



DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 274a

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

RIN 1615-AC27

Asylum Application, Interview, and Employment Authorization for Applicants

AGENCY: Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) is proposing to modify its current regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application.

DATES: Written comments and related material to this proposed rule, including the proposed information collections, must be received to the online docket via www.regulations.gov, or to the mailing address listed in the ADDRESSES section below, on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on this proposed rule using one of the following methods:

- *Federal eRulemaking Portal [preferred]:* <http://www.regulations.gov>. Follow the website instructions for submitting comments.
- *Mail:* Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS-2019-0011 in your correspondence. Mail must be postmarked by the comment submission deadline.

FOR FURTHER INFORMATION CONTACT: Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue N.W., Suite 1100, Washington, DC 20529-2140; Telephone (202) 272-8377.

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Table of Abbreviations

ASC—Application Support Center
 BCR—Biometrics Collection Rate
 BFR—Biometrics Fee Ratio
 BIA—Board of Immigration Appeals
 BLS—Bureau of Labor Statistics
 CAT—Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
 CBP—U.S. Customs and Border Protection
 CFR—Code of Federal Regulations
 CPMS—Customer Profile Management System
 DHS—U.S. Department of Homeland Security
 DOJ—Department of Justice
 DOS—Department of State
 E.O.—Executive Order
 EAD—Employment Authorization Document
 EOIR—Executive Office for Immigration Review
 FBI—Federal Bureau of Investigation
 FDNS—Fraud Detection and National Security Directorate
 FIFO—First in/First Out
 Form I-589—Application for Asylum and for Withholding of Removal
 Form I-765—Application for Employment Authorization
 Form I-863—Notice of Referral to Immigration Judge
 FY—Fiscal Year
 GSA—General Services Administration
 HSA—Homeland Security Act of 2002
 ICE—U.S. Immigration and Customs Enforcement
 IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996
 INA—Immigration and Nationality Act

IRCA—Immigration Reform and Control Act of 1986
INS—Immigration and Naturalization Service
LCA—Labor Condition Application
LIFO—Last In, First Out
NEPA—National Environmental Policy Act
NTA—Notice to Appear
OMB—Office of Management and Budget
PM—Presidential Memorandum
PRA—Paperwork Reduction Act
RFA—Regulatory Flexibility Act
Secretary—Secretary of Homeland Security
UMRA—Unfunded Mandates Act of 1995
U.S.C.—United States Code
USCIS—U.S. Citizenship and Immigration Services

I. Public Participation

All interested parties are invited 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, legal, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English or include an English translation. Comments that will provide the most assistance to DHS 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 change.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. **USCIS-2019-0011** for this rulemaking. Please note that DHS has published a notice of proposed rulemaking (NPRM) entitled “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” DHS Docket No. USCIS-2018-0001, separate from this NPRM. The two NPRMs include distinct proposals, and for this proposed rule, DHS will

only consider comments submitted to Docket No. USCIS-2019-0011. 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 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 you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <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-2019-0011. 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

DHS seeks to reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization filed by asylum applicants seeking an employment authorization document pursuant to 8 CFR 274a.12(c)(8) (hereinafter “(c)(8) EAD” or “EAD”) or other non-asylum-based forms of relief such as cancellation of removal, and to discourage illegal entry into the United States. DHS also seeks to reduce incentives for aliens to intentionally delay asylum proceedings in order to extend the period of employment authorization based on the pending application, and to simplify the adjudication process. DHS seeks to prevent those asylum applicants who have committed certain crimes from

obtaining a (c)(8) employment authorization document, and to make the decision to grant (c)(8) employment authorization to asylum applicants discretionary, in line with USCIS' statutory authority.

DHS is proposing to modify its current regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application. DHS proposes to modify its regulations in the following areas:

- **Extend the waiting period to apply for employment authorization:** DHS proposes that asylum applicants wait 365 calendar days from the date their asylum applications are received by USCIS or the Department of Justice, Executive Office for Immigration Review (DOJ-EOIR) before they may apply for and receive an EAD. DHS also proposes that USCIS will deny (c)(8) EAD applications if there are any unresolved applicant-caused delays on the date of the EAD adjudication.
- **Eliminate the issuance of recommended approvals for a grant of affirmative asylum:** DHS proposes that USCIS will no longer issue recommended approvals for asylum. These are typically cases where an asylum officer has made a preliminary determination to grant asylum but has not yet received the results of the mandatory, confidential investigation of the alien's identity and background.
- **Revise eligibility for employment authorization:** DHS proposes to exclude aliens who, absent good cause, entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry from eligibility for (c)(8) employment authorization. DHS also proposes to exclude from eligibility for employment authorization aliens who have failed to file for asylum within one year of their last entry, unless and until an asylum officer or Immigration Judge (IJ) determines that an exception

to the statutory requirement to file for asylum within one year applies. Because the one-year filing deadline does not apply to unaccompanied alien children, under this proposal, the one-year filing deadline would not exclude unaccompanied alien children from eligibility to obtain an employment authorization document. DHS also proposes to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer or an IJ during the 365-day waiting period or before the request for initial employment authorization has been adjudicated. DHS further proposes to exclude from eligibility for employment authorization aliens who have: (1) been convicted of any aggravated felony as defined under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony in the United States or serious non-political crime outside the United States or (3) been convicted of certain public safety offenses in the United States. If an applicant has unresolved domestic arrests or pending charges involving domestic violence, child abuse, possession or distribution of controlled substances¹, or driving under the influence of drugs or alcohol, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances. DHS seeks public comment on whether these and additional crimes should be included as bars to employment authorization. DHS also proposes to make the decision to grant (c)(8) employment authorization discretionary to align with the discretionary authority Congress conferred in INA 208(d)(2), 8 U.S.C. 1158(d)(2). DHS

¹See section 102 of the Controlled Substances Act (21 U.S.C. 802).

is also clarifying that only applicants for asylum who are located in the United States may apply for employment authorization. DHS is adding a severability clause in the event that, for whatever reason, any of the provisions are not implemented.

- **Revise the provisions for EAD termination:** DHS proposes revising when (c)(8) employment authorization terminates. DHS proposes that when a USCIS asylum officer denies an alien's request for asylum, any employment authorization associated with a pending asylum application will be terminated effective on the date of asylum application denial. If a USCIS asylum officer determines that the alien is not eligible for asylum, the asylum officer will typically refer the case to DOJ-EOIR. DHS proposes that if USCIS refers a case to DOJ-EOIR, employment authorization would continue, and the alien would be eligible to continue applying for EAD renewals, if needed, until the IJ renders a decision on the asylum application. If the IJ denies the asylum application, the alien's employment authorization would terminate 30 days after denial, unless the alien filed a timely appeal with the Board of Immigration Appeals (BIA). Renewal of employment authorization would be available to the alien during the pendency of the appeal to the BIA. DHS, however, would prohibit employment authorization during the Federal court appeal process, but the alien could reapply for a (c)(8) EAD if the Federal court remanded the asylum case to BIA.
- **Change provisions for filing an asylum application:** DHS proposes to remove the requirement that USCIS return an incomplete application within 30 days or have it deemed complete for adjudication purposes. DHS also proposes that amending an asylum application, requesting an extension to submit additional evidence beyond a time that allows for its meaningful consideration prior to the interview, or failing to appear to

receive a decision as designated, will constitute an applicant-caused delay, which, if not resolved by the date the application for employment authorization is adjudicated, will result in the denial of that employment authorization application. DHS also is clarifying the effect of an applicant's failure to appear for either an asylum interview or a scheduled biometric services appointment on a pending asylum application.

- **Limit EAD validity periods:** DHS proposes to clarify that the validity period of (c)(8) employment authorization is discretionary and further proposes that any (c)(8) EAD validity period, whether initial or renewal, will not exceed increments of two years. USCIS may set shorter validity periods for initial and renewal (c)(8) EADs.
- **Incorporate biometrics collection requirements into the employment authorization process for asylum seekers:** DHS proposes to incorporate biometrics collection into the employment authorization process for asylum applicants, which would require applicants to appear at an Application Support Center (ASC) for biometrics collection and pay a biometric services fee. At present, biometrics collection generally refers to the collection of fingerprints, photographs, and signatures.² Such biometrics collection will allow DHS to submit a (c)(8) applicant's fingerprints to the Federal Bureau of Investigation (FBI) for a criminal history check, facilitate identity verification, and facilitate (c)(8) EAD card production. DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants

² See <https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment> (describing biometrics as including fingerprints, photographs, and digital signature) (last visited July 11, 2019).

with pending applications and provide notice of the place, date and time of the biometrics appointment.

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

Specify the effective date: DHS proposes to apply changes made by this rule only to initial and renewal applications for employment authorization under 8 CFR 274a.12(c)(8) and (c)(11) filed on or after the effective date of the final rule, with limited exceptions. DHS will apply two of the proposed ineligibility provisions – those relating to criminal offenses and failure to file the asylum application within one year of the alien's last entry to the US – to initial and renewal applications for employment authorization applications pending on the effective date of the final rule. In order to implement the criminal ineligibility provision, DHS will require applicants with an initial or renewal (c)(8) EAD application pending on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place,

date and time of the biometrics appointment. If applicable, initial applications filed before the effective date of this rule by members of the *Rosario* class will not be subject to any of the provisions of this proposed rule.³ DHS seeks public comment on whether other aliens, such as those affected by the Settlement Agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D.Cal.1991), or those whose asylum applications predate the 1995 asylum reforms, should be subject to all, some or none of the provisions in this rule.

DHS is updating the regulations to reflect the amendments made by this proposed rule, and proposing revisions to existing USCIS information collections to accompany the proposed regulatory changes.

A. *Major Provisions of the Regulatory Action*

DHS proposes to include the following major changes:

- **Amending 8 CFR 208.3, Form of application.** The amendments to this section propose to remove the language providing that an application for asylum will automatically be deemed “complete” if USCIS fails to return the incomplete application to the alien within a 30-day period. This provision is inconsistent with how all other applications and petitions for immigration benefits are treated, creates an arbitrary circumstance for

³ On May 22, 2015, plaintiffs in *Rosario v. USCIS*, No. C15-0813JLR (W.D. Wash.), brought a class action in the U.S. District Court for the Western District of Washington to compel USCIS to comply with the 30-day provision of 8 CFR 208.7(a)(1). On July 26, 2018, the court enjoined USCIS from further failing to adhere to the 30-day deadline for adjudicating EAD applications. DHS published a proposed rule to remove this timeframe on September 9, 2019, where it proposed to grandfather into the 30-day adjudication timeframe those class members who filed their initial EAD applications prior to the effective date of any final rule that changes the 30-day DHS timeline. To ensure compliance with the court order and consistency with the 30-day proposed rule, USCIS further proposes not to apply this rule to any initial EAD application filed by a *Rosario* class member that is pending as of the effective date of this rule, so long as the *Rosario* injunction remains in effect. USCIS has not included proposed regulatory text to this effect, but would include such text in the event that members of the *Rosario* class remain as of the date of publication of a final rule.

treating a potentially incomplete asylum application as complete, and imposes an unnecessary administrative burden on USCIS. DHS proposes to conform its current process for determining when an asylum application is received and complete to the general rules governing all other immigration benefits under 8 CFR 103.2, in addition to the specific asylum rules under 8 CFR 208.3 and 208.4. The regulations at 8 CFR 103.2(a)(7) state that USCIS will record the receipt date as of the actual date the benefit request is received at the designated filing location, whether electronically or in paper, provided that it is signed with a valid signature, executed, and filed in compliance with the regulations governing that specific benefit request. If a fee is required, the benefit request must also include the proper fee. Benefit requests not meeting these acceptance criteria are rejected at intake. Rejected benefit requests do not retain a filing date.

- **Amending 8 CFR 208.4, Filing the application.** The proposed amendments to this section provide that a request to amend a pending application for asylum or to supplement such an application may be treated as an applicant-caused delay, and if unresolved on the date the employment authorization application is adjudicated, will result in the denial of the application for employment authorization.
- **Amending 8 CFR 208.7, Employment authorization.**⁴

⁴ DHS has published a notice of proposed rulemaking (NPRM) entitled “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” DHS Docket No. USCIS-2018-0001, separate from this NPRM, which addresses application processing times. Processing times are therefore not addressed here.

- *Jurisdiction.* The proposed amendments to this section clarify that USCIS has jurisdiction over all applications for employment authorization based on pending or approved applications for asylum.
- *365-day Waiting Period.* The proposed amendments to this section also replace the 150-day waiting period and the 180-day asylum EAD clock. The proposed amendments will make asylum applicants eligible to apply for employment authorization 365 calendar days from the date their asylum application is received. The 365-day period was based on an average of the current processing times for asylum applications which can range anywhere from six months to over 2 years, before there is an initial decision, especially in cases that are referred to DOJ-EOIR from an asylum office. The amendments propose that if any unresolved applicant-caused delays in the asylum adjudication exist on the date the (c)(8) EAD application is adjudicated, the EAD application will be denied. Consistent with the current regulation, DHS also proposes to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer or an IJ during the waiting period of at least 365-days or before the adjudication of the initial request for employment authorization.
- *One Year Filing Deadline.* The proposed amendments to this section also exclude from eligibility for employment authorization aliens who have failed to file for asylum within one year unless and until an asylum officer or IJ determines that an exception to the statutory requirement to file for asylum within one year applies.
- *Illegal Entry.* The proposed amendments to this section also make any alien who entered or attempted to enter the United States at a place and time other than lawfully

through a U.S. port of entry ineligible to receive a (c)(8) EAD, with limited exceptions.

- *Criminal convictions.* The rule proposes amendments to this section include excluding from (c)(8) EAD eligibility any alien who has (1) been convicted of an aggravated felony as described in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony⁵ in the United States, (3) been convicted of a serious non-political crime outside the United States, (4) been convicted in the United States of domestic violence or assault (except aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships), child abuse or neglect; possession or distribution of controlled substances; or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state, local, or tribal jurisdiction. USCIS will consider, on a case-by-case basis, whether an alien who has unresolved domestic charges or arrests that involve domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol, warrant a favorable exercise of discretion for a grant of employment authorization..
- *Recommended Approvals.* The proposed amendments to this section also remove the language referring to “recommended approvals.” Under this proposal, USCIS would

⁵ See 18 U.S.C. 3156(a)(3)(the term “felony” means an offense punishable by a maximum term of imprisonment of more than one year).

- no longer issue grants of recommended approvals as a preliminary decision for affirmative asylum adjudications.
- *EAD Renewals.* The proposed amendments would permit renewals during the pendency of the asylum application, including in immigration court and at the BIA, for such periods as determined by USCIS in its discretion, but not to exceed increments of two years.
 - *Submission of biometrics.* The proposed amendments would require applicants to submit biometrics at a scheduled biometrics services appointment for all initial and renewal applications for employment authorization. DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment.
 - *Termination After Denial by USCIS Asylum Officer.* The proposed amendments to this section provide that when a USCIS asylum officer denies an alien's request for asylum any employment authorization associated with a pending asylum application, including any automatic extension of employment authorization, will be terminated effective on the date the asylum application is denied. If a USCIS asylum officer determines that the alien has no lawful immigration status and is not eligible for asylum, the asylum officer will refer the case to DOJ-EOIR and place the alien in removal proceedings. Employment authorization will be available to the alien while in removal proceedings and the application for asylum is under review before an IJ.

- *Termination After Denial by an IJ or the BIA.* The rule proposes that if USCIS refers a case to DOJ-EOIR, employment authorization would continue for 30-days following the date that the IJ denies the asylum application to account for a possible appeal of the denial to the BIA. If the alien files a timely appeal, employment authorization would continue, and the alien would be able to file a renewal EAD application, if otherwise eligible. Employment authorization would be prohibited during the Federal court appeal process, but the alien could request a (c)(8) EAD if the case is remanded to DOJ-EOIR for a new decision.
- *Eligibility.* The amendments to the section also clarify existing USCIS policy that only an applicant who is in the United States may apply for employment authorization.
- *Severability.* The amendments also include a severability clause. This section is drafted with provisions separated into distinct parts. In the event that any provision is not implemented for whatever reason, DHS intends that the remaining provisions be implemented as an independent rule in accordance with the stated purpose of this rule.
- **Amending 8 CFR 208.9, Procedure for interview before an asylum officer.** The amendments to this section clarify that an applicant’s failure to appear to receive and acknowledge receipt of the decision following an interview and an applicant’s request for an extension to submit additional evidence are applicant-caused delays for purposes of eligibility for employment authorization. The amendments also remove references to the “Asylum EAD clock.” This section is further amended to provide that documentary evidence must be submitted no later than 14 calendar days before the interview with an

asylum officer takes place to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview. As a matter of discretion, the asylum officer may consider evidence submitted within the fourteen (14) calendar days in advance of the interview date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence.

- **Amending 8 CFR 208.10, Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application.** The amendments to this section seek to clarify that an asylum applicant’s failure to appear for an asylum interview or biometric services appointment may lead to referral or dismissal of the asylum application, and may be treated as an applicant-caused delay affecting eligibility for employment authorization. In addition, the rule clarifies that USCIS is not obligated to send any notice to the applicant about his or her failure to appear at a scheduled biometrics appointment or an asylum interview as a prerequisite to making a decision on the application, which may include dismissing the asylum application or referring it to an IJ. These amendments are intended to facilitate more timely and efficient case processing when applicants fail to appear for essential appointments. Finally, the amendments replace references to fingerprint processing and fingerprint appointments with the term presently used by USCIS – “biometric services appointment.”
- **Amending 8 CFR 274a.12, Classes of aliens authorized to accept employment.** The amendments to this section remove the language in 8 CFR 274a.12(c)(8) referring to “recommended approvals.” The amendments also delete an obsolete reference to the Commissioner of the former Immigration and Naturalization Service (INS) and replace it with a reference to USCIS. Amendments to this section also clarify that aliens who have

been paroled into the United States after being found to have a credible fear or reasonable fear of persecution or torture may apply for employment authorization under 8 CFR 274a.12(c)(8), if eligible, but may not apply under 8 CFR 274a.12(c)(11) (parole-related EADs). The amendments also provide that employment authorization will not be granted if a denial of an asylum application is under judicial review, in conformity with amendments proposed at 8 CFR 208.7. DHS seeks public comment on this proposal and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those DHS determines are needed for foreign policy, law enforcement, or national security reasons, especially since parole is meant only as a temporary measure to allow an alien's physical presence in the United States until the need for parole is accomplished or the alien can be removed.

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

that was automatically extended pursuant 8 CFR 274a.13(d)(1) will automatically terminate on the date the asylum officer, IJ, or the BIA denies the asylum application.

- **Amending 8 CFR 274a.14, Termination of employment authorization.** For purposes of clarity, the amendment to this section adds a new paragraph at 8 CFR 274a.14(a)(1) that cross-references any automatic EAD termination provision elsewhere in DHS regulations, including the automatic termination provisions being proposed by this rule in 8 CFR 208.7(b).
- **Effective date:** With limited exceptions, the rules in effect on the date of filing form I-765 will govern all initial and renewal applications for a (c)(8) EAD based on a pending asylum application and a (c)(11) EAD based on a grant of parole after establishing a credible fear or reasonable fear of persecution or torture. The criminal provisions and the failure to file the asylum application within one year of last entry will apply to initial and renewal EAD applications pending on the date the final rule is published. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will provide notice of the place, date and time of the biometrics appointment to applicants with pending (c)(8) EAD application. If applicable, initial (c)(8) EAD applications filed before the effective date by members of the *Rosario* class would not be affected by this proposed rule. DHS will allow aliens with pending asylum applications that have not yet been adjudicated and who already have received employment authorization before the final rule's effective date to retain their (c)(8) employment authorization until the expiration date on their EAD, unless the employment authorization is

terminated or revoked on grounds in the existing regulations. DHS will also allow aliens who have already received employment authorization before the final rule's effective date under the (c)(11) eligibility category based on parole/credible fear to retain that employment authorization until their EAD expires, unless the employment authorization is terminated or revoked on grounds in the existing regulations. The proposals in this rule will not impact the adjudication of applications to replace lost, stolen, or damaged (c)(8) or (c)(11) EADs.

