS* court order, USCIS must comply with its existing regulation requiring a 30-day timeframe and process all initial EAD applications for asylum applicants within 30 days. Under this alternative, USCIS would instead process all future applications within 90 days. In FY 2017, prior to the

⁶² The BLS labor force data are found in Table A-1. Employment status of the civilian population by sex and age, seasonally adjusted, from the Current Population Survey July 2019 News Release: https://www.bls.gov/news.release/archives/empstat_07052019.pdf.

⁶³ Calculation: 3,654,326 total days/119,088 applicants = 31 days (rounded).

Rosario v. USCIS court order, USCIS was able to sustainably process approximately 47 percent of applications within 30 days. USCIS, therefore, assumes 47 percent of applicants would remain unaffected under this 90-day alternative. USCIS assumes the remaining 53 percent of applicants would have their processing time extended under this alternative. In FY 2017 there were a total of 119,088 approved applications for which processing took more than 30 days. USCIS assumes approved applications that were processed in 31-60 days, and 61-90 days in FY 2017 (71,556 and 31,356 applicants, respectively) would be processed in a similar amount of time under this alternative. For the 16,176 approved applications that took more than 90 days to process in FY 2017, USCIS assumes the processing time under this alternative would be 90 days, as this alternative would set the maximum processing time at 90 days. USCIS notes that while processing for this group under the 90-day alternative would be longer than the current 30-day processing time under the *Rosario v. USCIS* court order, it would be shorter as compared to the proposed rule, which proposes to remove any processing timeframe.⁶⁴

Based on the analysis provided in the Transfers and Costs section, USCIS used FY 2017 daily processing data to estimate lost wages, lost taxes, and other benefits for this alternative proposal. In FY 2017, USCIS adjudicated 102,912 approved applications⁶⁵ between 31 and 90 days. USCIS estimates that under this alternative the 102,912 approved EAD applicants would have experienced an estimated total 1,684,194 lost working days, and lost compensation could have ranged from \$158.82 million to \$480.89 million⁶⁶ annually depending on the wages the asylum applicant would have earned. In FY 2017, USCIS adjudicated 16,176 approved

⁶⁴ In FY 2017, USCIS adjudicated 16,176 approved and 5,202 denied (c)(8) EAD applications in over 90 days.

⁶⁵ In FY 2017, USCIS adjudicated 10,658 denied (c)(8) EAD applications between 31 and 90 days. Since denied applicants would not obtain work authorization and would not lose working days, this population is not impacted by this proposed rule and are therefore not included in the analysis for lost compensation.

⁶⁶ Calculations: 1,648,194 lost working days * (\$96.36 per day) = \$158.82 million; 1,648,194 lost working days * (\$291.77 per day) = \$480.89 million.

applications in greater than 90 days. USCIS estimates that under this alternative the 16,176 approved EAD applicants would have experienced an estimated total 679,392 lost working days, and lost compensation could have ranged from \$65.47 million to \$198.23 million annually depending on the wages the asylum applicants would have earned. Table 11 shows the number of approved applications completed in more than 30 days in FY 2017, the associated number of lost working days, and an estimate of the resulting lost compensation.

Table 11: Summary of Calculations for Initial Form I-765 for Pending Asylum Applicants in FY 2017				
	31-60 DAYS	61-90 DAYS	Greater than 90 days	Total
FY 2017 Completions	71,556	31,356	16,176	119,088
Lost Calendar Days	899,402	1,377,308	970,560	3,247,270
Lost Working Days	691,314	992,880	679,392	2,377,451
Lost Compensation (lower bound)	\$66,615,017	\$95,673,917	\$65,466,213	\$227,755,147
Lost Compensation (upper bound)	\$201,702,197	\$289,689,023	\$198,223,758	\$689,614,978
Source: USCIS analysis.				
Note: The prevailing minimum wage is used to calculate the lower bound while a national average wages is used to calculate the upper bound lost compensation.				