B. Summary of Costs, Benefits, and Transfer Payments

This proposed rule amends the (c)(8) EAD system primarily by extending the period that an asylum applicant must wait in order to be employment authorized, and by disincentivizing asylum applicants from causing delays in the adjudication of their asylum application. The Department has considered that asylum applicants may seek unauthorized employment without possessing a valid employment authorization document, but does not believe this should preclude the Department from making procedural adjustments to how aliens gain access to a significant immigration benefit. The provisions seek to reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization and remain for years in the United States for economic purposes

The quantified maximum population this rule would apply to about 305,000 aliens in the first year the rule could take effect and about 290,000 annually thereafter. DHS assessed the potential impacts from this rule overall, as well as the individual provisions, and provides quantitative estimates of such impacts where possible and relevant. For the provisions involving biometrics and the removal of recommended approvals, the quantified analysis covers the entire populations. For the 365-day EAD filing time proposal, the quantified analysis also covers the entire population; however, DHS relies on historical data to estimate the costs for affirmative

cases and certain assumptions to provide a maximum potential estimate for the remaining affected population. For the provisions that would potentially end some EADs early, DHS could estimate only the portion of the costs attributable to affirmative cases because DHS has no information available to estimate the number of defensive cases affected.

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

To take into consideration uncertainty and variation in the wages that EAD holders earn, all of the monetized costs rely on a lower and upper bound, benchmarked to a prevailing minimum wage and a national average wage, which generates a range. Specific costs related to the provisions proposed are summarized in Table 1. For the provisions in which impacts could be monetized, the single midpoint figure for the wage-based range is presented.⁶

<u>Table 1. Summary of Costs and Transfers of the Proposed Rule</u>	
I. <u>Quantified</u>	
<u>Provision Summary</u>	<u>Annual Costs and Transfers (mid-point)</u>
365-day EAD filing wait period (for DHS affirmative asylum cases and partial estimates)	Population: 39,000 Cost: \$542.7 million (quantified impacts for 39,000 of the

⁶ The populations reported in Table 1 reflect the maximum population that would be covered by the provision. Some of the populations that would incur monetized impacts are slightly different due to technical adjustments.

for DHS referrals to DOJ)	<p>153,458 total population) Reduction in employment tax transfers: \$83.2 million (quantified impacts for 39,000 of the 153,458) Cost basis: annualized equivalence cost Summary: lost compensation for a portion of DHS affirmative asylum cases that benefitted from initial EAD approvals who would have to wait longer to earn wages under the proposed rule; nets out cost-savings for persons who would no longer file under the rule; includes partial estimate of DHS referral cases to DOJ-EOIR and the apropos estimated tax transfers. It does not include impacts for defensively filed cases.</p>
Biometrics requirement	<p>Population for initial and renewal EADs: 289,751 Population for pending EADs: 14,451 Cost: \$37,769,580 Reduction in employment tax transfers: none Cost basis: maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: For initial and renewal EADs, there would be time-related opportunity costs plus travel costs of submitting biometrics, as well as \$85 fee for (c)(8) I-765 initial and renewal populations subject to the biometrics and fee requirements. A small filing time burden to answer additional questions and read associated form instructions in the I-765 is consolidated in this provision's costs. There would also be time-related opportunity costs plus travel costs of submitting biometrics for EADs pending on the effective date of the final rule.</p>
Eliminate recommended approvals	<p>Population: 1,930 annual Cost: \$13,907,387 Reduction in employment tax transfers: \$2,127,830 Cost basis: annualized equivalence cost Summary: delayed earnings and tax transfers that would have been earned for an average of 52 calendar days earlier with a recommended approval.</p>
Terminate EADs if asylum application denied/dismissed (DHS)	<p>Population: 575 (current and future) Cost: \$31,792,569 Reduction in employment tax transfers: \$4,864,263 Cost basis: maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: forgone earnings and tax transfers from ending EADs early for denied/dismissed DHS affirmative asylum applications. This change would affect EADs that are currently valid and EADs for affirmative asylum applications in the future that would not be approved. DHS acknowledges that as a result of this proposed change, businesses that have hired such workers would incur labor turnover costs earlier than without this rule.</p>
365-day EAD filing wait period (for the residual population)	<p>Population: 114,458 Cost: \$1,189.6 million – \$3,600.4 million (quantified impacts for the remaining 114,458 of the 153,458) Reduction in employment tax transfers: \$182.0 million – \$550.9 million (quantified impacts for the remaining 114,458 of the 153,458) Cost basis: annualized equivalence cost</p>

	Summary: lost compensation for the population of approved annual EADs for which DHS does not have data to make a precise cost estimate; The costs reported are a maximum because the potential impact is based on the maximum impact of 151 days; in reality there would be lower-cost segments to this population and filing-cost savings as well.
II. <u>Unquantified</u>	
Revise (c)(11) category from I-765	Population: 13,000 Cost: delayed/foregone earnings Cost basis; NA Summary: DHS does not know how many of the actual population will apply for an EAD via the (c)(8) I-765, but the population would be zero at a minimum and 13,000 at a maximum, with a mid-point of 6,500. The population would possibly incur delayed earnings and tax transfers by being subject to the 365-day EAD clock (it is noted that this population would also incur costs under the biometrics provision, above), or lost earnings if they do not apply for a (c)(8) EAD. There is potentially countervailing cost-savings due to a reduced pool of filers under the proposed rule.
Criminal activity/illegal entry bar	DHS is unable to estimate the number of aliens impacted. Impacts could involve forgone earnings and lost taxes.
Adjudication of pending (c)(8) I-765 applications under the criminal and one-year-filing provisions	DHS cannot determine how many of the 14,451 pending EAD filings would be impacted by the criminal and one-year-filing provisions. Impacts could involve forgone earning and tax transfers.
One-year filing deadline	Some portion of the 8,472 annual filing bar referrals could be impacted, which could comprise deferred/delayed or forgone earning and tax transfers. DHS does not have data on filing bar cases referred to DOJ-EOIR.
Terminate EADs if asylum application denied/dismissed (DOJ-EOIR)	DOJ-EOIR has denied an average of almost 15,000 asylum cases annually; however, DHS does not have data on the number of such cases that have an EAD. Costs would involve forgone earnings and tax transfers for any such EADs that would be terminated earlier than they otherwise would, as well as forgone future earnings and tax transfers. DHS acknowledges that as a result of this proposed change businesses that have hired such workers would incur labor turnover costs earlier than without this rule. Businesses unable to replace these workers would also incur productivity losses.

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.⁷ The transfers would fall on the asylum applicants who would be delayed in entering the U.S. labor force or who would leave the labor force earlier than under current regulations. The transfers would be in the form of lost compensation (wages and benefits). A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the impacts of this rule would also be borne by companies that would have hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These companies would incur a cost, as they would be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided and by having to pay workers to work overtime hours. 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, but estimated the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies are able to easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will

⁷ 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>.

bear little or no costs, so \$4,461.9 million (annualized at 7%) will be transferred from asylum applicants to workers currently in the labor force or induced back into the labor force (we assume no tax losses as a labor substitute was found). Conversely, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then \$4,461.9 million is the estimated monetized cost of the rule, and \$0 is the estimated 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 \$682.9 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 the provisions that affect the amount of time an asylum applicant is employed. USCIS notes that given that the U.S. unemployment rate is hovering around a 50-year low – at 3.7% as of August 2019—it could be possible that employers may face difficulties finding reasonable labor substitutes. DHS does note that an alternative measure of the unemployment rate from the Bureau of Labor Statistics (the U-6) provides additional information on the labor market not found in the official unemployment rate (the U-3). The U-6 rate is a broader measure of labor underutilization and takes into account workers not included in the official U-3 rate that could potentially benefit from this rule. For example, the U-6 rate considers persons who are neither working nor looking for work but indicate they want and are available for a job and have looked for work sometime in the past twelve months and also considers part-time workers who otherwise want and are available for full time employment.

The U-6 rate shows unemployment at 7.2 percent, which is much higher than the official U-3 rate of 3.7 percent.⁸

Included in the broader U-6 unemployment rate is the number of persons employed part time for economic reasons (sometimes referred to as involuntary part-time workers), which BLS estimates is 4.4 million in August 2019. 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.⁹ In addition, BLS reports for August 2019 that 1.6 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. They were not counted as unemployed in the official U-3 unemployment rate because they had not searched for work in the 4 weeks preceding the BLS survey, but are counted in the U-6 rate.¹⁰ The U-6 rate provides additional evidence that U.S. workers might be available to substitute into the jobs that asylum applicants currently hold.

Because the biometrics requirement proposed in this rule is a cost to applicants and not a transfer, its minimum value of \$27.17 million is the minimum cost of the rule. The range of impacts described by these two scenarios, plus the consideration of the biometrics costs, are

⁸ The full definition of the U-3 and U-6 unemployment rates can be found on the Bureau of Labor Statistics (BLS) website under the “Local Area Unemployment Statistics (LAUS),” at: <https://www.bls.gov/lau/stalt.htm>. The actual figures for the U-3 and U-6 unemployment rates are found in table A-15, “Alternative Measures of Labor Underutilization,” in the Economic News Release Archives at: https://www.bls.gov/news.release/archives/empsit_09062019.htm.

⁹ See Table A-8, “Employed Persons by Class of Worker and Part-Time Status”, Persons at work part time for economic reasons: https://www.bls.gov/news.release/archives/empsit_09062019.htm.

¹⁰ See Table A-16, “Persons not in the labor force and multiple jobholders by sex, not seasonally adjusted”, Persons marginally attached to the labor force: https://www.bls.gov/news.release/archives/empsit_09062019.htm.

summarized in Table 2 below (Table 2A and 2B capture the impacts a 3 and 7 percent rates of discount, in order).

Table 2A. Summary of Range of Monetized Annualized Impacts at 3%						
Category	Description	Scenario: No Replacement Labor found for Asylum Applicants		Scenario: All Asylum Applicants Replaced with Other Workers		Primary average of the highest high and the lowest low, for each row
		Low Wage	High Wage	Low Wage	High Wage	
Transfers						
Transfers - Compensation	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals)	\$0.00	\$0.00	\$1,473,953,451	\$4,461,386,308	\$2,230,693,154
Transfers - Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals)	\$225,587,337	\$682,771,643	\$0.00	\$0.00	\$341,385,822
Costs						
Cost Subtotal - Biometrics	Biometrics Requirements	\$27,154,124	\$45,726,847	\$27,154,124	\$45,726,847	\$36,440,486
Cost Subtotal - Lost Productivity	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals)	\$1,473,953,451	\$4,461,386,308	\$0.00	\$0.00	\$2,230,693,154
Total Costs		\$1,501,107,576	\$4,507,113,155	\$27,154,124	\$45,726,847	\$2,267,133,639
Table 2B. Summary of Range of Monetized Annualized Impacts at 7%						
Category	Description	Scenario: No Replacement Labor found for Asylum Applicants		Scenario: All Asylum Applicants Replaced with Other Workers		Primary average of the highest high and the lowest low, for each row
		Low Wage	High Wage	Low Wage	High Wage	
Transfers						

Transfers - Compensation	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals)	\$0.00	\$0.00	\$1,474,123,234	\$4,461,900,172	\$2,230,950,086
Transfers - Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals)	\$225,613,314	\$682,850,264	\$0	\$0	\$341,425,132
Costs						
Cost Subtotal - Biometrics	Biometrics Requirements	\$27,171,858	\$45,766,847	\$27,171,858	\$45,766,847	\$36,469,352
Cost Subtotal - Lost Productivity	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals)	\$1,474,123,234	\$4,461,900,172	\$0.00	\$0.00	\$2,230,950,086
Total Costs		\$1,501,295,093	\$4,507,667,018	\$27,171,858	\$45,766,847	\$2,267,419,438

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

Table 3. OMB A-4 Accounting Statement (\$ millions, 2019)					
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 un-monetized, benefits	N/A		N/A	N/A	RIA
Unquantified Benefits	The benefits potentially realized by the proposed rule are qualitative and accrue to a streamlined system for employment authorizations for asylum seekers that would reduce fraud,				RIA

	improve overall integrity and operational efficiency, and prioritize aliens with bona fide asylum claims. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large. The proposed rule aligns with the Administration’s goals of strengthening protections for U.S. workers in the labor market. The proposed biometrics requirement would enhance identity verification and management.				
COSTS					
Annualized monetized costs (discount rate in parenthesis)	(7%)	\$2,267.4	\$27.17	\$4,507.7	RIA
	(3%)	\$2,267.1	\$27.17	\$4,507.1	RIA
Annualized quantified, but un-monetized, costs	N/A		N/A	N/A	RIA
Qualitative (unquantified) costs	<p>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. There could also be a loss of Federal, state, and local income tax revenue.</p> <p>Estimates of costs to proposals that would involve DOJ-EOIR defensively-filed asylum applications and DHS-referrals could not be made due to lack of data. Potential costs would involve delayed/deferred or forgone earnings, and possible lost tax revenue.</p> <p>There would also be delayed or forgone labor income and tax transfers for pending EAD applicants impacted by the criminal and one-year filing provisions, renewal applicants, transfers from the (c)(11) group, and filing bar cases, all of whom would be subject to some of the criteria being proposed; in addition, such impacts could also affect those who would be eligible currently for an EAD, or have such eligibility terminated earlier, but would be ineligible for an EAD under the proposed rule.</p>				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	(7%)	\$2,231.0	\$0	\$4,461.9	RIA

transfers: compensation					
	(3%)	\$2,230.7	\$0	\$4,461.4	
From whom to whom?	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals). Some of the deferred or forgone earnings could be transferred from asylum applicants to workers in the U.S. labor force or induced into the U.S. labor force. Additional distributional impacts from asylum applicant to the asylum applicant's support network that provides for the asylum applicant while awaiting an EAD; these could involve burdens to asylum applicants' personal private or familial support system, but could also involve public, private, or charitable benefits-granting agencies and non-governmental organizations (NGOs).				RIA
Annualized monetized transfers: taxes	(7%)	\$341.4	\$0	\$682.9	RIA
	(3%)	\$341.4	\$0	\$682.8	
From whom to whom?	A reduction in employment taxes from companies and employees to the Federal Government. There could also be a transfer of Federal, state, and local income tax revenue (provisions: 365-day wait + end EADs early + end recommended approvals)				
Category	Effects				Source Citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments	DHS does not know how many low-wage workers could be removed from the labor force due to the proposed rule. There may also be a reduction in state and local tax revenue. Budgets and assistance networks that provide benefits to asylum seekers could be impacted negatively if asylum applicants request additional support.				RIA
Effects on small businesses	This proposed rule does not directly regulate small entities, but has indirect costs on small entities. DHS acknowledges that ending EADs linked to denied DHS-affirmative asylum claims and EADs linked to asylum cases under DOJ-EOIR purview would result in businesses that have hired such workers incurring labor turnover costs earlier than without this rule. Such small businesses may also incur costs related to a difficulty in finding workers that may not have occurred without this rule.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

As will be explained in greater detail later, the benefits potentially realized by the proposed rule are qualitative. This rule would reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization or other forms of non-asylum-based relief from removal, thereby

allowing aliens with bona fide asylum claims to be prioritized. A streamlined system for employment authorizations for asylum seekers would reduce fraud and improve overall integrity and operational efficiency. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States.¹¹ These effects stand to provide qualitative benefits to asylum seekers, communities where they live and work, the U.S. government, and society at large.

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

The proposed biometrics requirement would provide a benefit to the U.S. government by enabling DHS to know with greater certainty the identity of aliens requesting EADs in connection with an asylum application. The biometrics will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the

¹¹ The rule may also provide less incentive for those pursuing unauthorized employment in the United States to use the asylum application process to move into authorized employment status.

applicant's biometrics against government databases (e.g., FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production. Along with the proposals summarized above and discussed in detail in the preamble and regulatory impact sections of this proposed rule, DHS proposes to modify and clarify existing regulations dealing with technical and procedural aspects of the asylum interview process, USCIS authority regarding asylum, applicant-caused delays in the process, and the validity period for EADs. These provisions are not expected to generate costs. If adopted in a final rule, the rules and criteria proposed herein relating to certain criminal offenses and the one-year-filing bar would apply to pending EAD applications. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending EAD applications and provide notice of the place, date and time of the biometrics appointment. Some aliens could be impacted and some may not be granted an EAD as they would otherwise under current practice, but DHS does not know how many could be impacted and does not estimate costs for this provision.

III. Purpose of the Proposed Rule

On April 29, 2019, the White House issued a Presidential Memorandum (PM) entitled, "Presidential Memorandum on Additional Measures to Enhance Border Security and Restore

Integrity to Our Immigration System.”¹² The White House, referencing the President’s earlier Proclamations noted that “our immigration and asylum system is in crisis as a consequence of the mass migration of aliens across our southern border” and that the

“emergency continues to grow increasingly severe. In March, more than 100,000 inadmissible aliens were encountered seeking entry into the United States. Many aliens travel in large caravans or other large organized groups, and many travel with children. The extensive resources required to process and care for these individuals pulls U.S. Customs and Border Protection personnel away from securing our Nation’s borders. Additionally, illicit organizations benefit financially by smuggling illegal aliens into the United States and encouraging abuse of our asylum procedures. This strategic exploitation of our Nation’s humanitarian programs undermines our Nation’s security and sovereignty. The purpose of this memorandum is to strengthen asylum procedures to safeguard our system against rampant abuse of our asylum process.”¹³

The PM directs the Secretary of Homeland Security to propose regulations to bar aliens who have entered or attempted to enter the United States unlawfully from receiving employment authorization prior to being approved for relief and to immediately revoke the employment authorization of aliens who are denied asylum or become subject to a final order of removal.

¹² Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System, 2019 DAILY COMP. PRES. DOC. 251 (Apr. 29, 2019).

¹³ *Id.*

Through this proposed rule, DHS seeks to address the national emergency and humanitarian crisis at the border¹⁴ by 1) reducing incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization, or other forms of non-asylum based relief, and remain for years in the United States due to the backlog of asylum cases, and 2) disincentivizing illegal entry into the United States by proposing that any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry be ineligible to receive a (c)(8) EAD, with limited exceptions. DHS is also proposing administrative reforms that will ease some of the administrative burdens USCIS faces in accepting and adjudicating applications for asylum and related employment authorization.

As explained more fully below, USCIS believes these reforms will help mitigate the crisis that our immigration and asylum systems are facing as a consequence of the mass migration of aliens across our southern border,¹⁵ as well as improve the current asylum backlog, helping to clear the way for meritorious asylum applications to be received, processed, and adjudicated more quickly, and allowing USCIS to issue employment authorizations more efficiently. The extensive resources required to process and care for these individuals pulls personnel away from securing our Nation's borders. Additionally, illicit organizations benefit financially by smuggling illegal aliens into the United States and encouraging abuse of our asylum procedures. This strategic exploitation of our Nation's humanitarian programs

¹⁴ Proclamation No. 9844, 84 FR 4949 (Feb. 15, 2019).

¹⁵ <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>

undermines our Nation's security and sovereignty.¹⁶ These interests, when weighed against any reliance interest on behalf of impacted aliens, are greater, particularly because of the large increase in number of those seeking asylum at the border, which is operationally unsustainable for DHS long-term.

It is the policy of the Executive Branch to manage humanitarian immigration programs in a safe, orderly manner that provides access to relief or protection from removal from the United States for aliens who qualify, and that promptly denies benefits to and facilitates the removal of those who do not.¹⁷ This rulemaking is part of a series of reforms DHS is undertaking, in coordination with DOJ-EOIR, to improve and streamline the asylum system, so that those with bona fide asylum claims can be prioritized and extended the protections that the United States has offered for over a century, including employment authorization, to aliens legitimately seeking refuge from persecution

A. Efforts to Reform the Asylum System

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, was the first comprehensive legislation to establish the modern refugee and asylum system.¹⁸ Congress passed the Refugee Act mainly to replace the ad hoc process that existed at the time for admitting refugees and to

¹⁶ *Id.*

¹⁷ <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>

¹⁸ Congress added the definition of refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), based on the 1967 United Nations (U.N.) Protocol relating to the Status of Refugees, 19 U.S.T. 6223, TIAS No. 6577, 606 U.N.T.S. 267 (1967), which the United States ratified in November of 1968. The Refugee Act also made withholding of removal mandatory, authorized adjustment of status for asylees and refugees, expanded the funding available for domestic refugee assistance services, and barred eligibility for asylum for aliens who were convicted of a serious crime, firmly resettled, persecutors, or a danger to the security of the United States.

provide a more uniform refugee and asylum process.¹⁹ The focus of the Refugee Act was reforming the overseas refugee program. The Refugee Act did not explicitly address how the United States should reform the asylum process or handle the then-sudden influx of asylum seekers, such as occurred with the Mariel boatlift – a mass influx of Cuban citizens and nationals, many of whom with criminal histories, to the United States in 1980.²⁰ Congress also provided that any alien who had applied for asylum before November 1, 1979, had not been granted asylum, and did not have a final order of deportation or exclusion, could obtain employment authorization.²¹

In 1980, the then-INS issued an interim regulation implementing the asylum provisions of the Refugee Act.²² This regulation provided that an INS district director could authorize an applicant for asylum to work, in six-month increments, if the alien had filed a non-frivolous application for asylum.²³ The regulation did not define what constituted a “frivolous” filing. The regulation also excluded, without explanation, the limitation on the size of the class of aliens who could qualify for employment authorization (i.e., only aliens who had applied for asylum before November 1, 1979, but had not been granted asylum, and did not have a final

¹⁹ See Pub. L. 96-212, 94 Stat. 102, § 101(b) and S. REP. 96-256 (July 23, 1979), at pp. 141-143. Earlier treatment of refugees came from the Displaced Persons Act of 1948, 62 Stat. 1009, as amended, the Refugee Relief Act of 1953, 67 Stat. 400, and the Refugee-Escapee Act of 1957, 71 Stat. 643.

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

²¹ 94 Stat. 102 at sec. 401(b) and (c).

²² See *Aliens and Nationality; Refugee and Asylum Procedures*, 45 FR 37392 (June 2, 1980). This interim rule was not finalized until 1983. See also *Aliens and Nationality; Asylum Procedures*, 48 FR 5885-01 (Feb. 9, 1983).

²³ 45 FR at 37394, section 208.4.4.

order of deportation or exclusion). As a result of the regulation, the class of aliens who could seek employment authorization based on an asylum application was interpreted to include past and future asylum seekers.

Congress, however, did not provide adequate resources or enact legislation that would address the “pull” factors that led to significant increases in illegal immigration and in asylum filings following enactment of the Refugee Act.²⁴ In addition, the publication of two INS regulations—the 1986 implementing regulations for the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603 (Nov. 6, 1986)²⁵ and the 1990 asylum regulations—further incentivized illegal immigration and the filing of non-meritorious asylum claims or other forms of relief because of the ease with which aliens could obtain employment authorization, regardless of the basis for the application for employment authorization.²⁶ In the implementing regulations for IRCA, INS provided that aliens could receive an interim EAD if INS did not adjudicate the application for employment authorization within 60 days (former 8 CFR

²⁴ See, e.g., David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (July 1995) and David A. Martin, *The 1995 Asylum Reforms*, CTR. FOR IMMIGRATION STUDIES (May 1, 2000) for a discussion of the history and consequences of the asylum reforms in 1990s.

²⁵ IRCA legalized many illegal aliens present in the United States prior to 1986, created new temporary agricultural worker programs, and mandated employment verification and employer sanctions to address the problem of U.S. employers hiring illegal immigrants. One of the main reasons Congress passed IRCA was its growing concern over the large influx of aliens crossing our borders illegally, particularly on the Southwest border, to find jobs. The employer verification system and employer sanctions were designed to address this concern by reducing the “pull” factor created by the availability of higher paying jobs in the United States. See, e.g., H.R. REP. NO. 99-682(I) at pp. 5649-5654 (July 16, 1986) (Committee explanation for the need for IRCA to control illegal immigration).

²⁶ See Martin, *supra* note 2121, at p. 734; see also David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (May 1990) at pp. 1267-69, 1288-89, and 1373.

274a.12(c) and (d)).²⁷ The IRCA regulations also required asylum officers to give employment authorization, in one-year increments, to any alien who had filed a non-frivolous²⁸ asylum application. In the 1990 asylum regulation, INS also mandated that asylum officers give interim EADs to any alien who had filed a non-frivolous asylum application, and that asylum officers continue to renew employment authorization for the time needed to adjudicate the asylum application (former 8 CFR 208.7(a)).²⁹

While IRCA's creation of the employer verification system and employer sanctions was designed to reduce the "pull" factor created by the availability of higher paying jobs in the United States, the ability to get interim employment authorization within 90 days, regardless of the basis for requesting employment authorization in the first instance, had the exact opposite effect.³⁰ In addition, because the agency already had a backlog for adjudicating asylum applications, it was unlikely any asylum application would be adjudicated within a 90-day timeframe, which virtually guaranteed that most asylum applicants would be eligible for interim employment authorization.³¹ The combined effect of the statutory employment authorization for

²⁷ DOJ final rule, *Control of Employment of Aliens*, 52 FR 16216-01 (May 1, 1987). The 60-day period was subsequently extended to 90-days with the publication of the final rule, *Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens*, 56 FR 41767-01 (Aug. 23, 1991).

²⁸ DOJ INS also for the first time defined "frivolous" to mean "manifestly unfounded or abusive." See former 8 CFR 208.7(a) (1991).

²⁹ DOJ INS final rule, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 FR 30674-01 (July 27, 1990).

³⁰ See *Martin*, *supra* note 21, at p. 733-36.

³¹ In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. 103-322, 108 Stat. 1796 (Sept. 13, 1994). As part of its findings, Congress stated "...in the last decade applications for asylum have greatly exceeded the original 5,000 annual limit provided in the Refugee Act of 1980, with more than 150,000 asylum applications filed in fiscal year 1993, and the backlog of cases growing to 340,000." VCCLEA, at sec. 130010(1).

asylum applicants, the regulations, and insufficient agency resources resulted in a greater influx of aliens, many of whom were not legitimate asylum seekers, but instead merely sought to work in the United States.³²

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. 103-322, 108 Stat. 1796 (Sept. 13, 1994), which provided for expedited exclusion proceedings and summary deportation of aliens with failed asylum claims and provided that no applicant for asylum would be entitled to employment authorization unless the Attorney General (now Secretary of Homeland Security) determined, as a matter of discretion, that employment authorization was appropriate.³³ Congress passed these amendments mainly because the asylum system was being overwhelmed with asylum claims, including frivolous and fraudulent claims filed merely to obtain employment authorization.³⁴ The hope was that the expedited exclusion proceedings would reduce such claims. During consideration of the VCCLEA, DOJ also conducted a review of the asylum process and published regulations designed to reduce the asylum backlogs, eliminate procedural hurdles that lengthened the process, and deter abuses in the system.³⁵ For the first time, DOJ implemented a waiting period for asylum seekers—150 days—before they could apply for employment authorization. DOJ

³² See *Martin*, *supra* note 21, at p. 733-37.

³³ See Pub. L. 103-322, 108 Stat. 1796, at sec. 130005.

³⁴ See *id.* at sec. 130010(1) (findings of the Senate on the need for reforms to the asylum process, including finding of a backlog of cases up to 340,000); see also H.R. CONF. REP. 103-711 (Aug. 21, 1994), at pp. 241-245 and 393-394.

³⁵ DOJ INS final rule, *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 FR 62284-01 (Dec. 5, 1994).

based the timeframe on the 150-day processing goals it had set for asylum officers and IJs to complete asylum cases.

In 1996, Congress again amended section 208 when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. Congress retained the expedited exclusion (now removal) procedures to address the influx of thousands of aliens seeking entry into the United States.³⁶ Congress also reformed the asylum provisions and codified some of the administrative reforms INS made when it published the 1994 asylum regulation. IIRIRA incorporated language that barred an alien not only from eligibility for asylum, but also from any other immigration benefits ((such as when an alien filed a frivolous application),³⁷ added a one-year deadline to file for asylum, and codified INS's regulatory prohibition on asylum seekers being granted discretionary employment authorization before a minimum of 180 days has passed from the date of filing of the asylum application.³⁸

B. Need for Reform

Since IIRIRA, there have been no major statutory changes to the asylum provisions to address the immigration realities faced by the United States today. However, since 2016, the

³⁶ See, e.g., H.R. CONF. REP. 104-828, title III, subtitle A (1996).

³⁷ 8 U.S.C. 1158(d)(6) provides:

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

³⁸ DHS published an interim final rule implementing IIRIRA in 1997. See DOJ INS, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 FR 10312-01 (Mar. 6, 1997). DOJ published a separate final rule December 6, 2000 which finalized the provisions related to the asylum process proposed in the DOJ INS and EOIR joint rule, *New Rules Regarding Proceedings for Asylum and Withholding of Removal*, 63 FR 31945 (June 11, 1998), and in response to comments to the asylum procedures made in response to the IIRIRA interim final rule.

United States has experienced an unprecedented surge³⁹ in the number of aliens who enter the country unlawfully across the southern border. In Fiscal Year 2019, CBP apprehended over 800,000 aliens attempting to enter the United States illegally.⁴⁰ These apprehensions are more than double of those in Fiscal Year 2018.⁴¹ If apprehended, many of these individuals claim asylum and remain in the United States while their claims are adjudicated. There is consistent historical evidence that approximately 20 percent or less of such claims will be successful.⁴² This surge in border crossings and asylum claims has placed a strain on the nation's immigration system. The large influx has consumed an inordinate amount of the Department of Homeland Security's resources, which includes surveilling, apprehending, screening, and processing the aliens who enter the country, detaining many aliens pending further proceedings, and representing the United States in immigration court proceedings. The surge has also consumed substantial resources at the Department of Justice, whose immigration judges adjudicate asylum claims and whose officials prosecute aliens who violate Federal criminal law. The strain also extends to the judicial system, which must handle petitions to review denials of asylum claims, many of which can take years to reach final disposition, even when the claims for asylum lack merit.

³⁹ See CBP Southwest Border Total Apprehensions/Inadmissibles at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

⁴⁰ *Id.*

⁴¹ See CBP Enforcement Statistics at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

⁴² See Executive Office for Immigration Review Adjudication Statistics "Asylum Decision Rates" (July 2019), <https://www.justice.gov/eoir/page/file/1104861/download>

In order to maintain the very integrity of the asylum system, it is imperative that DHS take all necessary measures to create disincentives to come to the United States for aliens who do not fear persecution on the five protected grounds of race, religion, nationality, political opinion, or particular social group, or torture.⁴³ Fleeing poverty and generalized crime in one's home country does not qualify an individual for asylum in the United States. *See, e.g., Hui Zhuang v. Gonzales*, 471 F.3d 884, 890 (8th Cir. 2006) ("Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.").

Statistics support DHS's assertion that the vast majority of protection claims are not motivated by persecution under the five protected grounds or torture. The historic high in affirmative asylum applications and credible fear receipts in FY 2018⁴⁴ is matched by a historic low rate of approval of affirmative asylum applications and credible fear claims in FY 2018.⁴⁵

As noted above, it is the policy of the Executive Branch to manage our humanitarian immigration programs in a safe, orderly manner that provides access to relief or protection from removal from the United States for aliens who qualify, and that promptly denies benefits to and facilitates the removal of those who do not.⁴⁶ Many protection applications appear to be coming from applicants escaping poor economic situations and generalized violence rather than the five

⁴³ *See, e.g.*, <https://www.wbur.org/cognoscenti/2018/08/08/why-do-migrants-flee-central-america-susan-akram>, https://www.washingtonpost.com/world/national-security/hunger-not-violence-fuels-guatemalan-migration-surge-us-says/2018/09/21/65c6a546-bdb3-11e8-be70-52bd11fe18af_story.html?noredirect=on; <https://time.com/longform/asylum-seekers-border/>.

⁴⁴ USCIS Asylum Division Volume Projection Committee – FY 2020/2021, June 2019.

⁴⁵ *Id.*

⁴⁶ <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/>.

protected grounds for asylum or torture. DHS is proposing more stringent requirements for eligibility for employment authorization, in order to disincentivize aliens who are not legitimate asylum seekers from exploiting a humanitarian program to seek economic opportunity in the United States.

DHS believes that this rule stands alone as an important disincentive for individuals use asylum as a path to seek employment in the United States. DHS further believes that this rule will complement broader interagency efforts to mitigate large-scale migration to the U.S. Southern Border by precluding some asylum seekers from entering the United States.⁴⁷ These programs are strengthened by DHS making important procedural adjustments to how those aliens who do enter the United States gain access to such a significant immigration benefit as employment authorization. Further, while some of these aliens may disregard the law and work unlawfully in contravention to these reforms, the Department does not avoid the establishment of regulatory policies because certain individuals might violate the regulations.⁴⁸

⁴⁷ On January 25, 2019, DHS announced certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the United States, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. Instead, these aliens will be returned to Mexico until their hearing date. See “Policy Guidance for Implementation of the Migrant Protection Protocols” (Jan. 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. On July 15, 2019, DHS and DOJ announced a bar to eligibility for asylum to any alien who enters or attempts to enter the United States across the southern border, but who did not apply for protection from persecution or torture where it was available in at least one third country outside the alien’s country of citizenship, nationality, or last lawful habitual residence through which he or she transited en route to the United States. See “DHS and DOJ Issue Third-Country Asylum Rule (July 2019), <https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule>.

⁴⁸ Notably, even the former INS remarked on the need for reform, notwithstanding the possibility that aliens may simply disregard the law and work illegally:

The Department also considered the claim that asylum applicants will disregard the law and work without authorization. While this is possible, it also is true that unlawful employment is a phenomenon not limited to asylum applicants, but is found among many categories of

Congress gave the Executive Branch the discretion to make employment authorization available by regulation.⁴⁹ The current practice of granting employment authorization to aliens before they have been determined eligible for asylum is a “pull” factor for the illegal immigration of aliens who are ineligible for any immigration status or benefit in the United States, and there is an urgent need for reform.⁵⁰ Employment authorization for foreign nationals seeking asylum is not a right. It is a benefit which must be carefully implemented in order to benefit those it is meant to assist.

IV. Background

A. Legal Authority

The Secretary of Homeland Security’s authority to propose the regulatory amendments in this rule can be found in various provisions of the immigration laws. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107-296, 116 Stat. 2135), 6 U.S.C. 112 and sections 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States. Section 402(4) of the HSA, 6 U.S.C. 202(4), expressly authorizes the Secretary, consistent with 6 U.S.C. 236236236 (concerning visa issuance and refusal), to establish and administer rules

persons who have illegally entered or remained in the United States. The Department does not believe that the solution to this problem is to loosen eligibility standards for employment authorization. This is particularly so because of the evidence that many persons apply for asylum primarily as a means of being authorized to work. These rules will discourage applications filed for such reasons and thus enable the INS to more promptly grant asylum – and provide work authorization – to those who merit relief..

59 FR 62284-01, 62291.

⁴⁹ INA sec. 208(d)(2).

⁵⁰ See *Martin*, *supra* note 21.

governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not U.S. citizens or lawful permanent residents. *See also* 6 U.S.C. 271(a)(3), (b) (describing certain USCIS functions and authorities). Section 208 of the INA, 8 U.S.C. 1158, gives the Secretary the discretionary authority to grant asylum to an alien who meets the definition of refugee under section 101(a)(42), 8 U.S.C. 1101(a)(42).⁵¹ Sections 235, 236, and 241 of the INA, 8 U.S.C. 1225, 1226, and 1231, govern the apprehension, inspection and admission, detention and removal, withholding of removal, and release of aliens encountered in the interior of the United States or at or between the U.S. ports of entry. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed in the United States by statute or in the discretion of the Secretary. The Secretary proposes the changes in this rule under these authorities.

B. Eligibility for Asylum

Asylum is a discretionary benefit that can be granted by the Secretary or Attorney General if the alien establishes, among other things, that he or she has experienced past persecution or has a well-founded fear of future persecution on account of race, religion,

⁵¹ A refugee is defined under INA section 101(a)(42), 8 U.S.C. 1101(a)(42), as:

- (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or
- (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.....

nationality, membership in a particular social group, or political opinion.⁵² Under the INA, certain aliens are barred from obtaining asylum, including aliens who are persecutors, have been convicted of a particularly serious crime (which includes aggravated felonies), have committed serious nonpolitical crimes outside of the United States, who are a danger to the security of the United States, have engaged in certain terrorism-related activities or are members of terrorist organizations, or were firmly resettled in a third country.⁵³

Aliens seeking asylum generally must apply for asylum within one year from the date of their last arrival in the United States. An alien who files for asylum after the one-year deadline is not eligible to apply for asylum unless the Secretary or Attorney General, in his or her discretion, excuses the late filing.⁵⁴ For a late filing to be excused, the alien must demonstrate that changed circumstances materially affected the alien's eligibility for asylum, or extraordinary circumstances delayed filing during the one-year period.⁵⁵ Even if an alien meets all the criteria for asylum, including establishing past persecution or a well-founded fear of future persecution and any exceptions to late filing, the Secretary or Attorney General can still deny asylum as a matter of discretion.⁵⁶

Aliens who are granted asylum cannot be removed or returned to their country of nationality or last habitual residence, are employment authorized incident to their status, and may

⁵² INA sec. 208(b), 8 U.S.C. 1158(b).

⁵³ INA sec. 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A).

⁵⁴ The one-year deadline does not apply to an alien who is an unaccompanied alien child, as defined in 6 U.S.C. 279(g). INA sec. 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E).

⁵⁵ INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D).

⁵⁶ See INA sec. 208(b)(1), 240(c)(4)(ii); 8 U.S.C. 1158(b)(1), 1229a(c)(4)(ii).

be permitted to travel outside of the United States with prior consent from the Secretary.⁵⁷

Asylum can be terminated if the alien was not eligible for asylum status at the time of the asylum grant or is otherwise no longer eligible for asylum under the law.⁵⁸

C. Affirmative vs. Defensive Asylum Filings

To request asylum, an alien must file an application with either USCIS or with the immigration court, using Form I-589, Application for Asylum and for Withholding of Removal. If the immigration judge or the Board of Immigration Appeals determines that an alien knowingly filed a frivolous application for asylum, the alien is permanently ineligible for asylum and any other benefits or relief under the Act, with the exception of relief from removal through withholding and deferral of removal. INA sec. 208(d)(6), 8 U.S.C. 1158(d)(6); 8 CFR 208.2020, 1208.20.

Asylum applications are characterized by which agency has jurisdiction over the alien's case. If an alien is physically present in the United States, not detained, and has not been placed in removal proceedings, the alien files the asylum application with USCIS. These applications are known as "affirmative" filings. If DHS places an alien in removal proceedings, the alien files an application for asylum with an IJ.⁵⁹ These applications are known as "defensive" filings and include aliens the USCIS asylum officer refers to the IJ for de novo review of their asylum claim.

⁵⁷ INA sec. 208(c)(1), 8 U.S.C. 1158(c)(1).

⁵⁸ INA sec. 208(c)(2), 8 U.S.C. 1158(c)(2).

⁵⁹ Where an asylum application is filed by an unaccompanied alien child, USCIS has initial jurisdiction over that application, even if the applicant is in removal proceedings. INA sec. 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. 110-457 (Dec. 23, 2008).

Aliens who present themselves at a U.S. port of entry (air, sea, or land) are generally deemed applicants for admission.⁶⁰ If an immigration officer determines that an alien is inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act for being in possession of false documents, making false statements, or lacking the required travel documentation, the alien may be placed in expedited removal proceedings under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1). Such aliens may indicate an intention to apply for asylum, express a fear of persecution or torture, or a fear of return to their home country and must be interviewed by an asylum officer to determine whether the alien has a credible fear of persecution or torture. INA section 235(b)(1), 8 U.S.C. 1225(b)(1); 8 CFR 235.3(b)(4). If an alien is determined to have a credible fear, “the alien shall be detained for further consideration of application for asylum.” INA sec. 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). Asylum applications based initially on a positive credible fear determination are under the jurisdiction of the immigration courts once a Notice to Appear (NTA) is filed with the court and are considered “defensively-filed” applications. Similarly, if an alien has a positive credible fear determination, but is released from detention by ICE, the alien is still considered to be under the jurisdiction of the immigration court once the NTA is filed and must file the application for asylum with the court.

D. Employment Authorization for Asylees and Asylum Applicants

Whether an alien is authorized to work in the United States depends on the alien’s status in the United States and whether employment is specifically authorized by statute or only authorized

⁶⁰ INA sec. 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C) provides separate exceptions for when a lawful permanent resident will be considered an applicant for admission (*e.g.*, abandoned residence, continuous absence of 180 days, illegal activity after departure from the United States).

pursuant to the Secretary's discretion. Employment authorization for aliens granted asylum and for asylum applicants is authorized under INA sections 208(c)(1)(B) and (d)(2), respectively.

Employment authorization for aliens granted asylum is statutorily mandated and incident to their status. Aliens granted asylum (asylees) are not required to apply for an EAD but can do so under 8 CFR 274a.12(a)(5) if they want to have documentation that reflects that they are employment authorized. Employment authorization for aliens granted withholding of removal or deferral of removal are governed by 8 CFR 274a.12(a)(10) and (c)(18) respectively.