In addition to the lost wages, USCIS acknowledges that such processing delays may result in the loss in tax revenue to the government. Similar to the analysis in the Transfers and Costs section, USCIS estimates the potential loss to Medicare and social security. Lost wages ranging \$227.76 million to \$689.61 million would result in employment tax revenue losses to the

government ranging from \$34.85 million to \$105.51 million annually.⁶⁷ Again, depending on the circumstances of the employee, there could be additional federal income tax losses not estimated here. There may also be state and local income tax losses that would vary according to the jurisdiction. The ten-year total discounted lost compensation to asylum applicants at 3 percent could range from \$1,942.80 million to \$5,882.56 million and at 7 percent could range from \$1,599.66 million to \$4,843.57 million (years 2019-2028). USCIS recognizes that the impacts of this alternative could be overstated if the provisions in the broader asylum EAD NPRM are finalized as proposed. Specifically, the broader asylum EAD NPRM would limit or delay eligibility for employment authorization for certain asylum applicants. Accordingly, if the population of aliens is less than estimated as a result of the broader asylum EAD rule, the estimated impacts of this alternative could be overstated because the population affected may be lower than estimated in this rule.

As previously discussed, USCIS does not know the portion of overall impacts of this rule that are transfers or costs, but estimates that the maximum monetized impact of this 90-day alternative from lost compensation is \$689.61 million annually. Accordingly, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then \$689.61 million is the estimated maximum monetized cost of the rule and \$0 is the estimated minimum in monetized transfers. Additionally, under this scenario, there would be a reduction of \$105.51 million in employment tax transfers from companies and employees to the Federal Government. Conversely, if all companies are able to easily find reasonable labor substitutes, they will bear little or no costs, so \$689.61 million will be transferred from asylum

⁶⁷ Calculations: Lower bound lost wages \$227.76 million x 15.3 percent employee tax rate = \$34.85 million. Upper bound lost wages \$689.61 million x 15.3 percent employee tax rate = \$105.51 million.

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).

(2) Comparison of Alternatives

Currently, the *Rosario v. USCIS* court decision requires USCIS to process asylum EAD applications in 30 days. This rule proposes to remove any adjudication timeframe for processing future asylum EAD applications. USCIS also considered an alternative under which USCIS would process all future applications within 90 days. In the table below, USCIS compares the lost working days and associated lost compensation and taxes under the 90-day alternative with the proposed rule. As previously discussed, if companies can find replacement labor for the position the asylum applicant would have filled, the effects of this rule would be primarily transfers from asylum applicants to others already in the labor market (or induced to return). If companies cannot find reasonable substitutes, the rule would primarily be a cost to these companies through lost productivity and profits, and also result in a decrease in employment tax transfers from employees to the government. USCIS uses the lost compensation to asylum applicants as a measure of the overall impact of the rule – either as distribution impacts (transfers) or as a proxy for businesses’ cost for lost productivity.

Table 12: Comparison of Alternatives, Using FY 2017 Annual Data						
	Number of Applicants Impacted by Change (FY 2017)	Lost Working Days	Lost Compensation (lower bound)	Lost Compensation (upper bound)	Lost Employment Taxes When Replacement Labor is Not Found (lower bound)	Lost Employment Taxes When Replacement Labor is Not Found (upper bound)
Current 30-day Processing Timeframe (i.e. no action baseline)	N/A	N/A	N/A	N/A	N/A	N/A

90-day Adjudication Timeframe Alternative	119,088	2,377,451	\$227,755,147	\$689,614,978	\$34,846,537	\$105,511,092
No Adjudication Timeframe (i.e. Proposed Alternative)	119,088	2,655,429	\$255,877,138	\$774,764,960	\$39,149,202	\$118,539,039
Source: USCIS analysis.						