An asylum applicant, however, is not entitled to employment authorization by statute. INA section 208(d)(2), 8 U.S.C. 1158(d)(2). The Secretary, through regulations, may authorize employment for aliens who request asylum while the asylum application is pending adjudication. Even if the Secretary chooses to grant employment authorization to an asylum applicant, under the current statute and regulations, he or she cannot grant such authorization until 180 days after the filing of the application for asylum. *Id.* In practice, this 180-day period is commonly called the "180-day Asylum EAD Clock."⁶¹ The goal of the Asylum EAD clock is to deter applicants from delaying their asylum application. Therefore, USCIS does not count, for purposes of eligibility for an EAD, the days that actions by the applicant have resulted in delays to the adjudication of his or her asylum application. However, applicants, practitioners, and USCIS

⁶¹ EOIR-USCIS joint notice, *The 180-day Asylum EAD Clock Notice*, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf (last updated May 9, 2017).

itself have all cited difficulty with accurate clock calculations.⁶² In light of these issues, USCIS is proposing to eliminate the clock altogether and, instead, extend the mandatory waiting period to file an asylum-based EAD application. USCIS is also proposing that the EAD application will be denied if the asylum case is subject to an applicant-caused delay at the time the Form I-765 (c)(8) application is adjudicated.

While the INA bars certain aliens from being granted asylum who, for example, are persecutors, have been convicted of a particularly serious crime, have committed serious nonpolitical crimes⁶³ outside of the United States, who are a danger to the security of the United States, have engaged in certain terrorism-related activities or are members of terrorist organizations, or were firmly resettled in a third country, such aliens may still apply for asylum, and subsequently also apply for an EAD once their application has been pending for 150 days. INA sec. 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A).

Aliens seeking employment authorization generally must apply for an EAD by filing Form I-765, Application for Employment Authorization, with USCIS in accordance with the form instructions, along with any prescribed fee (unless waived). 8 CFR 274a.13. The regulations at 8 CFR 208.7 and 274a.12(c)(8) govern employment authorization for asylum applicants.

E. Asylum and EAD Adjudications

⁶² See Dep't of Homeland Security, Citizenship & Immigration Services Ombudsman Report, *Employment Authorization For Asylum Applicants: Recommendations To Improve Coordination And Communication* (Aug. 26, 2011), at p.6.

⁶³ See, e.g., INA sec. 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); INA sec. 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I); INA sec. 212(a)(2)(B), 8 U.S.C. 1182(a)(2)(B).

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

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

Once the asylum application is accepted, the 150-day waiting period for filing a (c)(8) EAD application begins. The regulations at 8 CFR 208.7(a) further provide that USCIS will have 30 days from the filing date of the EAD application to grant or deny that application. The 180-day asylum EAD “clock” therefore includes the 150-day waiting period for filing the (c)(8)

EAD application, which is the time while the asylum application is pending with USCIS, or an IJ, and the additional 30-day period that USCIS has to grant or deny the EAD application. The 180-day Asylum EAD Clock excludes delays requested or caused by the applicant and does not run again until the applicant cures the delay or until the next scheduled event in a case, such as a postponed interview due to the delay, or a continued hearing.

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

As noted, there are a number of actions that can delay or toll the running of the 180-day Asylum EAD Clock. For example, if an applicant fails to appear for a required biometrics appointment, the 180-day clock will stop and not recommence until the alien appears for his or her biometrics appointment. Similarly, if an alien asks to amend or supplement his or her asylum application, fails to appear at an asylum office to receive and acknowledge receipt of the decision, requests an extension after the asylum interview, or reschedules an asylum interview, all of these actions will stop the 180-day Asylum EAD Clock, and the EAD clock will not recommence until the required action is completed.⁶⁴ As a result, some aliens may have to wait longer than 180 calendar days before they can be granted employment authorization.

Once an asylum applicant receives an EAD based on a pending asylum application, his or her employment authorization will terminate either on the date the EAD expires or 60 days after

⁶⁴ See *id.* EOIR-USCIS joint notice, *The 180-day Asylum EAD Clock Notice*, for additional examples of actions that can affect the 180-day Asylum EAD Clock.

the denial of asylum, whichever is longer (affirmatively-filed cases). If the asylum application is denied by an IJ, the BIA, or a denial of asylum is upheld by a Federal court, the employment authorization terminates upon the expiration of the EAD, unless the applicant seeks renewal of employment authorization during the pendency of any administrative or judicial review.

V. Discussion of Proposed Rule

A. 365-Day Waiting Period to Apply for Asylum-Application-Based EADs

DHS is proposing to extend the time period an asylum applicant must wait before he or she is eligible to be granted employment authorization based on a pending asylum application from 180 days to 365 calendar days. *See* proposed 8 CFR 208.7. DHS is proposing this change to a 365-day waiting period to remove the incentives for aliens who are not legitimate asylum seekers to exploit the system and file frivolous, fraudulent, or non-meritorious claims to obtain employment authorization. Currently, if an alien files an application for asylum, the alien can obtain an employment authorization document after just 180 days, not including any days not counted due to an applicant-caused delay. Backlogs at USCIS and the years-long wait for hearings in the immigration courts allow aliens to remain in the United States for many years, be authorized for employment, and ultimately gain equities for an immigration benefit, even if their asylum applications will be denied on their merits.⁶⁵ DHS believes that the longer waiting period for filing a (c)(8) EAD application will be a strong deterrent to frivolous, fraudulent, and non-

⁶⁵ *See, e.g.,* Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis; Charting a Way Forward*, MIGRATION POLICY INSTITUTE (Sept. 2018) at pp. 4 and 9-12, for additional discussion on the impact of backlogs and delays in immigration proceedings.

meritorious asylum filings. Further, in light of DHS’s assessment⁶⁶ that many asylum applications appear to be coming from aliens escaping general criminal violence and poor economic situations in their home countries, rather than the five protected grounds for asylum or torture, it is logical that more stringent requirements for eligibility for employment authorization, such as a substantially longer waiting period for employment authorization, would disincentivize these would-be asylum seekers from coming to the United States in search of economic opportunity.. DHS also believes that this deterrent, coupled with last-in, first out (LIFO) asylum-adjudication scheduling discussed below, will lead to meritorious applications being granted sooner – resulting in immediate work authorization conferred on asylees by INA section 208(c)(1)(B) – and non-meritorious applications being denied sooner – resulting in the prompt removal of aliens who fail to establish eligibility to remain in the United States. DHS acknowledges that the reforms proposed will also apply to individuals with meritorious asylum claims, and that these applicants may also experience economic hardship as a result of heightened requirements for an EAD. However, DHS’s ultimate goal is to maintain integrity in the asylum process, sustaining an under-regulated administrative regime is no longer feasible. It is not unreasonable to impose additional time and security requirements on asylum seekers. Asylum seekers already are subject to temporal and security restrictions, and for the United States to scale up those restrictions based on operational needs is entirely reasonable.

⁶⁶ See “Statement from the Department of Homeland Security following the Acting Secretary’s appearance at Georgetown University” (Oct. 2019), <https://www.dhs.gov/news/2019/10/07/statement-department-homeland-security-following-acting-secretary-s-appearance>. DHS has made this assessment based on internal reporting from regional asylum offices, internal country information assessments, and corroborating journalist sources cited prior in this Notice of Proposed Rule Making.

DHS is proposing this change to complement its LIFO scheduling priority, re-implemented on January 29, 2018.⁶⁷ This priority approach, first established by the asylum reforms of 1995 and used for 20 years until 2014, seeks to deter those who might try to use the existing backlog as a means to obtain employment authorization. Returning to a LIFO interview schedule will allow USCIS to identify frivolous, fraudulent, or otherwise non-meritorious asylum claims earlier and place those aliens into removal proceedings. Under the previous Administration, the Department discontinued LIFO processing, the timing of which corresponded with a significant increase in asylum applications.

In the last decade, USCIS has seen its backlog of asylum applications skyrocket, with the number of new affirmative asylum filings increasing by a factor of 2.5 between FY 2014 and FY 2017.⁶⁸ As of March 31, 2019, USCIS currently faces an affirmative asylum backlog of over 327,984 cases. The high volume of cases stems in part from the recent surges in illegal immigration and organized caravans of thousands of aliens, primarily from the Northern Triangle countries (El Salvador, Honduras, and Guatemala), creating a humanitarian and national security crisis at the southern border. USCIS also has had to divert resources and asylum officers from processing affirmative asylum backlog cases to address the continuing high volume of credible fear and reasonable fear cases that require immediate interviews.

DHS proposes to eliminate the 180-day Asylum EAD Clock and instead deny EAD applications that have unresolved, applicant-caused delays existing on the date of EAD

⁶⁷ USCIS News Release, *USCIS To Take Action to Address Asylum Backlog* (Jan. 31, 2018).

⁶⁸ *See supra* note 39.

adjudication. The proposed elimination of the 180-day EAD clock will resolve some of the difficulties adjudicators face in processing asylum EAD applications. Calculating the current Asylum EAD clock is one of the most complex and time-consuming aspects of EAD adjudications.⁶⁹ It requires multipart calculations and the tracking of the start and stop dates for each individual applicant's case. It also requires coordination with DOJ-EOIR for defensively-filed cases that are not under USCIS' jurisdiction.⁷⁰ In light of these issues, USCIS is proposing to eliminate the clock altogether and instead extend the mandatory waiting period to file for an EAD and notify applicants that their EAD application will be denied if the asylum case is subject to an applicant-caused delay at the time the Form I-765 (c)(8) application is adjudicated. USCIS believes eliminating the 180-day Asylum EAD clock will significantly streamline the employment authorization process of the (c)(8) EAD because EAD adjudicators will no longer have to calculate the number of days that must be excluded to account for applicant-caused delays or coordinate with DOJ-EOIR to do so, and will instead simply rely on 365 calendar days from the asylum application receipt date to determine when an alien can request employment authorization. DHS has promulgated a separate rulemaking proposing the elimination of the requirement to adjudicate the EAD application within 30 days. *See Removal of 30-Day*

⁶⁹ USCIS acknowledges that many processes have been automated by the Person Centric Query System (PCQS) Asylum EAD Clock Calculator. However, the Asylum EAD Clock Calculator is not fully automated and there are still calculations that are not captured in the Clock Calculator. Additionally, not all scenarios have business rules that have been created. This requires officers to do manual calculations in many scenarios. The elimination of the 180-day Asylum EAD Clock will create overall efficiencies for USCIS given these limitations with the Clock Calculator.

⁷⁰ *See, e.g.*,² Citizenship & Immigration Services Ombudsman, *Employment Authorization For Asylum Applicants*, at p.6.

Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications” DHS Docket No. USCIS-2018-0001, 84 FR 47148 (Sept. 9, 2019).

DHS recognizes that a number of aliens who are legitimate asylum seekers may experience potential economic hardship because of the extended waiting period. However, the asylum system in the United States is completely overwhelmed.⁷¹ DHS is urgently seeking solutions, including mustering an all-volunteer force to assist with processing incoming migrants at the southwest border of the United States.⁷² But mitigating this unprecedented pressure on the U.S. immigration system will require more than just adding and reallocating DHS resources. DHS must take steps to address the pull factors bringing economic migrants to the United States.⁷³ The urgency to maintain the efficacy and the very integrity of the U.S. asylum and immigration system outweighs any hardship that may be imposed by the additional six-month waiting period. The integrity and preservation of the U.S. asylum system takes precedence over potential economic hardship faced by alien arrivals who enjoy no legal status in the United States, whether or not those aliens may later be found to have meritorious claims. DHS seeks public comment on this proposed amendment.

B. One-Year Filing Deadline

⁷¹ See, e.g., Joel Rose and John Burnett, *Migrant Families Arrive in Busloads as Border Crossings Hit 10-Year High*, Nat’l Pub. Radio (March 5, 2019) for observations about the recent surges in illegal immigration on the southern border.

⁷² See, e.g., Geneva Sands, *DHS Secretary Nielsen Asks for Volunteers to Help at the Border*, CNN Politics (Mar. 29, 2019); Miriam Jordan, *More Migrants are Crossing the Border This Year. What’s Changed?*, N.Y. TIMES (Mar. 05, 2019).

⁷³ See, e.g., de Córdoba, Jose. *The Guatemalan City Fueling the Migrant Exodus to America*, The Wall Street Journal, (July 21, 2019), www.wsj.com/articles/the-guatemalan-city-fueling-the-migrant-exodus-to-america-11563738141.

As part of the reforms to the asylum process, DHS also is emphasizing the importance of the statutory one-year filing deadline for asylum applications. Both DHS and DOJ-EOIR adjudicate asylum applications filed by aliens who reside in the United States for years before applying for asylum. Many aliens filing for asylum now are aliens who were inspected and admitted or paroled but failed to depart at the end of their authorized period of stay (visa overstay), or who entered without inspection and admission or parole and remained, not because of a fear of persecution in their home country, but for economic reasons.⁷⁴ In addition, the Asylum Division reports that a contributing factor to the asylum backlog is an increase in the number of applicants who file skeletal or fraudulent asylum applications affirmatively to trigger removal proceedings before the immigration court where they can apply for cancellation of removal, a statutory defense against removal and pathway to lawful permanent resident status

⁷⁴ Even Congress found that the asylum system was being overwhelmed with asylum claims, including frivolous and fraudulent claims filed merely to obtain employment authorization. *See, e.g.*, Public Law 103-322, 108 Stat. 1796, at sec. 130010(3) (findings of the Senate on the need for reforms to the asylum process, including finding that the asylum system was being abused “by fraudulent applicants whose primary interest is obtaining work authority in the United States while their claim languishes in the backlogged asylum processing system.”). *See also* H.R. REP. NO. 99-682(I) at pp. 5649-5654, where Congress discussed the impact of economic migrants on the U.S. economy during consideration of IRCA in 1986:

Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible, and effective way to respond to the large scale influx of undocumented aliens. While there is no doubt many who enter illegally do so for the best of motives – to seek a better life for themselves and their families – immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders.

* * *

Since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this serious problem. The need for control is underscored by international demographics. Undocumented aliens tend to come from countries with high population growth and few employment opportunities. The United States is not in a position to redress this imbalance by absorbing these workers into our economy and our population. U.S. unemployment currently stands at 7% and is much higher among the minority groups with whom undocumented workers compete for jobs directly.

available to those who have at least ten years of physical presence in the United States and meet additional eligibility criteria.⁷⁵ DHS seeks to address this practice and reduce the asylum backlog by proposing to make aliens ineligible for (c)(8) employment authorization if they fail to file their asylum application within one year of their last arrival in the United States as required by statute. Based on statute and relevant case law, DHS also proposes limited exceptions to the one-year-filing deadline as it relates to eligibility for a (c)(8) EAD, namely those who meet an exception under INA section 208(a)(2)(D) or if the applicant was an unaccompanied alien child on the date the asylum application was first filed. DHS believes that the statutory one-year filing period is a sufficient period of time for bona fide asylum applicants to make their claim with USCIS or an IJ. DHS seeks public comments on these proposed amendments.

C. Criminal Bars to Eligibility

DHS is proposing to expand the bars to the (c)(8) EAD to any alien who has: (1) been convicted of any aggravated felony as defined in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony in the United States or any serious non-political crime outside the United States, or (3) been convicted in the United States of certain public safety offenses involving domestic violence or assault; child abuse or neglect; controlled substances; or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state or local jurisdiction. DHS also proposes to consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses,

⁷⁵ See CIS Ombudsman, *Annual Report*, at p.44.

warrant a favorable exercise of discretion.⁷⁶ DHS also proposes to consider, on a case-by-case basis, whether an alien who has unresolved domestic charges or arrests that involve domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol, warrant a favorable exercise of discretion for a grant of employment authorization.

To determine if an asylum applicant seeking employment authorization has a disqualifying criminal history, DHS proposes to require such applicants to appear at an ASC to provide their biometrics for their initial and renewal applications. The biometrics will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant's biometrics against government databases (e.g., FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment.

DHS seeks comment on additional public safety related crimes that should bar (c)(8) EAD eligibility. *See* proposed 8 CFR 208.7 and 274a.12(c)(8). Providing discretionary employment authorization to criminal aliens and aliens who have been convicted for serious crimes that offend public safety, and who have not been determined eligible for asylum.

⁷⁶ *See, e.g.*, INA sec. 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); INA sec. 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I); INA sec. 212(a)(2)(B), 8 U.S.C. 1182(a)(2)(B).

D. Procedural Reforms

DHS is proposing to clarify that USCIS has jurisdiction over all applications for employment authorization based on a pending or approved asylum application, regardless of whether USCIS or DOJ-EOIR has jurisdiction over the asylum case. DHS is also proposing several procedural changes to streamline the asylum adjudication process. Currently, most applications, petitions, and requests for immigration benefits have specific minimum requirements that must be met before the forms can be accepted for filing. DHS proposes to amend the regulations at 8 CFR 208.3 to remove the language providing that a Form I-589, Application for Asylum and for Withholding of Removal, will be deemed a complete, properly filed application if USCIS fails to return the incomplete Form I-589 to the alien within a 30-day period. *See* proposed 8 CFR 208.333. This procedural change will require asylum applicants to file the asylum application in accordance with the requirements outlined in the regulations and form instructions and is consistent with the general principle that applicants and petitioners bear the burden of filing complete applications and petitions. Applications not properly filed are rejected and returned to the applicant with the reasons for the rejection, consistent with other forms.

DHS also proposes to remove the language referring to “recommended approvals” of asylum applications and the benefits of such applicants who receive those notices. *See* proposed 8 CFR 208.3 and 274a.12(c)(8). Recipients of recommended approvals have not fully completed the asylum adjudication process. Previously, USCIS issued such notices even when all required background and security check results had not been received, and recipients of recommended approvals were eligible for employment authorization. However, because Congress has mandated that DHS not approve asylum applications until DHS has received and reviewed all the

results of the required background and security checks, DHS has determined that continuing to issue recommended approval notices is contrary to this mandate.⁷⁷ In addition, USCIS believes it is an inefficient use of resources for USCIS to manage a separate processing regime, which requires USCIS to review the asylum application twice: first to determine if it is initially approvable as a “recommended approval,” and then again (after a recommended approval notice has been issued to the applicant) to ensure that the applicant remains eligible for asylum based on the results of the background and security checks. This change would enhance efficiency by removing duplicative case processing tasks and enhance the integrity of the overall asylum process because all information will be considered before issuance of the asylum decision

DHS is also proposing that any documentary evidence submitted fewer than 14 calendar days before the asylum interview (with allowance for a brief extension to submit additional evidence as a matter of discretion) may result in an applicant-caused delay if it delays the adjudication of the asylum application. The purpose of this provision is to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview.

E. Termination of Employment Authorization

⁷⁷ See INA sec. 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i).

(5) Consideration of asylum applications

(A) Procedures. - The procedure established under paragraph (1) shall provide that-

(i) *asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;*

(emphasis added).

DHS proposes revising the rule governing when employment authorization terminates to provide that when USCIS or DOJ-EOIR denies an asylum application, the alien's employment authorization associated with the asylum application will be terminated automatically, effective on the date of denial of the asylum application.

1. Denial of Asylum Application by USCIS Asylum Officer

Currently, the regulations at 8 CFR 208.7(b)(1) provide that an asylum applicant's employment authorization terminates within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. DHS does not believe it is the will of Congress that aliens with denied asylum applications should continue to hold employment authorization once the asylum claim is denied. DHS therefore proposes that when a USCIS asylum officer denies an alien's request for asylum, any employment authorization associated with a pending asylum application will be automatically terminated effective on the date the asylum application is denied. Further, consistent with the current regulation, DHS proposes to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer during the 365-day waiting period or before the adjudication of the initial employment authorization request.

When a USCIS asylum officer refers an affirmative application to DOJ-EOIR, the asylum application remains pending, and the associated employment authorization remains valid while the IJ adjudicates the application. Aliens granted asylum by USCIS or an IJ no longer require, nor are they eligible for, a (c)(8) EAD, but they can apply for an EAD under 8 CFR 274a.12(a)(5) if they want documentation that reflects they are employment authorized.

2. Termination After Denial by IJ

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

3. Automatic Extensions of Employment Authorization and Terminations.

To conform the automatic extension and termination provisions proposed under 8 CFR 208.7(b), DHS is also proposing amendments to the current regulations at 8 CFR 274a.13(d), which govern automatic extensions of employment authorization and termination of such extensions. If an asylum applicant's employment authorization will expire before the asylum officer, IJ, or the BIA renders a decision on the asylum application, under current regulations, the alien may file an application to renew the employment authorization. If the renewal EAD application is filed timely, the alien's employment authorization is extended automatically for up to 180 days or the date of the EAD decision, whichever comes first. As previously discussed, when a USCIS asylum officer, IJ, or the BIA denies the asylum application, any employment authorization would terminate on the date of the denial, except for the thirty-day appeal window

for an alien to file an appeal before the BIA following an asylum application's denial by an IJ. This rule at proposed 8 CFR 208.7(b)(2) makes clear that employment authorization automatically terminates regardless of whether it is in a period of automatic extension. Therefore, the rule proposes conforming amendments at 8 CFR 274a.13(d)(3), specifying that automatic extensions would be automatically terminated upon a denial of the asylum application, or on the date the automatic extension expires (which is up to 180 days), whichever is earlier. *See* proposed 8 CFR 274a.13(d)(3).