The distribution of existing government resources would vary under the baseline, the proposed rule, and the 90-day alternative. When *Rosario* compelled USCIS to comply with the 30-day provision in FY 2018 (the baseline), USCIS redistributed its adjudication resources to work up to full compliance. If the 30-day timeframe is removed (the proposed rule), all of these redistributed resources could be reallocated back to the way they were pre-*Rosario* (which USCIS assumes will look like FY 2017). Under the 90-day alternative, some of the resources could be moved back, but not all of them because in FY 2017 USCIS was able to adjudicate 92 percent of applicants in 90 days.

DHS decided not to propose the 90-day alternative because although it would provide USCIS with more time to adjudicate initial EAD applications from pending asylum applicants and applicants with a new expected timeframe, it would not provide USCIS with the certainty and flexibility it needs to fulfill its core mission. Further, under DHS’s final 2017 AC21 Rule, USCIS removed the 90-day timeframe for all other EAD categories. Maintaining any adjudication timeframe for this EAD would unnecessarily constrict adjudication workflows. Ultimately, USCIS is unable to plan its workload and staffing needs with the level of certainty that a binding timeframe may require, and has no way of predicting what national security and fraud concerns may be or what procedures would be necessary in the future. DHS therefore

declined to adopt a 90-day regulatory timeframe, which would unnecessarily place operational constraints on adjudicators.

B. Regulatory Flexibility Act

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 entities during the development of their rules. The term "small entities" refers to small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This proposed rule would continue to provide employment authorization to asylum applicants who voluntarily apply for such benefits. This proposed rule only removes the 30-day adjudication timeframe and the corresponding 90-day renewal requirement. For the purposes of the RFA, DHS estimates that approximately 119,088 individuals may be impacted by this proposed rule annually. Individuals are not considered by the RFA to be a small entity. As previously explained, this proposed rule may result in lost compensation for some initial applicants whose EAD processing is delayed beyond the 30-day regulatory timeframe. However, the proposed rule does not directly regulate employers.

The RFA does not require agencies to examine the impact of indirect costs to small entities. Regardless, 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 proposed rule.

DHS requests comments from the public that would assist in understanding costs not described herein. An initial regulatory flexibility analysis follows.

- (1) A description of the reasons why the action by the agency is being considered.

This proposed rule would remove the 30-day regulatory timeframe for the adjudication of initial EAD applications by pending asylum applicants because it is outdated, does not account for the recent volume of applications and no longer reflects current operations. The proposed rule would also make a technical change to remove the 90-day filing requirement to reduce confusion regarding EAD renewal requirements for pending asylum applicants and ensure the regulatory text reflects current DHS policy and regulations under DHS's final 2017 AC21 Rule.

(2) A succinct statement of the objectives of, and legal basis for, the proposed rule.

The authority of the Secretary of Homeland Security (Secretary) for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. General authority for issuing the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and to establish such regulations as she deems necessary for carrying out such authority. Further authority for the regulatory amendment in the final rule is found in section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), which states an applicant for asylum is not entitled to employment authorization, and may not be granted asylum application-based employment authorization prior to 180 days after filing of the application for asylum, but otherwise authorizes the Secretary to prescribe by regulation the terms and conditions of employment authorization for asylum applicants.

The proposed rule would remove the 30-day adjudication timeframe in order to better align with DHS processing times achieved in FY 2017, reduce confusion regarding EAD renewal requirements and ensure the regulatory text reflects current DHS policy and regulations under DHS's final 2017 AC21 Rule.

(3) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

This proposed rule would directly regulate pending asylum applicants, or individuals, applying for work authorization. However, DHS presents this IRFA as the proposed 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. DHS cannot reliably estimate how many small entities may be indirectly impacted as a result of this proposed rule, but DHS believes the number of small entities directly regulated by this rule is zero.

(4) A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed 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.

(5) Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap or conflict with the proposed rule.

DHS is unaware of any relevant federal rule that may duplicate, overlap, or conflict with the proposed rule. Elsewhere in this preamble, DHS notes that notwithstanding the language of the parallel DOJ regulations in 8 CFR 1208.7, as of the effective date of a final rule, the revised language of 8 CFR 208.7(a)(1) and removal of 8 CFR 208.7(d) would be binding on DHS and its adjudications. DHS would not be bound by the 30-day provision of the DOJ regulations at 8 CFR 1208.7(a)(1). DOJ has no authority to adjudicate employment authorization applications.

DHS has been in consultation with DOJ on this proposed rule, and DOJ may issue conforming changes at a later date.

- (6) Description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

DHS is not aware of any alternatives to the proposed rule that accomplish the stated objectives and that would minimize the economic impact of the proposed rule on small entities as this rule imposes no direct costs on small entities. DHS requests comments and seeks alternatives from the public that will accomplish the same objectives..

C. Congressional Review Act

This proposed rule is a major rule, as defined by 5 U.S.C. 804. Accordingly, absent exceptional circumstances, 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

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 2018 levels by the Consumer Price Index for All Urban Consumers (CPI-U), is \$165 million.

Some private sector entities may incur a cost, as they could be losing the productivity and potential profits the asylum applicant could have provided had the asylum applicant been in the

labor force earlier. 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, USCIS 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 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). USCIS nonetheless welcomes public comment on potential UMRA impacts.

E. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects 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. Therefore, in accordance with section 6 of Executive Order 13132 (Federalism), it is determined that this proposed 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 (Civil Justice Reform).

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. *See* Public Law 104-13, 109 Stat. 163 (May 22, 1995). This rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

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 proposed rule may delay the ability for some initial applicants to work, which could decrease disposable income of families, as the lost compensation to asylum applicants could range from \$255.88 million to \$774.76 million 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. Further, the potential for lost compensation does not account for the fact that compliance with the 30-day timeframe is not sustainable in the long-term, as DHS has been unable to meet the 30-day processing timeframe in certain cases even with additional adjudication resources.

I. Executive Order 13175

This proposed 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.

J. National Environmental Policy Act (NEPA)

DHS Directive (Dir) 023–01 Rev. 01 and Instruction (Inst) 023-01-001 Rev. 1 establish the policies and 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 1500–1508.

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. Inst. 023–01-001 Rev. 01 establishes Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01-001 Rev. 01 Appendix A Table 1. 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. Dir. 023–01 Rev. 01 section V.B (1)–(3).

This proposed rule would remove the following purely administrative provisions from an existing regulation: (1) the 30-day adjudication provision for EAD applications filed by asylum applicants, and (2) the provision requiring pending asylum applicants to submit Form I-765 renewal applications 90 days before their employment authorization expires. 8 CFR 208.7(a)(1), (d).

Assuming that NEPA applies to this rule at all,⁶⁸ this rule falls within categorical exclusions number A3(a) in Inst. 023– 01-001 Rev. 01, Appendix A, Table 1: “Promulgation of

⁶⁸ DHS reserves its position that NEPA generally does not apply to USCIS rules.

rules . . . strictly of an administrative or procedural nature” and A3(d) for rules that interpret or amend an existing regulation without changing its environmental effect. This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this proposed rule is also categorically excluded from further NEPA review.

K. 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 (e.g., 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 proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

L. Executive Order 12630

This proposed rule would 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.

M. 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 proposed 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.

N. 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 proposed rule and determined that this proposed rule would not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, this proposed rule does not require a Statement of Energy Effects under Executive Order 13211.

V. List of Subjects and Regulatory Amendments

List of Subjects in 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements

Accordingly, DHS proposes to amend part 208 of chapter I 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.

§ 208.7 [Amended]

2. Amend section 208.7 by:

a. In paragraph (a)(1), removing the words “If the asylum application is not so denied, the Service shall have 30 days from the date of filing of the request employment

authorization to grant or deny that application, except that no” and adding, in their place, the word “No”;

b. In paragraphs (a)(1) and (c)(3), removing the words “the Service” and adding, in their place, the word “USCIS”; and

c. Removing paragraph (d).

Kevin K. McAleenan,
Acting Secretary of Homeland Security.

[FR Doc. 2019-19125 Filed: 9/6/2019 8:45 am; Publication Date: 9/9/2019]