DHS also proposes a technical change that would add a new paragraph at 8 CFR 274a.14(a)(1) to generally reference any automatic termination provision elsewhere in DHS regulations, including the automatic EAD termination provision being proposed by this rule.⁷⁸ As 8 CFR 274a.14(a)(1) is a general termination provision, DHS feels that incorporation of a general reference to other termination provisions would help avoid possible confusion regarding the applicability of such other provisions in relation to 8 CFR 274a.14(a)(1).

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

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

In 2017, DHS issued a memo, "Implementing the President's Border Security and Immigration Enforcement Improvement Policies," which stated that CBP or ICE will only

⁷⁸ *See* proposed 8 CFR 208.7(b)(2); *see also* 8 CFR 214.2(f)(9)(ii)(F)(2) (automatic termination of F-1 student-based employment authorization based on economic necessary where the student fails to maintain status).

consider the release of aliens from detention based on the parole authority under INA section 212(d)(5) on a case-by-case basis.⁷⁹ One such case is when an arriving alien subject to expedited removal establishes a credible fear of persecution or torture, or eligibility for withholding of removal, adequately establishes his or her identity, does not pose a flight risk or danger to the community, and otherwise warrants parole as a matter of discretion. Currently, when DHS exercises its discretion to parole such aliens, officers are instructed to endorse the Form I-94 parole authorization with an express condition that employment authorization not be provided under 8 CFR 274a.12(c)(11) on the basis of the parole. This rule would conform the regulations to that important policy. DHS continues to believe that it would be an inconsistent policy to permit these asylum seekers released on parole to seek employment authorization without being subject to the same statutory requirements and waiting period as non-paroled asylum seekers. Therefore, this rule proposes to clarify, consistent with existing DHS policy, that employment authorization for this category of parolees is not immediately available under the (c)(11) category. Such aliens may still be eligible to apply for a (c)(8) employment authorization to become employment authorized subject to the eligibility changes proposed in this rule. DHS seeks public comment on this proposal and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those DHS determines are needed for foreign policy, law enforcement, or national security reasons, especially since parole is meant only as a temporary measure to allow an alien's

⁷⁹ See Secretary of Homeland Security John Kelly, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies," Section K (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

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

G. Illegal Entry

DHS proposes to exclude aliens from receiving a (c)(8) EAD if they enter or attempt to enter the United States illegally without good cause. Good cause is defined as a reasonable justification for entering the United States illegally as determined by the adjudicator on a case-by-case basis. Since what may be a reasonable justification for one applicant may not be reasonable when looking at the circumstances of another applicant, DHS believes a case-by-case determination of good cause in a (c)(8) adjudication will incentivize aliens to comply with the law to the extent possible and avoid injury and death associated with illegal entries, and reduce government expenditures related to detecting, apprehending, processing, housing, and transporting escalating numbers of illegal entrants. To the extent that this change could be considered a “penalty” within the meaning of Article 31(1) of the 1951 Convention relating to the Status of Refugees, which is binding on the United States by incorporation in the 1967 Protocol relating to the Status of Refugees, DHS believes that it is consistent with U.S. obligations under the 1967 Protocol because it exempts aliens who establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry.

The amendments to this section make any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry ineligible to receive a (c)(8) EAD, with the limited exception of when an alien demonstrates that he or she: (1) presented himself or herself without delay to the Secretary of Homeland Security (or his or her delegate); and (2) indicated to a DHS agent or officer an intent apply for asylum or

expressed a fear of persecution or torture; and (3) otherwise had good cause for the illegal entry or attempted entry. Examples of reasonable justifications for the illegal entry or attempted entry include, but are not limited to, requiring immediate medical attention or fleeing imminent serious harm, but would not include the evasion of U.S. immigration officers, or entering solely to circumvent the orderly processing of asylum seekers at a U.S. port of entry, or convenience. Asylum is a discretionary benefit that should be reserved only for those who are truly in need of the protection of the United States. It follows that work authorization associated with a pending asylum application should be similarly reserved.

H. Effective Date of the Final Rule

The rules in effect on the date of filing Form I-765 will govern all initial and renewal applications for (c)(8) and (c)(11) employment authorization, with limited exceptions. DHS will apply two proposed provisions – ineligibility based on certain criminal offenses and failure to file the asylum application within one year – to initial and renewal applications for (c)(8) EAD’s pending on the effective date of the final rule. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD application on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment. To ensure consistency with a separate proposed rule entitled “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” DHS Docket No. USCIS-2018-0001, 84 FR 47148 (Sept. 9, 2019), DHS proposes that this NPRM will not apply to initial applications filed before the effective date of this rule by members of the *Rosario* class. Under this proposal, DHS would allow aliens with pending asylum

applications that have not yet been adjudicated and who already have employment authorization before the final rule's effective date to remain work authorized until the expiration date on their EAD, unless the card is terminated or revoked on grounds in existing regulations. This proposed rule will not have any impact on applications to replace lost, stolen, or damaged (c)(8) EADs. All (c)(11) EAD applications based on parole/credible fear that are received by USCIS on or after the date the final rule is effective will be denied, as that ground for employment authorization is inconsistent with INA 208(d)(2).

VI. Statutory and Regulatory Requirements

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a “significant regulatory action” that is economically significant, under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this rule.

1. Summary

USCIS has considered alternatives and has undertaken a range of initiatives to address the asylum backlog and mitigate its consequences for asylum seekers, agency operations, and the integrity of the asylum system. These efforts include: (1) revised scheduling priorities including changing from First in, First Out (“FIFO”) order processing to LIFO order; (2) staffing increases

and retention initiatives; (3) acquiring new asylum division facilities; (4) assigning refugee officers to the Asylum Division; and (5) conducting remote screenings.⁸⁰

- **Revised Interview Scheduling Priorities:** A significant scheduling change occurred in January 2018 with FIFO scheduling returning to LIFO scheduling order. Previously implemented in 1995, LIFO remained in effect until 2014. Under FIFO scheduling, USCIS generally processed affirmative asylum applications in the order they were filed. The now-operative LIFO scheduling methodology prioritizes newly-filed applications. Some offices already report a 25 percent drop in affirmative asylum filings since implementation of the LIFO scheduling system in January 2018.⁸¹
- **Staffing Increases and Retention Initiatives:** Since 2015, USCIS has increased the number of asylum officer positions by more than 50 percent, from 448 officers authorized for FY 2015 to 686 officers authorized for FY 2018. Along with these staffing enhancements, USCIS increased the frequency with which it offered its Combined Training and Asylum Division Officer Training Course. Moreover, to address asylum officer turnover, USCIS has made efforts to increase telework options and expand opportunities for advancement.⁸²
- **New Asylum Division Facilities:** The Asylum Division also expanded its field operations, opening sub-offices in Boston, New Orleans, and Arlington, VA. Its most significant expansion, however, is just getting underway. Currently, the Asylum Division

⁸⁰ See Dep't of Homeland Security, 2018 Citizenship & Immigration Services Ombudsman Annual Report at 44.

⁸¹ *Id.* at 45.

⁸² *Id.* at 46.

is establishing an asylum vetting center—distinct from the planned DHS-wide National Vetting Center—in Atlanta, Georgia. This center will allow for the initiation of certain security checks from a central location, rather than at individual asylum offices, in an effort to alleviate the administrative burden on asylum officers and to promote vetting and processing efficiency. USCIS has already begun hiring for the center, which will ultimately staff approximately 300 personnel, composed of both asylum and Fraud Detection and National Security Directorate (FDNS) positions. USCIS expects completion of the center’s construction in 2020.⁸³

- **Remote Screenings: Telephonic and Videoconference:** In 2016, the Asylum Division established a sub-office of the Arlington Asylum Office dedicated to adjudicating credible and reasonable fear claims. This sub-office performs remote (primarily telephonic) screenings of applicants who are located in detention facilities throughout the country. The Asylum Division states that its practice of performing remote telephonic screenings of credible and reasonable fear claims have enhanced processing efficiency since implementation. These screenings allow asylum offices greater agility and speed in reaching asylum seekers whose arrival patterns in the United States are not always predictable and who may be detained at remote detention facilities.⁸⁴
- **Refugee Officers Assigned to the Asylum Division:** Throughout 2018, USCIS had approximately 100 refugee officers serving 12-week assignments with the Asylum

⁸³ *Id.*

⁸⁴ *Id.*

Division at any given time. These refugee officers are able to interview affirmative asylum cases, conduct credible fear and reasonable fear screenings, and provide operational support. USCIS now assigns refugee officers both to asylum offices and DHS's family residential centers.⁸⁵

A simple regulatory alternative to extending the waiting period to 365 days and strengthening eligibility requirements is rescinding work authorization for asylum applicants altogether, which is permissible under INA 208(d)(2). This too would reduce pull factors and alleviate the asylum backlog. However, DHS seeks to balance deterrence of those abusing the asylum process for economic purposes and providing more timely protection to those who merit such protection, which includes immediate and automatic employment authorization when the asylum application is granted. DHS believes the proposed amendments in this rule strike a greater balance between these two goals. The proposed amendments build upon a carefully planned and implemented comprehensive backlog reduction plan and amends the (c)(8) EAD process so that those with bona fide asylum claims can be prioritized and extended the protections, including employment authorization, that the United States offers to aliens seeking refuge from persecution or torture.

a. Baseline

The impacts of this rule are measured against a baseline. This baseline is the best assessment of the way the world would look absent this proposed action. The table below

⁸⁵ *Id.* at. 46-47.

explains each of the proposed provisions of this rule, and the baseline against which the change is measured.

Table 4: Baseline and Proposal by Provision			
Description	CFR Citation	Proposal	Baseline
Provisions that affect asylum and employment authorization			
Eliminate the issuance of “Recommended Approvals” for a grant of affirmative asylum	8 CFR 208.7 8 CFR 274a.12	USCIS would no longer issue grants of recommended approvals as a preliminary decision for affirmative asylum adjudications. As such, aliens who previously could apply early for an EAD based on a recommended approval now will be required either to wait 365 days before they could apply for an EAD, or wait until they are granted asylum (if the asylum grant occurs earlier than 365 days).	Aliens who have received a notice of recommended approval are able to request employment authorization prior to the end of the waiting period for those with pending asylum applications.
“Complete” asylum applications	8 CFR 208.3	Removing outdated provision that application for asylum will automatically be deemed “complete” if USCIS fails to return the incomplete application to the alien within a 30-day period.	Application for asylum is automatically deemed “complete” if USCIS fails to return the incomplete application to the alien within a 30-day period.
Eligibility for Employment Authorization - Applicant-caused delay	8 CFR 208.4 8 CFR 208.9	Examples of applicant-caused delays include, but are not limited to the list below <ul style="list-style-type: none"> • A request to amend a pending application for asylum or to supplement such an application if unresolved on the date the (c)(8) EAD application is adjudicated; • An applicant’s failure to appear to receive and acknowledge receipt of the decision following an interview and a request for an extension to submit additional evidence, and; • Submitting additional documentary evidence fewer than 14 calendar days prior to interview. 	No 14-day regulatory restriction on how close to an asylum interview applicants can submit additional evidence.

Provisions that affect employment authorization only			
365-day wait	8 CFR 208.7	All aliens seeking a (c)(8) EAD based on a pending asylum application wait 365 calendar days from the receipt of their asylum application before they can file an application for employment authorization.	150-day waiting period plus applicant-caused delays that toll the 180-day EAD clock
Revise eligibility for employment authorization - One Year Filing Deadline	8 CFR 208.7	Exclude from (c)(8) EAD eligibility aliens who have failed to file for asylum for one year unless and until an asylum officer or IJ determines that an exception to the statutory requirement to file for asylum within one year applies.	No such restriction
Revise eligibility for employment authorization - Criminal Convictions	8 CFR 208.7	In addition to aggravated felons, also exclude from (c)(8) eligibility aliens who have committed certain lesser criminal offenses.	Aggravated felons are not eligible.
Revise eligibility for employment authorization - Illegal Entry	8 CFR 208.7	Exclude from (c)(8) eligibility aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry, with limited exceptions.	No such restriction
Termination of EAD after Asylum Denial or Dismissal by USCIS Asylum Officer	8 CFR 208.7	When a USCIS asylum officer denies or dismisses an alien's request for asylum, the (c)(8) EAD would be terminated effective on the date the asylum application is denied. If a USCIS asylum officer refers the case to an IJ and places the alien in removal proceedings, employment authorization will be available to the alien while the IJ adjudicates the asylum application.	An asylum applicant's EAD terminates within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. When an asylum officer refers an affirmative application to an IJ, the application remains pending and the associated EAD remains valid while the IJ adjudicates the application.
Termination of EAD after Asylum Denial by IJ	8 CFR 208.7	If the IJ denies the asylum application, employment authorization would continue for 30 days after the date the IJ denies the application to allow for appeal to the BIA. If the alien files a timely appeal of the denied asylum application with the BIA, employment	8 CFR 208.7(b)(2) provides that when an IJ denies an asylum application, the EAD terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review.

		authorization eligibility would continue through the BIA appeal.	
Termination of EAD after Asylum Denial Affirmed by the BIA	8 CFR 208.7	Employment authorization would not be granted after the BIA affirms a denial of the asylum application and while the case is under review in Federal court, unless the case is remanded to DOJ-EOIR for a new decision.	Asylum applicants are currently allowed to renew their (c)(8) EADs while their cases are under review in Federal court.
Eligibility for Employment Authorization - Failure to appear	8 CFR 208.10	An applicant's failure to appear for an asylum interview or biometric services appointment may lead to the dismissal or referral of his or her asylum application and may be deemed an applicant-caused delay affecting employment authorization eligibility.	No such restriction
Limit EAD validity periods	8 CFR 208.7	USCIS will, in its discretion, determine validity periods for initial and renewal EADs but such periods will not exceed two years. USCIS may set shorter validity periods.	No such restriction
Incorporate biometrics requirements into the employment authorization process for asylum seekers	8 CFR 208.7	Asylum applicants applying for (c)(8) employment authorization must submit biometrics at a scheduled biometrics services appointment. This requirement would also apply to applicants with a pending initial or renewal (c)(8) EAD application on the effective date of this; though DHS will not collect the biometric services fee from these aliens.	No such requirement. However, there is a requirement to submit biometrics with an asylum application.
Eligibility for Employment Authorization - aliens who have been paroled after being found to have a credible fear of persecution or torture	8 CFR 274a.12	Aliens who have been paroled into the United States after being found to have credible fear or reasonable fear of persecution or torture may not apply for employment authorization under 8 CFR 274a.12(c)(11). They may, however, continue to apply for an EAD under 8 CFR 274a.12(c)(8) if their asylum application has been; pending for more than 365 days and they	Consistent with current DHS policy guidance.

		meet the remaining eligibility requirements.	
Application for EAD	8 CFR 274a.13	Clarifying that EAD applications must be filed in accordance with the general filing requirements in 8 CFR 103.2(a), 208.3, and 208.4.	N/A
Application for EAD	8 CFR 274a.13(a)(1)	Provides USCIS discretion to grant (c)(8) EAD applications consistent with INA 208(d)(2).	Current regulations do not give the agency discretion to issue (c)(8) EADs. 8 CFR 274a.13(a)(1) currently states: The approval of applications filed under 8 CFR 274a.12(c), <i>except for 8 CFR 274a.12(c)(8)</i> , are within the discretion of USCIS.
Application for EAD - automatic extensions and automatic terminations	8 CFR 274a.13(d)(3) 8 CFR 208.7(b)(2)	For asylum applications denied, any EAD that was automatically extended pursuant to 8 CFR 274a.13(d)(1) based on a timely filed renewal application will automatically terminate on the date the asylum officer, the IJ, or BIA denies the asylum application, or on the date the automatic extension expires (which is up to 180 days), whichever is earlier.	For asylum applications denied, any EAD that was automatically extended pursuant to 8 CFR 274a.13(d)(1) will terminate at the expiration of the EAD or 60 days after the denial of asylum, whichever is longer.
Cross-reference to any automatic termination provision	8 CFR 274a.14	Cross-reference to any automatic termination provision elsewhere in DHS regulations, including the automatic termination provision being proposed by this rule.	N/A
Specify the effective date		EAD applications, including renewals, filed on or after the effective date will be adjudicated under the rule, except for the criminal and one-year-filing bar provisions, and except for initial applications filed by <i>Rosario</i> class members.	N/A

b. Costs and Benefits

This proposed rule amends the (c)(8) EAD system so that those with bona fide asylum claims can be prioritized and extended the protections, including employment authorization, that

United States offers to aliens seeking refugee from persecution by reducing the asylum backlog. The provisions seek to reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal, and remain for years in the United States for economic purposes.

The quantified maximum population this rule would apply to is about 305,000 aliens in the first year the rule could take effect and about 290,000 annually thereafter. DHS assessed the potential impacts from this rule overall, as well as the individual provisions, and provides quantitative estimates of such impacts where possible and relevant. For the provisions involving biometrics and the removal of recommended approvals, the quantified analysis covers the entire populations. For the 365-day EAD filing time proposal, the quantified analysis also covers the entire population; however, DHS relies on historical data to estimate the costs for affirmative cases and certain assumptions to provide a maximum potential estimate for the remaining affected population. For the provisions that would potentially end some EADs early, DHS could estimate only the portion of the costs – those attributable to affirmative cases – because DHS has no information available to estimate the number of defensive cases affected.

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

To take into consideration uncertainty and variation in the wages that EAD holders earn, all of the monetized costs rely on a lower and upper bound, benchmarked to a prevailing minimum wage and a national average wage, which generates a range. Specific costs related to the provisions proposed are summarized in Table 5. For the four provisions in which the impacts, or a portion of the impacts, could be monetized, the single midpoint figure for the wage-based range is presented.⁸⁶

<u>Table 5. Summary of Costs and Transfers of the Proposed Rule</u>	
III. <u>Quantified</u>	
<u>Provision Summary</u>	<u>Annual Costs and Transfers (mid-point)</u>
365-day EAD filing wait period (for DHS affirmative asylum cases and partial estimates for DHS referrals to DOJ)	Population: 39,000 Cost: \$542.7 million (quantified impacts for 39,000 of the 153,458 total population) Reduction in employment tax transfers: \$83.2 million (quantified impacts for 39,000 of the 153,458) Cost basis: annualized equivalence cost Summary: lost compensation for a portion of DHS asylum cases that benefitted from initial EAD approvals who would have to wait longer to earn wages under the proposed rule; nets out cost-savings for persons who would no longer file under the rule; includes partial estimate of DHS referral cases to DOJ-EOIR and the apropos estimated tax transfers. It does not include impacts for defensively filed cases.
Biometrics requirement	Population for initial and renewal EADs: 289,751 Population for pending EADs: 14,451 Cost: \$37,769,580 Reduction in employment tax transfers: none Cost basis: maximum costs of the provision, which would apply to the first year the rule could take effect Summary: For initial and renewal EADs, there would be time-related opportunity costs plus travel costs of submitting biometrics, as well as \$85 fee for (c)(8) I-765 initial and renewal populations subject to the biometrics and fee requirements. A small filing time burden to answer additional questions and read associated form instructions in the I-765 is

⁸⁶ The populations reported in Table 55 reflect the maximum population that would be covered by the provision. Some of the populations that would incur monetized impacts are slightly different due to technical adjustments.

	consolidated in this provision's costs. There would also be time-related opportunity costs plus travel costs of submitting biometrics for EADs pending on the effective date of the final rule.
Eliminate recommended approvals	Population: 1,930 annual Cost: \$13,907,387 Reduction in employment tax transfers: \$2,127,830 Cost basis: annualized equivalence cost Summary: delayed earnings and tax transfers that would have been earned for an average of 52 calendar days earlier with a recommended approval.
Terminate EADs if asylum application denied/dismissed (DHS)	Population: 575 (current and future) Cost: \$31,792,569 Reduction in employment tax transfers: \$4,864,263 Cost basis: maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: forgone earnings and tax transfers from ending EADs early for denied/dismissed DHS affirmative EADs asylum applications. This change would affect EADs that are currently valid and EADs for affirmative asylum applications in the future that would not be approved. DHS acknowledges that as a result of this proposed change, businesses that have hired such workers would incur labor turnover costs earlier than without this rule.
365-day EAD filing wait period (for the residual population)	Population: 114,458 Cost: \$1,189.6 million – \$3,600.4 million (quantified impacts for the remaining 114,458 of the 153,458) Reduction in employment tax transfers: \$182.0 million – \$550.9 million (quantified impacts for the remaining 114,458 of the 153,458) Cost basis: annualized equivalence cost Summary: lost compensation for the population of approved annual EADs for which DHS does not have data to make a precise cost estimate; The costs reported are a maximum because the potential impact is based on the maximum impact of 151 days; in reality there would be lower-cost segments to this population and filing-cost savings as well.
IV. <u>Unquantified</u>	
Revise (c)(11) category from I-765	Population: 13,000 Cost: delayed/foregone earnings Cost basis: NA Summary: DHS does not know how many of the affected population will apply for an EAD via the (c)(8) I-765, but the population would be zero at a minimum and 13,000 at a maximum, with a mid-point of 6,500. The population would possibly incur delayed earnings and tax transfers by being subject to the 365-day EAD clock (it is noted that this population would also incur costs under the biometrics provision, above), or lost earnings if they do not apply for a (c)(8) EAD. There is potentially countervailing cost-savings due to a reduced pool of filers under the proposed rule.
	DHS is unable to estimate the number of aliens impacted. Impacts could involve forgone earnings and lost taxes.

Criminal activity/illegal entry bar	
Adjudication of pending (c)(8) I-765 under the criminal and one-year-filing provisions	DHS cannot determine how many of the 14,451 pending EAD filings would be impacted by the criminal and one-year-filing provisions. Impacts could involve forgone earning and tax transfers.
One-year filing deadline	Some portion of the 8,472 annual filing bar referrals could be impacted, which could comprise deferred/delayed or forgone earning and tax transfers. DHS does not have data on filing bar cases referred to DOJ-EOIR.
Terminate EADS if asylum application denied/dismissed (DOJ-EOIR)	DOJ-EOIR has denied an average of almost 15,000 asylum cases annually; however, DHS does not have data on the number of such cases that have an EAD. Costs would involve forgone earnings and tax transfers for any such EADs that would be terminated earlier than they otherwise would, as well as forgone future earnings and tax transfers. DHS acknowledges that as a result of this proposed change, businesses that have hired such workers would incur labor turnover costs earlier than without this rule.
Renewal EADS	The proposed rule would impose the conditions in the rule to renewal filers. Some may be delayed or precluded from renewing their EADs, or incur Form I-765 filing fees and opportunity costs for re-filing.

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.⁸⁷ The distributional impacts would fall on the asylum applicants who would be delayed in entering the U.S. labor force or who would leave the labor force earlier than under current regulations. 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, or, eligible to work lawfully, possibly in the form

⁸⁷ 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>.

of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the impacts of this rule would also be borne by companies that would have hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These companies would incur a cost, as they would be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided. 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, but estimated the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies are able to easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will bear little or no costs, so \$4,461.9 million (annualized at 7%) will be transferred from asylum applicants to workers currently in the labor force or induced back into the labor force (we assume no tax losses as a labor substitute was found). Conversely, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then \$4,461.9 million is the estimated maximum monetized cost of the rule that could be a transfer, 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 \$682.9 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 the provisions that affect the amount of time an asylum applicant is employed.

USCIS notes that given that the U.S. unemployment rate is hovering around a 50-year low – at 3.7% as of August 2019—it could be possible that employers may face difficulties finding reasonable labor substitutes. DHS does note that an alternative measure of the unemployment rate from the Bureau of Labor Statistics (the U-6) provides additional information on the labor market not found in the official unemployment rate (the U-3). The U-6 rate is a broader measure of labor underutilization and takes into account workers not included in the official U-3 rate that could potentially benefit from this rule. For example, the U-6 rate considers persons who are neither working nor looking for work but indicate they want and are available for a job and have looked for work sometime in the past twelve months and also considers part-time workers who otherwise want and are available for full time employment. The U-6 rate shows unemployment at 7.2 percent, which is much higher than the official U-3 rate of 3.7 percent.⁸⁸

Included in the broader U-6 unemployment rate is the number of persons employed part time for economic reasons (sometimes referred to as involuntary part-time workers), which BLS estimates is 4.4 million in August 2019. 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.⁸⁹ In addition, BLS reports for August 2019 that 1.6 million persons were marginally attached to the labor force. These individuals were not in the labor force, wanted and

⁸⁸ The full definition of the U-3 and U-6 unemployment rates can be found on the Bureau of Labor Statistics (BLS) website under the “Local Area Unemployment Statistics (LAUS),” at: <https://www.bls.gov/lau/stalt.htm>. The actual figures for the U-3 and U-6 unemployment rates are found in table A-15, “Alternative Measures of Labor Underutilization,” in the Economic News Release Archives at: https://www.bls.gov/news.release/archives/empisit_09062019.htm.

⁸⁹ See Table A-8, “Employed Persons by Class of Worker and Part-Time Status”, Persons at work part time for economic reasons: https://www.bls.gov/news.release/archives/empisit_09062019.htm.

were available for work, and had looked for a job sometime in the prior 12 months. They were not counted as unemployed in the official U-3 unemployment rate because they had not searched for work in the 4 weeks preceding the BLS survey, but are counted in the U-6 rate.⁹⁰ The U-6 rate provides additional evidence that U.S. workers might be available to substitute into the jobs that asylum applicants currently hold.

Because the biometrics requirement proposed in this rule is a cost to applicants and not a transfer, its minimum value of \$27.17 million is the minimum cost of the rule. The range of impacts described by these two scenarios, plus the consideration of the biometrics costs, are summarized in Table 6 below (Table 6A and 6B capture the impacts a 3 and 7 percent rates of discount, in order).

Table 6A. Summary of Range of Monetized Annualized Impacts at 3%						
Category	Description	Scenario: No Replacement Labor found for Asylum Applicants		Scenario: All Asylum Applicants Replaced with Other Workers		Primary
		Low Wage	High Wage	Low Wage	High Wage	average of the highest high and the lowest low, for each row
Transfers						
Transfers - Compensation	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals)	\$0.00	\$0.00	\$1,473,953,451	\$4,461,386,308	\$2,230,693,154
Transfers - Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals)	\$225,587,337	\$682,771,643	\$0.00	\$0.00	\$341,385,822
Costs						

⁹⁰ See Table A-16, “Persons not in the labor force and multiple jobholders by sex, not seasonally adjusted”, Persons marginally attached to the labor force: https://www.bls.gov/news.release/archives/empsit_09062019.htm.

Cost Subtotal - Biometrics	Biometrics Requirements	\$27,154,124	\$45,726,847	\$27,154,124	\$45,726,847	\$36,440,486
Cost Subtotal - Lost Productivity	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals)	\$1,473,953,451	\$4,461,386,308	\$0.00	\$0.00	\$2,230,693,154
Total Costs		\$1,501,107,576	\$4,507,113,155	\$27,154,124	\$45,726,847	\$2,267,133,639

Table 6B. Summary of Range of Monetized Annualized Impacts at 7%

Category	Description	Scenario: No Replacement Labor found for Asylum Applicants		Scenario: All Asylum Applicants Replaced with Other Workers		Primary
		Low Wage	High Wage	Low Wage	High Wage	average of the highest high and the lowest low, for each row
Transfers						
Transfers - Compensation	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals)	\$0.00	\$0.00	\$1,474,123,234	\$4,461,900,172	\$2,230,950,086
Transfers - Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals)	\$225,613,314	\$682,850,264	\$0	\$0	\$341,425,132
Costs						
Cost Subtotal - Biometrics	Biometrics Requirements	\$27,171,858	\$45,766,847	\$27,171,858	\$45,766,847	\$36,469,352
Cost Subtotal - Lost Productivity	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals)	\$1,474,123,234	\$4,461,900,172	\$0.00	\$0.00	\$2,230,950,086
Total Costs		\$1,501,295,093	\$4,507,667,018	\$27,171,858	\$45,766,847	\$2,267,419,438

As required by Office of Management and Budget (OMB) Circular A-4, Table 7 presents the prepared A-4 accounting statement showing the costs associated with this proposed regulation:

Table 7. OMB A-4 Accounting Statement (\$ millions, 2019) 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 un-monetized, benefits	N/A		N/A	N/A	RIA
Unquantified Benefits	<p>The benefits potentially realized by the proposed rule are qualitative and accrue to a streamlined system for employment authorizations for asylum seekers that would reduce fraud, improve overall integrity and operational efficiency, and prioritize aliens with bona fide asylum claims. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large. The proposed rule aligns with the Administration’s goals of strengthening protections for U.S. workers in the labor market. The proposed biometrics requirement would enhance identity verification and management.</p>				RIA
COSTS					
Annualized monetized costs (discount rate in parenthesis)	(7%)	\$2,267.4	\$27.17	\$4,507.7	RIA
	(3%)	\$2,267.1	\$27.17	\$4,507.1	RIA
Annualized quantified, but un-monetized, costs	N/A		N/A	N/A	RIA
Qualitative (unquantified) costs	<p>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. There could also be a loss of Federal, state, and local income tax revenue.</p> <p>Estimates of costs to proposals that would involve DOJ-EOIR defensively-filed asylum applications and DHS-referrals could not be made due to lack of data. Potential costs would involve delayed/deferred or forgone earnings, and possible lost tax revenue.</p> <p>There would also be delayed or forgone labor income and tax transfers for pending EAD applicants impacted by the criminal and one-year filing provisions, renewal applicants, transfers from the (c)(11) group, and filing bar cases, all of whom would be subject to some of the criteria being proposed; in addition, such impacts could also affect those who would be eligible currently for an EAD but would be ineligible for an EAD, or have such eligibility terminated earlier, under the proposed rule.</p>				RIA

TRANSFERS					
Annualized monetized transfers: "on budget"	(7%)	\$0	\$0	\$0	RIA
	(3%)	\$0	\$0	\$0	
From whom to whom?	N/A				
Annualized monetized transfers: compensation	(7%)	\$2,231.0	\$0	\$4,461.9	RIA
	(3%)	\$2,230.7	\$0	\$4,461.4	
From whom to whom?	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals). Some of the deferred or forgone earnings could be transferred from asylum applicants to workers in the U.S. labor force or induced into the U.S. labor force. Additional distributional impacts from asylum applicant to the asylum applicant's support network that provides for the asylum applicant while awaiting an EAD; these could involve burdens to asylum applicants' personal private or familial support system, but could also involve public, private, or charitable benefits-granting agencies and non-governmental organizations (NGOs).				RIA
Annualized monetized transfers: taxes	(7%)	\$341.4	\$0	\$682.9	RIA
	(3%)	\$341.4	\$0	\$682.8	
From whom to whom?	A reduction in employment taxes from companies and employees to the Federal Government. There could also be a transfer of Federal, state, and local income tax revenue (provisions: 365-day wait + end EADs early + end recommended approvals)				
Category	Effects				Source Citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments	DHS does not know precisely how many low age workers could be removed from the labor force due to the proposed rule. There may also be a reduction in state and local tax revenue. Budgets and assistance networks that provide benefits to asylum seekers could be impacted negatively if asylum applicants request additional support.				RIA
Effects on small businesses	This proposed rule does not directly regulate small entities, but has indirect costs on small entities. DHS acknowledges that ending EADs linked to denied DHS-affirmative asylum claims and EADs linked to asylum cases under DOJ-EOIR purview would result in businesses that have hired such workers incurring labor turnover costs earlier than without this rule. Such small businesses may also incur costs related to a difficulty in finding workers that may not have occurred without this rule.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

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

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

The proposed biometrics requirement would provide a benefit to the U.S. government by enabling DHS to know with greater certainty the identity of aliens requesting EADs in connection with an asylum application. The biometrics will allow DHS to conduct criminal

history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant's biometrics against government databases (e.g., FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production. Along with the proposals summarized above and discussed in detail in the preamble and regulatory impact sections of this proposed rule, DHS plans to modify and clarify existing regulations dealing with technical and procedural aspects of the asylum interview process, USCIS authority regarding asylum, applicant-caused delays in the process, and the validity period for EADs. These provisions are not expected to generate costs. If adopted in a final rule, the rules and criteria proposed herein relating to certain criminal offenses and the one-year-filing bar would apply to pending EAD applications. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will provide notice of the place, date and time of the biometrics appointment to applicants with pending EAD applications. Some aliens could be impacted and some may not be granted an EAD as they would otherwise under current practice, but DHS does not know how many could be impacted and does not estimate costs for this provision.

2. Background and Purpose of Rule

The purpose of this proposed rule is to reform, improve, and streamline the asylum process, so that those with bona fide asylum claims can be prioritized and extended protection, including immediate employment authorization based on an approved asylum application. The provisions seek to reduce incentives to file frivolous, fraudulent, or otherwise non-meritorious asylum applications and other forms of non-asylum based relief primarily to obtain employment

authorization. As is detailed in the preamble, it has been decades since significant reforms were made to the asylum process, and there have been no major statutory changes to the asylum provisions to address the current aspects of the immigration laws that incentivize illegal immigration to the United States and frivolous asylum filings.

DHS has seen a surge in illegal immigration into the United States, and USCIS currently faces a critical asylum backlog that has crippled the agency's ability to timely screen and vet applicants awaiting a decision.

As a result of regulatory review required by E.O. 13767, Border Security and Immigration Enforcement Improvements, DHS identified the regulations that were inconsistent with this order and is revising them in this proposed rule. While working with Congress on legal reforms to deter frivolous, fraudulent, and non-meritorious filings, DHS is also taking administrative steps to improve the asylum application process, pursuant to the Secretary's authorities over immigration policy and enforcement. The broad goal is to minimize abuse of the system by inadmissible or removable aliens who are not eligible for asylum, but who seek to prolong their stay in the United States. The proposed changes will remove incentives for illegal aliens to cross the border for economic reasons and better allow DHS to process bona fide asylum seekers in an expedited manner. As a result, bona fide asylum applications would be adjudicated timelier, and the significant benefits associated with grants of asylum would be realized sooner.⁹¹

⁹¹ A grant of asylum allows an alien to remain in the United States, creates a path to lawful permanent residence and citizenship, and allows for certain family members to obtain lawful immigration status. *See* INA sec. 208(b)(3) (allowing derivative asylum for asylee's spouse and unmarried children); INA sec. 208(c)(1) (prohibiting removal or return of an alien granted asylum to alien's country of nationality, or in the case of a person have no nationality, the country of last habitual residence); INA sec. 209(b) (allowing adjustment of status of aliens granted asylum); INA sec. 316(a) (describing requirements for naturalization of lawful permanent residents). An asylee is authorized to

Information and data pertinent to the ensuing analysis is provided. A thorough qualitative discussion of the asylum application and related employment authorization application process is available in the preamble. Table 8 provides data concerning DHS affirmative asylum filings via Form I-589 for the five-year span of fiscal years 2014-2018.⁹²

Table 8. USCIS Form I-589 Affirmative Asylum Petition Data, FY 2014 - 2018						
FY	Receipts	Approvals	Denials	Admin. Close	Referrals- DOJ-EOIR	Pending Pool
2014	56,912	11,841	707	1,849	15,969	46,928
2015	84,236	15,999	458	3,010	20,353	85,593
2016	115,888	10,762	138	3,785	16,564	152,516
2017	142,760	15,229	137	5,825	29,639	252,627
2018	108,031	19,978	927	9,436	52,221	314,453
5-year total	507,827	73,809	2,367	23,905	134,746	---
Average	101,565	14,762	473	4,781	26,949	170,423

As can be gathered from Table 8, denials for DHS affirmative asylum filings are low, and approvals are also low, relatively speaking. Foremost, DHS administratively closes 4.7 percent of receipts.⁹³ More significantly, DHS refers a large share of cases to DOJ-EOIR. The average

work in the United States and may receive financial assistance from the Federal Government. *See* INA sec. 208(c)(1)(B) (authorizing aliens granted asylum to engage in employment in the United States); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A), 1613(b)(1) (describing eligibility for Federal Government assistance).

⁹² The data are collected from monthly “Affirmative Asylum Statistics” reports, which are publicly available at the USCIS data reporting website under the “Asylum” search filter: <https://www.uscis.gov/tools/reports-studies/immigration-forms-data-report>. The data were applicable as of April 1, 2019.

⁹³ USCIS administratively closes I-589s where no decision can be made on the application by USCIS for various reasons, including, but not limited to: (1) lack of jurisdiction over the I-589 where the applicant is already in removal proceedings before EOIR and not a UAC (in those cases, the case is administratively closed but no NTA is issued since the person is already in proceedings); (2) an application is abandoned, withdrawn, or the applicant fails to show up for the interview or biometric services appointment after rescheduling options are exhausted (in those cases, no decision is made on eligibility but an NTA would be issued if the person is out of status and is still in the

referral rate is 26.5 percent, which ranged from a low of 14.4 percent to a high of 49.2 over the period. Measured against receipts, the average approval and denial rates are 14.5 percent and .5 percent, respectively. However, if the basis is recalibrated to “adjudicated cases”—the sum of approvals, denials, referrals (interviewed), and filing bar referrals—more salient approval and denial rates of 38.2 and 1.2 percent, respectively, are obtained. These rates are more tractable because they remove the impact of administrative closures, referrals that did not involve an USCIS interview, and most importantly, the effect embodied in the growth of the pending (hence not yet processed cases) pool. Against “adjudicated cases,” DHS referred more than three-fifths (60.6 percent) of asylum cases to DOJ-EOIR, and this share does not include non-interview referrals. As it relates to the total of all referrals, on average the share attributed to interview, filing bar, non-interview cases is 56, 29, and 14 percent, respectively.⁹⁴

In Table 8, the average across the five-year period is provided. It is noted that the pending pool of applications has surged, as is evidenced by the fact that the 2017 and 2018 figures for end-of-year pending pool far exceeded the overall five-year average. For receipts, there has also been substantial growth, though filings declined markedly in 2018 from 2017.

U.S.); (3) the applicant has a final administrative removal or ICE has reinstated a prior removal order (in those cases, the I-589 would be administratively closed and the person would be referred for a reasonable fear screening).

⁹⁴ The adjudicated basis also excludes some other minor categories such as “dismissals,” which comprise a handful of cases each year. It is noted that the definitional basis for adjudicated cases is the same as (or similar to with minor adjustments) the basis that DHS uses in much of its public facing and official reporting on asylum. Relevant calculations: the FY 2014-2018 average of “adjudicated” cases, as defined in the text, is 193,301. Dividing the annual average approvals of 73,809 by 193,301 yields the approval rate of 38.2 percent. Dividing the annual average denials of 2,387 by 193,301 yields the denial rate of 1.2 percent. The non-interview referral rate is obtained by dividing the sum of annual average filing bar and interview referrals, of 117,125, by 193,301 yields 60.6 percent. The annual average of total referrals is 134,746. The sum of interview, filing bar, and non-interview cases, in order of, 74,763, 42,362, and 17,621, is 134,746. Dividing each of the former by the latter yield 56, 29, and 14 percent, respectively.

Data pertaining to DOJ-EOIR defensively-filed asylum cases was obtained and relevant data are collated in Table 9.⁹⁵

Table 9. DOJ-EOIR Asylum Caseload and Decisions (FY 2014 - 2018)							
FY	USCIS Referrals to DOJ-EOIR	Defense Filed	Total filed	Cases granted	Cases denied	Other outcome	Admin. closed
2014	16,258	31,196	47,454	8,562	9,292	10,418	9,540
2015	17,289	46,203	63,492	8,113	8,847	11,018	15,420
2016	12,718	69,349	82,067	8,684	11,737	12,883	21,623
2017	22,143	121,418	143,561	10,539	17,632	14,745	10,889
2018	49,118	111,887	161,005	13,161	26,594	22,328	2,098
5-year total	117,526	380,053	497,579	49,059	74,102	71,392	117,526
Average	23,505	76,011	99,516	9,812	14,820	14,278	23,505
share of completions				15.7%	23.7%	22.9%	37.7%

The first data column in Table 9 captures DHS referrals to DOJ-EOIR, and generally corresponds with data in the fifth data column of Table 8.⁹⁶ As the data indicate, asylum filings at DOJ-EOIR have also increased sharply over the five-year period, noting that the increase in defensive filings over the last three years has been particularly strong. Defensive cases also

⁹⁵ The DOJ-EOIR data is publicly available under the “Statistics and Reports” suite, “Workload and Adjudication Statistics” section at <https://www.justice.gov/eoir/workload-and-adjudication-statistics>. The data are found in the “Asylum Decision Rates” and “Total Asylum Applications” reports, at <https://www.justice.gov/eoir/page/file/1104861/download>, and <https://www.justice.gov/eoir/page/file/1106366/download>, in order. The data reflect the updated data as of January 30, 2019.

⁹⁶ DHS Asylum cases referred to DOJ-EOIR over the period (Table 888) on average are a higher by about 13 percent on average, than the DOJ-EOIR Affirmative asylum filings. The primary reason is UAC cases. DHS counts them as referrals, but, since they are already in EOIR’s caseload as an NTA has been filed in these cases, USCIS does not enter them into CASE-ISS and transfer the application through the usual referral process. EOIR counts them as defensively-filed asylum cases as opposed to affirmative asylum cases that have been referred.

comprise the bulk of filings, more than tripling affirmative filings on average. Over the entire five-year period there were 312,079 total completions, noting that this tally comprises grants, denials, cases that were administratively closed, and “others.” The latter comprises defensively-filed asylum applications that were abandoned, not adjudicated, or withdrawn.

Table 10 provides data on (c)(8) I-765 filings, and DHS notes that these apply to both DHS affirmative filings (including referrals to DOJ-EOIR) and those filings connected to defensively-filed asylum cases.

<u>Table 10. DHS I-765(c)(8) Filing Data for DHS Affirmative filings (including referrals to DOJ-EOIR), and Defensive Cases (FY 2014 – 2018)</u>						
	<u>Initials</u>			<u>Renewals</u>		
FY	Receipts	Approve	Deny	Receipts	Approve	Deny
2014	62,169	48,596	10,547	45,103	42,940	2,517
2015	106,030	85,606	13,080	72,559	63,631	3,221
2016	169,970	152,283	14,330	128,610	115,555	4,156
2017	261,782	234,080	21,179	212,255	166,208	4,854
2018	262,991	246,725	29,091	62,289	91,010	4,685
5-year total	862,942	767,290	88,227	520,816	479,344	19,433
Average	172,588	153,458	17,645	104,163	95,869	3,887

As Table 10 indicates, the number of employment authorization applications filed under the (c)(8) eligibility category has increased steadily since 2014, although the trend appears to have levelled off in 2018 (it is too early to tell if this will continue) at a historically high level. Over the entire period, 89 percent of initial filings for work authorization were approved. There

is also a relatively high rate of renewal filings, and 62.5 percent of initial approvals were followed by an approved renewal.⁹⁷

DHS obtained and performed analysis on a data set capturing a portion of (c)(8) Form I-765 information that covers principal applicants and dependents who also filed an I-589 Form with DHS (i.e. DHS affirmative cases, including DOJ-EOIR referrals), from 2014 through 2018.⁹⁸ Details and caveats concerning this data set are dealt with in detail in ensuing discussion of the costs of the proposed 365 EAD filing time wait. Based on analysis of this data, several time-centered variables are developed that are relevant to the forthcoming analysis. These indicators are produced and displayed in Table 11.

Table 11. Calculated Time Intervals for DHS affirmative filings (including DOJ-EOIR referrals), (average calendar days, FY 2014 – 2018)					
FY	I-589 affirmative filing to I-765(c)(8) filing interval	I-765(c)(8) process time for affirmative cases	I-589 process time for DHS affirmative cases (excl. DOJ-EOIR referral cases)	Time between I-589 filing with DHS and referral to DOJ-EOIR	I-589 affirmative filing to I-765(c)(8) approval interval
2014	223	83	820	590	307
2015	228	84	812	737	312
2016	231	68	537	476	298
2017	210	67	380	278	277
2018	181	43	190	84	223
5-Yr Average	215	69	N/A*	N/A*	283

* DHS does not show a 5-year average for these time intervals because they are directly affected by the change from FIFO to LIFO processing.

⁹⁷ Relevant calculations: for approval rate, 153,458 average approvals/172,588 average receipts = .889, and for renewal rate, 95,869 average renewals/153,458 initial approvals = .6247. Both decimals are rounded and multiplied by 100.

⁹⁸ The (c)(8) I-765 data was provided by the USCIS Office of Performance and Quality (OPQ) from file tracking data (data accessed on Jan. 19, 2019).

The data presented in Table 11 capture average calendar days.⁹⁹ The ‘I-589 process time’ reflects the filing time to decision for DHS affirmative cases only, as DHS does not have data on I-589 process time for cases referred to DOJ-EOIR. The following column captures the average time interval between when an I-589 was filed with DHS and when it was referred to DOJ-EOIR. The final column captures the average time interval between when an I-589 was filed with DHS and a (c)(8) I-765 was approved. As is readily seen, there have been substantial declines in all of the intervals.

Before developing the general and provision-specific populations that the rule could impact, a final data element is provided. In January 2018, USCIS reinstated its LIFO scheduling priority for asylum applications. DHS partitioned out LIFO cases starting after January 2018 until the end of January 2019 to capture a full calendar year of time. The mean processing time was 166 days, which is even lower than the 190-day average for DHS adjudicated cases displayed in Table 11 for the fiscal year 2018.

3. Population

In this section, the baseline population estimates are conducted for the rule in general and each specific provision. The term “baseline” applies to the maximum population that the rule could involve. However, an important consideration in this regard is that there could be feedback from one provision that affects the baseline population. In the ensuing section on costs,

⁹⁹ The final data column captures the important “wait” time, between the filing date of the I-589 asylum petition and the approval of a (c)(8) I-765. This interval captures the amount of time an individual has between filing for asylum and being able to work and earn labor income. This metric is not exact though, as once a favorable decision is made concerning the EAD application, it takes some time to finalize and send the approval notice.

the baseline figures will be tuned and modified to reflect the specific populations that could be impacted by the proposed provisions. These adjusted populations will be the ones incurring specified cost impacts.

The proposed rule would require aliens who file for an EAD under the (c)(8) asylum category to submit biometrics and pay the \$85 biometric services fee. This biometrics requirement is the encompassing provision that captures the largest population under the rule. There will also be a small burden increase associated with the Form I-765. Asylum applicants filing for employment authorization under (c)(8) will be required to attend a biometric services appointment and will also need to answer new, additional questions on the form relating to new eligibility requirements, and read the associated instructions. USCIS estimates that the biometric services appointment will add an additional 1 hour and 10 minutes, while reading the instructions and answering the questions will add an estimated 15 minutes to the overall Form I-765 time burden for this category of filers. The encompassing population is the average of 172,588 initial filers would incur the small time burden and biometrics requirement (Table 10). In addition, current EAD holders who file for renewals would also submit biometrics and pay the \$85 biometric services fee. Currently, initial (c)(8) I-765 filers do not pay the I-765 filing fee, but renewal filers do, and this proposed rule does not suggest a change to the protocol. The annual average renewal (c)(8) I-765 filing population is 104,163 (Table 10).

The proposed rule would require all asylum applicants to wait 365 calendar days before filing for an initial EAD. Currently, applicants have a 150-day waiting period before they can file for an initial (c)(8) EAD. However, applicants whose initial EAD applications are denied would not be affected, and renewal EADs would not be affected by the proposed 365-day waiting period. Hence, the baseline population for the 365-calendar-day waiting period

provision is the average number of initial (c)(8) I-765 approvals from FY 2014-2018, which is 153,458 (Table 10).

DHS is proposing to eliminate the preferential category of recommended approvals for asylum, under which an asylum applicant can file an EAD request upon initial favorable review by an asylum officer, prior to completion of all background, security, and related checks. Currently, aliens who have received a notice of recommended approval are able to request employment authorization ahead of the waiting period for those with pending asylum applications. From FY 2014 to FY 2018, DHS issued 15,359 recommended approvals, or 3,072 on average annually. This population would be subject to the proposed rule.

The proposed rule would make any alien who entered or attempted to enter the United States illegally ineligible for a discretionary EAD, absent mitigating circumstances discussed in the preamble. DHS does not know how many persons would have been subject to this provision in the past, and cannot determine this population going forward. The proposed rule also would bar any alien who has been convicted of or charged with a serious crime from eligibility for a discretionary EAD, with some exceptions, as is discussed in detail in the preamble. DHS does not know how many persons would have been subject to this provision in the past and cannot determine this sub-population going forward. While individual adjudicative and security-related records can capture evidence and factors related to criminal activity, such information is not available in a dataset that can be queried for the requisite type of analysis and estimation needed.

DHS proposes to terminate an alien's employment authorization connected to affirmative asylum applications on the date the asylum application is denied or dismissed by USCIS. Currently, such EADs terminate within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. DHS analysis reveals that about 215 EADs

were approved annually on average concomitant to denied DHS affirmative asylum claims; as of the present write-up, 360 such EADs are valid. The proposal to eliminate EADs linked to DHS affirmative asylum denials would end the validity of those EADs earlier than they otherwise end.

DHS is also proposing to revise its regulations prescribing when employment authorization terminates following the denial of an asylum application by an IJ or BIA. DHS cannot determine how many DOJ-EOIR cases (either via DHS referral or defensive) apply to either the annual or existing population because DHS does not have granular data on DOJ-EOIR cases that would facilitate analysis of EADs. This rule proposes that employment authorization would continue for 30 days following the date that an IJ denies an asylum application to allow for a possible appeal of the denial to the BIA. Currently, such EADs are allowed to naturally expire according to the terms of their EAD, unless the applicant seeks administrative or judicial review.

The rule is proposing that EAD applications under the (c)(8) asylum category that are pending adjudication when the rule takes effect would be subject to the criminal and one-year-bar provisions proposed in the rule. File tracking data reveals that as of April 1, 2019, 14,451 pending EAD applications would be impacted, as they would be subject to some of the criteria in the proposed rule.¹⁰⁰ Some of these pending cases that would be granted an EAD under the current process could be denied as a result of the rule, but DHS has no way of predicting how many would be affected as such. In order to implement the criminal ineligibility provision for the pending population, DHS would require applicants with a pending initial or renewal (c)(8) EAD on the

¹⁰⁰ This population estimate is based on current volumes and may vary depending on when this rule becomes final.

effective date of this rule to appear at an ASC for biometrics collection, but would not collect the biometrics services fee from these aliens.

DHS proposes to bar from eligibility for employment authorization aliens who failed to file for asylum within one year of their last arrival in the United States, as required by law, if an asylum officer or IJ determines that an exception to the one-year filing bar does not apply. This bar would not apply to unaccompanied alien children. From FY 2014 to FY 2018, DHS referred 42,362 cases to DOJ-EOIR based on the one-year filing bar, for an annual average of 8,472.

The proposed rule seeks to clarify that aliens who are paroled from custody after receiving a positive credible fear or reasonable fear determination are not eligible to seek immediate work authorization under 8 CFR 274a.12(c)(11), although, historically, USCIS has granted many of these requests. Aliens could still file under the (c)(8) category, if eligible. However, they would be subject to the proposed 365-day wait period. From FY 2014 to FY 2018, an average of 13,000 applications sought employment authorization through the (c)(11) category.

Table 12 presents a summary of the populations that could be affected by the proposed rule.

Table 12. Summary of Asylum EAD Populations Under the Proposed Rule (annual)	
Abbreviated Provision (Description)	Population Estimate
A. I-765(c)(8) initial filers - biometrics	172,588
B. I-765(c)(8) renewal filers — biometrics	104,163
C. Enact 365-day EAD filing wait period	153,458
D. Eliminate recommended approvals	3,072
E. Bar criminals from obtaining EADs	Unknown
F. End EADs for denied/dismissed asylum claims	<ul style="list-style-type: none"> • DHS affirmative = 215 annually and 360 currently valid • Affirmative referrals to DOJ-EOIR = Unknown • DOJ-EOIR defensive = Unknown
G. Bar for illegal entry into the U.S.	Unknown
H. One-year asylum filing bar	8,472
I. Pending (c)(8) I-765 under proposed conditions	14,451
J. Clarify(c)(11) I-765 eligibility	13,000
Total Proposed Rule Population	304,562

In order to derive the total population potentially impacted by the rule, we add the annual flow volumes of the encompassing current biometrics (and time burden) population of 172,588 and the renewal filing volume of 104,163, which total to 276,751. To this sub-total, adding the potential 13,000 (c)(11) filers yields 289,751, which is the encompassing biometrics population. Since the other sub-populations collated in Table 12 are, by definition, (c)(8) I-765 filers, we do not add them to the flow volume, to safeguard against double-counting. But for the first year, the expected annual population of 289,751 is annotated to include two pools that would be impacted by the proposed rule; (i) the population of pending (c)(8) I-765 applications (14,451); and, (ii) the 360 existing EADs that are connected to denied affirmative asylum claims that could be ended early. These two pools total to 14,811 which, when added to the expected annual flow volume, yields a maximum population of 304,562, which could be expected in the first year the rule takes effect. Starting in year two, the population would expectedly revert to the annualized flow volume of 289,751, because the two added pools would not be a factor after the first year.

Having estimated the general population subject to the rule and the sub-populations germane to the specific provisions, DHS next conducts the economic impact assessment, noting, as was done in the introduction to this section, that the populations reported above are adjusted for technical considerations regarding the effects.¹⁰¹

4. Transfers, Costs and Benefits of this Proposed Rule

a. Costs

¹⁰¹ Preliminary data revisions indicate that the (c)(8) I-765 filings and approvals in 2018 and 2017 could be higher than reported herein (Table 10). Finalized adjustments to the populations based on revised and validated data will be made at the appropriate stage of final rule development.

This section will be parsed into three modules. In Module 1, some key assumptions that will apply to multiple provisions are established. Module 2 develops quantitative costs and transfers for relevant provisions, while Module 3 covers costs and transfers that are not amenable to quantification.

Module 1. Data and Assumptions

As was mentioned in the “Population” section above, DHS obtained a data set capturing (c)(8) I-765 filing data for initial applicants. This data include a large number of variables. DHS also obtained information on affirmatively-filed asylum applications, and integrated elements of the two data sets to capture information on affirmative asylum applicants who also filed for an EAD. Our analysis is based on this large scale data set that captured numerous variables important to the analysis. Several key assumptions and foundations apply across multiple provisions, which, in favor of brevity and readability, are introduced up front and only discussed hereafter where necessary.

For the proposed provisions that would delay or prohibit an asylum applicant from earning work authorization, the impacts of this rule would include both distributional effects (which are transfers) and costs. These distributional impacts would fall to the EAD holders in the form of lost or delayed compensation (wages and benefits). A portion of this lost compensation would be transferred from these aliens to others that are currently in the U.S. labor force, possibly in the form of additional work hours or overtime pay. A portion of the impacts of this rule would also be costs borne by companies that would have hired the asylum applicants had they been in the labor market earlier, but were unable to find available replacement workers. Companies may also incur opportunity costs by having to choose the next best alternative to immediately filling the job the asylum applicant would have filled. As a result, DHS does not

know the portion of overall impacts of this rule that are transfers or costs. If companies can find replacement labor for the position the asylum applicant would have filled, this rule would have primarily distributional effects in the form of transfers from asylum applicants to others already in the labor market (or workers induced to return to the labor market). If companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, this rule would primarily be a cost to these companies through lost productivity and profits. USCIS uses the lost compensation to asylum applicants as a measure of the overall impact of the provisions that would delay or prohibit an asylum applicant from obtaining work authorization – either as distributional impacts (transfers) or as a proxy for businesses’ cost for lost productivity.

Furthermore, in instances where a company cannot hire replacement labor for the position the asylum applicant would have filled, such delays may result in tax transfer considerations to the government. It is difficult to quantify income tax transfers because individual tax situations vary widely, but DHS estimates the potential reduction in transfer payments to 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).¹⁰² With both the employee and employer not paying their respective portion of Medicare and Social Security taxes, the total estimated reduction in tax transfer payments from employees and employers to

¹⁰² 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. 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>.

Medicare and Social Security is 15.3 percent.¹⁰³ We will rely on this total tax rate where applicable.

The assessments of possible distributional impacts rely on the implicit assumption that everyone who received an approved (c)(8) EAD entered the labor force and found work, and thus earned wages of labor. We believe this assumption is justifiable because applicants would generally not have expended the direct and opportunity costs of applying for an EAD if they did not expect to recoup an economic benefit. Furthermore, the unemployment rate is currently, and has been recently, low by historical standards, currently sitting at 3.6 percent, making it likely that such labor force entrants have found work.¹⁰⁴

Because the (c)(8) EAD does not include or 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 employ such workers. In some DHS rulemakings, the estimates of distributional impacts and time-related opportunity costs were linked to the Federal minimum wage for new entrants to the labor force. The Federal minimum wage is \$7.25, which, when adjusted for benefits by a multiple of 1.46, is \$10.59 per hour, with an annual salary of \$15,080.¹⁰⁵ This reliance is

¹⁰³ 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.

¹⁰⁴ This unemployment rate reflects the Bureau of Labor Statistics (BLS) most recent data, for April 2019. It can be found in the “Employment Situation Summary” of the Economic News Release section: <https://www.bls.gov/news.release/empsit.toc.htm>.

¹⁰⁵ The benefits-to-wage multiplier is calculated by the BLS as (Total Employee Compensation per hour) / (Wages and Salaries per hour) = \$36.32 / \$24.91 = 1.458 (1.46 rounded). See Economic News Release, Employer Cost for Employee Compensation (March 2019), U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and

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 states have their own minimum wage, and, even within states, there are multiple tiers.¹⁰⁶ 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 is 13.8 percent higher than the Federal minimum wage.¹⁰⁷ While DHS does not rule out the possibility that some portion of the population might earn wages at the average level for all occupations, without solid a priori or empirical information we believe that providing a range with the lower bound relying on the prevailing minimum wage is justifiable. Therefore, for the purpose of this analysis, USCIS uses both the prevailing minimum hourly wage rate of \$8.25 to estimate a lower bound and a national average wage rate of \$24.98 to take into consideration the variance in average wages across states as an upper bound. The fully-loaded average hourly wage is \$36.47. All of the quantified estimates of costs and transfer payments in this analysis incorporate lower and upper bounds based on these wages.¹⁰⁸

industry group (March 19, 2019), available at https://www.bls.gov/news.release/archives/ecec_03192019.pdf. Calculation for annual Federal minimum salary: hourly wage of \$10.59 x 2,080 annual work hours = \$15,080.

¹⁰⁶ The EPI report is available at: <https://www.epi.org/publication/when-it-comes-to-the-minimum-wage-we-cannot-just-leave-it-to-the-states-effective-state-minimum-wages-today-and-projected-for-2020/>. There are multiple tiers of minimum wages across many states that apply to size of business (revenue and employment), occupations, working hours, and other criteria. Some of these variations per state are described at: <https://www.minimum-wage.org>.

¹⁰⁷ Calculations (1) for prevailing minimum wage: \$8.25 hourly wage x benefits burden of 1.46 = \$12.05; (2) (($\$12.05 \text{ wage} - \10.59 wage)/ $\$10.59$) wage = .1378, which rounded and multiplied by 100 = 13.8 percent.

¹⁰⁸ The average wage for all occupations is found BLS Occupational Employment Statistics, May 2018 National Occupational Employment and Wage Estimates, and reflects the 2017 average for all occupations nationally. The

Most of the cost impacts will result from delayed or forgone earnings to asylum applicants. Since the data analysis centers on calendar days, and costs are specifically linked to hours, we apply a scalar developed as follows. Calendar days are transformed into work days to account for the actuality that typically, 5 out of 7, or 71.4 percent, of the calendar week is allotted to work-time, and that a workday is typically 8 hours. Based on the prevailing minimum wage of \$12.05, the combined scalar is \$68.83, and, based on the average wage it is \$208.32.¹⁰⁹ In summary, based on the prevailing minimum wage relied upon, each calendar day generates \$68.83 dollars in relevant delayed or forgone earnings. It follows that for the upper wage bound that each calendar day generates \$208.32 dollars in relevant delayed or forgone earnings/delayed earnings.

Module 2. Quantified Cost Impacts and Transfers

As was mentioned above, DHS proposes to require all asylum applicants to wait 365 calendar days before filing for an initial EAD. Currently, applicants have a 150-day waiting period before they can file for an initial (c)(8) EAD. The baseline population specific to the 365-day wait period is the average annual flow of initial (c)(8) EAD approvals (153,458, Table 10), as there would not be a cost for denied applicants. However, the DHS data set alluded to above captures about 39,000 annual affirmatively filed cases, including cases later referred to DOJ-EOIR, for which DHS could conduct analysis on, which represents about a quarter of the approval population. Of the 153,458 average annual EAD approvals, DHS is able to conduct a

data is found at: https://www.bls.gov/oes/2018/may/oes_nat.htm#00-0000. Calculation: hourly wage of \$24.98 x benefits burden (1.46) = \$36.47.

¹⁰⁹ Calculations: .714 x 8 hours per day x \$12.05 wage = \$68.83, and .714 x 8 hours per day x \$36.47 wage = \$208.32 (rounded).

quantified analysis of the impacts of the proposed 365-day wait on only these 39,000 affirmative asylum applicants it has in this dataset, below. The analysis of the 365-day proposed EAD filing wait involves the interaction between data germane to the asylum cases and the EAD simultaneously. In this context, we discuss several reasons why the analyzable set share is relatively low. Foremost, it captures no defensively-filed asylum cases. Second, it does not capture cases germane to pending asylum cases—it captures cases in which a DHS decision or referral to DOJ-EOIR was made. Third, the data had to be obtained by developing a program to query several disparate data sets at once and match data between them in a structured format, with dozens of data points and indicators for each case. For cases in which one or more of the key data points was missing or not viable, the analysis as required was not possible. DHS parsed and filtered the data to exclude extreme outliers and erroneous data to obtain the most viable and tractable data amenable for the analysis. For the EADs associated with affirmative asylum filings adjudicated by DHS for which data are available, a reasonably detailed estimation of the impacts from changing the wait period to file for employment authorization from the 150-day EAD clock to 365 days can be conducted. For affirmative cases referred to DOJ-EOIR by DHS for which data are available some estimation can be performed, but not with the same extent of precision and completeness, due to data constraints. This part of the analysis focuses on the DHS affirmative asylum cases for which complete data is available, and for DHS affirmative cases referred to DOJ-EOIR, for which some data is available. DHS does not have complete data for the “residual” population, and estimates a maximum potential impact for this population separately.

The analysis of the 365-day wait begins with consideration that some aliens, for whatever reason, did not file for an EAD until after 365 days. Our analysis of the approximately 39,000 I-

765 (c)(8) initial EAD approvals for affirmative asylum indicate that this group comprises 10.2 percent of the 39,000 approved EADs with available data. Technically, this group, comprising 3,978 EADs, would not be impacted by the proposed 365-day wait, and, adjusting for them yields a “narrowed” baseline of 35,022. While the percentage filing for an EAD after 365 days could vary in the future, it is integrated herein for the cost estimates.

As noted above, the impact of the proposed provision depends on the interaction between the asylum decision and the EAD approval, since a granted asylum application provides de facto work authorization. Therefore, the narrowed baseline can be decomposed into specific cost-segments to more appropriately hone the potential impacts. There has been a substantial reduction in DHS affirmative asylum processing time over the five-year span 2014-2018, and the adoption of LIFO processing has further contributed to the reduction. As noted above, in January 2018, USCIS reinstated LIFO processing. Although DHS typically relies on 3- or 5-year averages in most cost benchmarks, in this specific case, since LIFO is more likely to be representative of the future than an average of four years of FIFO and one year of LIFO, and, since it appears to have had a significant impact on asylum processing times, the costs are benchmarked to the calendar year of time covering the end of January 2018 to the end of January 2019 for DHS affirmative asylum decisions.

Of the narrowed baseline, DHS referrals to DOJ-EOIR comprise 74.4 percent (26,056 cases) and DHS affirmative adjudication comprises 25.6 percent (8,966 cases) annually. The narrowed baseline for DHS affirmative asylum is parsed into four groups, A-D, that capture different cost segments germane to the potential interaction between approved asylum and the EAD and expected future conditions. Group A comprises DHS affirmative asylum adjudicated prior to 365 days, in which the EAD was “binding”. The latter impart that the EAD was

approved prior to the asylum decision. For Group A, because the asylum application for these applicants would be adjudicated prior to the proposed 365-day wait period, the cost in terms of the proposed rule is the time interval between the current wait time and asylum approval. To explain this via an example, consider an individual that currently files for an EAD at the 150-day mark and has it approved 40 days later, at 190 days. If the concomitant asylum adjudication is at the 200-day mark, the true benefit the EAD could provide is 10 days (assuming the asylum claim is approved). Table 13 is introduced, which shows that Group A represented 11 percent of the narrowed baseline, or 3,852 aliens annually, and the average impact in terms of the EAD benefit is 53 days (in Table 13 all the shares are provided on the basis of the narrow baseline).

Group B similarly consists of DHS affirmative asylum adjudicated prior to 365 days, but in contradistinction to Group A, under Group B the EAD was “non-binding”—which means the grant of asylum could provide de facto work authorization, as it was adjudicated before the EAD. Because of this, Group B would not incur a cost impact in terms of delayed earnings from the proposed provision. For this 9.5 percent of the narrowed baseline, or 3,327 aliens, the EAD benefit was zero (as it was non-binding). Essentially, the EAD approval was inconsequential, and invoked a net cost because the filing costs were sunk. Hence, the cost in terms of the proposed rule is nil, but the forgone filing (sunk) costs can appropriately be credited as cost-savings.

A key takeaway is that Groups A and B would potentially not file for an EAD in the future, since the asylum application was adjudicated in less than the proposed 365-day wait period to apply for employment authorization. Moreover, a key inference is that under LIFO, the majority of DHS affirmative asylum cases were adjudicated in less than one year. Accordingly, forgone filing costs for the 7,180 aliens are accredited a cost-savings. There is no filing fee for

the initial (c)(8) EAD, and the time burden is currently 4.5 hours, which includes the time associated with submitting two passport-style photos along with the application. The Department of State (DOS) estimates that passport photos cost about \$20 per application.¹¹⁰ At the lower wage bound of \$12.05, the time related cost is \$54.23, which, when added to the photo cost of \$20, yields a per person cost of \$74.25 (rounded to \$74.3). The cost savings accruing to this group (A and B) would be \$533,438 annually. At the high wage bound, cost-savings per person would be \$184.10 and cost-savings to the group would be \$1,321,748 annually. DHS notes that this cost-savings estimate assumes the full sub-population would not file under the circumstances. However, as was mentioned in the preamble, some aliens might file for an EAD after being granted asylum if they want to have documentation that reflects that they are employment authorized.

Group C involves DHS affirmative asylum adjudicated after 365 days. It is within this context that some assumptions need to be established. We assume that in the future, all EAD filers would file at exactly 365 days and the processing time would be the global average of 69 days (Table 11), noting that the processing time relies on the five-year average as it is not directly impacted by the change to LIFO asylum processing). These assumptions make the analysis tractable and do not impose a loss of generality. For Group C, the asylum claim is decided after 434 days, which is the sum of the proposed 365 day wait and the average 69 EAD processing days. This group of 981 cases comprises 2.8 percent of the narrowed baseline. For

¹¹⁰ DOS estimates an average cost of \$10 per passport photo in the Paperwork Reduction Act (PRA). Supporting Statement found under OMB control number 1450-0004. A copy of the Supporting Statement is found on Reginfo.gov at: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001 (see question #13 of the Supporting Statement).

this group, the EAD is binding (universally) and the impact accrues to the difference between the global average current EAD-wait time of 283 days (Table 11) and 434 days, which is 151 days.

For Group D, affirmative asylum is currently adjudicated between 365 and 434 days. For Group D, the EAD was approved before the asylum decision, and was therefore binding. But under the proposed rule, retaining the assumptions from above concerning average EAD processing time of 69 days, the EAD would “switch” to a non-binding state because it would be granted after the asylum application was adjudicated. As a result, there would be two impacts. The distributional effect to Group D is equal to the current EAD benefit (the current EAD benefit would, by definition, be strictly greater than zero). The average calendar-day impact to this 2.3 percent of the narrowed baseline, or 806 aliens, is calculated to be 130 days. Secondly, because under the proposed rule the asylum application would be adjudicated after 365 days but before the EAD approval, the EAD filing costs would become sunk (i.e. while the applicant would apply for an EAD, it would not result in any benefit). Based on the population of 806 and the per-person filing cost of \$74.30 and \$184.10, reflecting the wage bounds, sunk filing costs would be \$59,849 and \$148,294, respectively. Subtracting this amount from the filing cost savings (Groups A and B) generates “net cost-savings” that would range from \$473,588 to \$1,321,748.¹¹¹

The remainder of the narrowed EAD approval baseline applies to DHS referrals to DOJ-EOIR, which comprise 26,056 cases (Group E). DHS cannot partition these cases into cost segments akin to Groups A-D for DHS referrals to DOJ-EOIR. While the data does allow DHS

¹¹¹ Conceptually, a fifth group, could be added, under for which asylum was adjudicated after 365 days but before the EAD approval. There would be no earnings impact as a result of this provision, but analysis reveals that no cases would fit this conceptual category.

to calculate the average wait time in terms of when asylum was filed and when the EAD was approved, because we do not have data concerning the decision on the asylum application, the interaction between the EAD and Asylum decision cannot be calculated. DHS analysis indicates that the impact is 133 days, and it is requisite to justify why this figure is reported as opposed to the 151-day impact for Group C. In practice, the average wait time and EAD processing times for Group C differ very slightly from the global averages reported in Table 11, but the difference is not statistically significant. However, the current wait for DHS referrals—measured strictly as the time interval between the filing for affirmative asylum and the EAD approval—is larger, at 301 days, and the difference is statistically significant.¹¹² As a result the difference in day-impact between Group C (151 days) and Group E (133 days) is 18 days, which is exactly the difference in current wait times between the two, at 283 and 301, in order.

Table 13. Narrowed Baseline of EAD Approvals That Could Be Analyzed

Group	Population	Share (%)	Group description	Average days
Group A	3,852	11.0%	DHS asylum adjudicated < 365 days; EAD binding	53
Group B	3,327	9.5%	DHS asylum adjudicated < 365 days; EAD non-binding	0
Group C	981	2.8%	DHS asylum adjudicated > 434 days; EAD binding by definition	151
Group D	806	2.3%	DHS asylum adjudicated between 365- 434 days; EAD currently binding	130
Group E	26,056	74.4%	DHS referrals to DOJ-EOIR	133

¹¹² The tests of significance for differences in the means for the global population and Group C population report exact probability values (p-values) of .124 and .179, allowing determination that the minute differences are not significant at the 95 percent level of confidence. The p-value for the difference in the mean of 301 for DHS referrals is .042, allowing determination that it is significantly different than the global of 283.

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DHS notes that while working with averages makes the analysis tractable and clearer, a caveat is that we rely on the assumption that the (c)(8) I-765 processing time is the same before and after the rule.¹¹³ In a sense too, we assume that the I-589 processing times, when we benchmark to the LIFO protocol, will be the same as well. If either change, the costs developed in Table 14 could vary. There could be two sources of such variation in the monetized costs. First, the populations of the subgroups would change, and, second, the day impacts could also change.

Table 14 (A and B) breaks out the cost for each group presented in Table 13. The population germane to each group is repeated, as is the day impact. The following three columns translate the information into quantified costs. The data presented are undiscounted, with the low wage estimates provided in Table 14(A) and the upper bound wage estimates provided in Table 14(B).

Table 14(A). Proposed 365-day EAD Filing Wait Cost Projections Based on the Lower Wage Bound (undiscounted, annual)					
Group	Population	Day impact	Costs per person (Day impact x \$68.83)	Costs (Population x Costs per person)	Tax Impacts (Costs x 15.3%)
A.	3,852	53	\$3,648	\$14,053,590	\$2,150,199

¹¹³ DHS is also separately publishing an NPRM entitled “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” DHS Docket No. USCIS-2018-0001, separate from this NPRM. If adopted as a Final Rule, that NPRM would affect current EAD processing times.

B.	3,327	0	\$0	\$0	\$0
C.	981	151	\$10,393	\$10,191,866	\$1,559,355
D.	806	130	\$8,948	\$7,207,587	\$1,102,761
E.	26,056	133	\$9,154	\$238,530,155	\$36,495,114
subtotals				\$269,983,197	\$41,307,429
Minus: net costs-savings =				\$473,588	
Equals: grand total =				\$269,509,609	\$41,307,429

Table 14(B). Proposed 365-day EAD Filing Wait Cost Projections Based on the Upper Bound Wage Bound (Undiscounted, Annual)

Group	Population	Day impact	Costs per person (Day impact x \$208.32)	Costs (Population x Costs per person)	Tax Impacts (Costs x 15.3%)
A.	3,852	53	\$11,041	\$42,534,415	\$6,507,766
B.	3,327	0	\$0	\$0	\$0
C.	981	151	\$31,456	\$30,846,571	\$4,719,525
D.	806	130	\$27,082	\$21,814,391	\$3,337,602
E.	26,056	133	\$27,707	\$721,932,323	\$110,455,645
subtotals				\$817,127,700	\$125,020,538
Minus: net costs-savings =				\$1,173,454	
Equals: grand total =				\$815,954,246	\$125,020,538

Subtracting the net cost-savings from the subtotals yields the total costs of the rule in terms of lost or delayed earnings from the proposed 365-day wait for 39,000 of the 153,458 EADs affected annually, which could range from \$269.5 million to \$815.9 million annually, depending on the wage of the asylum worker. Similarly, the reduction in tax transfer payments from employers and employees could range from \$41.3 million to \$125 million annually,

depending on the wage and if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. The annual midrange for costs and taxes are \$542.7 million and \$83.2 million annually, in order. However, DHS notes that the lack of data about DHS referrals precluded our ability to parse out potentially lower cost segments of the 26,056 annual affirmative cases referred to DOJ-EOIR, as we were able to do with DHS-adjudicated asylum applications. This inability likely results in a dual effect. First, for some segments, the day gap would be lower than the average 133 days, thus reducing deferred or lost wages and tax transfers. In addition, there would be cost savings that would accrue to forgone filings as some might not need to file a (c)(8) I-765. As it relates to defensively-filed asylum cases, as was seen in groups A-D of affirmative cases, there could be cost-savings from no longer filing an I-765, and for cases in which the EAD was filed after 365 days, the proposed rule would not have an impact.

In the above section, DHS analyzes 39,000 of the 153,458 affected EAD approvals for which DHS could obtain specific data to assess the impacts of the proposed 365-day EAD filing wait time. In this section, DHS analyzes the remaining 114,458, the “residual” population, which contains three groups of EAD cases linked to asylum: (i) what is likely a small number of DHS affirmative cases for which viable data could not be ascertained; (ii) DHS affirmative asylum cases in which the asylum claim was pending; and (iii) defensive cases. Since we have incomplete data on this population, USCIS estimates the day-impact as the difference between the future projected 434 days and the global current average of 283 days (EAD wait time), or 151 days.

For the residual population, the cost impact at the low wage bound is \$10,393 each (151 days multiplied by \$68.83), which, at a population of 114,458, generates \$1,189.6 million in lost

earnings and generates \$182.0 million in tax transfers annually. The cost impact at the upper wage bound is \$31,456 each (151 days multiplied by \$208.32), which, at a population of 114,458, generates \$3,600.4 million in lost earnings and generates \$550.9 million in tax transfers annually.

The costs reported above represent a maximum estimate of the potential impact for this residual population. This is because DHS lacks data on the how many days after filing for asylum these applicants apply for an EAD and how many days after filing for an EAD these applicants receive an asylum decision, which would allow DHS to parse the lower cost segments. Specifically, there may be a portion of the residual population that currently waits more than 365-days to apply for an EAD. The estimated 151-day delay would be overstated for this group and would decrease the above estimated impact. Additionally, there may be a portion of the residual population that would receive an asylum decision in less than 434 days. The estimated 151-day impact would also be overstated for this group. Furthermore, aliens who receive an asylum decision in less than 434 days would not have to file for an EAD under the proposed rule, resulting in cost savings for forgone future filings. However, DHS notes that a large number of defensive cases are unlikely to be adjudicated before 434 days. Although DHS does not have the information to map defensive asylum cases to the associated EADs, DHS was able to obtain data on defensive asylum claims that captured the date the asylum case was received, and the completion date. Our analysis reveals that for FY 2014-2018 the average time interval between the two days was 624 days. Since defensive asylum processing times have been on average (over the studied period) greater than 434 days, relying on the 151-day impact period is a reasonable estimate. Nevertheless, because 151 days is by definition the maximum impact allowable in our impact setup, the estimates are still overstated because at least some of the

defensive cases (and the DHS affirmative cases not included in the 39,000 batch with analyzable information) would invoke asylum decisions less than 434 days. As a result, the true day-impact for some of the residual population would be strictly less than 151 days.

This rule also proposes to incorporate a biometrics requirement into the employment authorization process for asylum seekers. Specifically, aliens will be required to appear at an ASC for biometrics collection and pay a biometrics services fee. The proposed biometrics requirement would apply to (c)(8) I-765 filers, for both initial and renewal EAD applications. Biometrics are currently collected for all (both affirmative and defensive) Form I-589 applicants, and they are exempt from paying the \$85 biometric services fee. However, biometrics are not currently collected when asylum applicants apply for employment authorization. The proposed rule would not impact the asylum filing biometrics protocol, but would require biometrics collection at the EAD filing stage for (c)(8) I-765 applicants, as well as payment of the \$85 biometric services fee.

To estimate the cost of this biometrics requirement, we begin with the population of 289,751, which, tallied earlier, comprises the initial, renewal, and potential (c)(11) transfer populations. Biometrics are also not currently collected for (c)(11) I-765 filers and thus would also be a new requirements for these 13,000 annual filers. First, as the analysis for the 365-day filing wait period demonstrated, a portion of filers, Groups A and B from above (20.5 percent), would potentially not file under the rule because the asylum decision would precede the EAD approval under the proposed rule (under the LIFO protocol). We scale the population by this percentage to yield an adjusted population of 230,352 (289,751 multiplied by (1 minus .205). Under the proposed collection requirement there will be exemptions and waivers that apply to both biometrics submission and the concomitant \$85 biometric services fee (that are outside the

purview of the rule). DHS cannot predict exactly how these waivers and exemptions will apply, but develops proxy metrics to allow for equitable estimations to populations not yet existent, in context. Therefore, the second stages of the population adjustment require a more detailed, technical approach. This approach is developed next.

When an individual appears at a DHS-USCIS ASC for a biometric collection appointment, their biometrics are digitally collected and stored in the Customer Profile Management System (CPMS) database, which is the USCIS data repository for biometrics submissions. DHS obtained biometric submission data from CPMS for the five-year period 2013-2017. The five-year average across all USCIS immigration forms was 3,619,794. Detailed analysis of the biometrics submissions data reveals that a small group of nine forms accounted for the vast majority, 90.5 percent, of the average biometrics submissions. These forms are: (1) Form N-400, Application for Naturalization; (2) Form I-90, Application to Replace Permanent Resident Card; (3) Form I-765, Application for Employment Authorization; (4) Form I-485, Application to Register Permanent Residence or Adjust Status; (5) Form I-589, Application for Asylum and Withholding of Removal; (6) Form I-821D, Consideration of Deferred Action for Childhood Arrivals; (7) Form I-131, Application for Travel Document; (8) Form I-751, Petition to Remove the Conditions on Residence; and (9) Form I-601A, Application for Provisional Unlawful Presence Waiver (noted here are that two of the forms, I-765 and I-589 are involved in the presently proposed rule). The remainder majority of forms are characterized by very small populations, very few biometrics submissions (for which many accounted for zero submissions in terms of percentage and number), and unspecified form types. The biometrics volumes for the prevalent group of nine forms (“PREV-9”) are presented in Table 15.

Table 15. Biometric Submissions by Form Grouping (FY 2013 – FY 2017)

Form	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	5-Year Avg.	Share
<i>PREV-9</i>							
N-400	778,172	779,221	772,648	961,092	1,013,252	860,877	23.78
I-90	554,918	790,069	780,050	743,589	770,552	727,836	20.11
I-765	421,011	391,650	800,711	489,553	588,008	538,187	14.87
I-485	459,298	506,991	494,664	500,369	547,755	501,815	13.86
I-589	95,938	116,668	173,248	230,900	304,308	184,212	5.09
I-821D	350,339	102,192	242,101	125,489	224,899	209,004	5.77
I-131	89,146	87,012	87,755	88,977	86,299	87,838	2.43
I-751	185,587	172,478	93,359	71,823	83,417	121,333	3.35
I-601A	16,381	37,293	48,978	52,654	67,494	44,560	1.23
PREV-9 (all)	2,950,790	2,983,574	3,493,514	3,264,446	3,685,984	3,275,662	90.5%
Other Forms	241,605	198,537	709,577	328,339	242,604	344,132	9.5%
Total	3,192,395	3,182,111	4,203,091	3,592,785	3,928,588	3,619,794	100%

The remaining 88 percent of forms comprise less than 10 percent of average biometrics submissions. The future population for biometrics submission under the proposed rule does not yet exist, in context. To estimate the future population, a method needs to be developed to extrapolate functional conditions from the existing state of affairs. To accomplish this, a biometrics collection rate (BCR), a formula estimating the proportion of biometric submissions out of the total age-eligible population within a form type, is developed. The BCR formula is motivated below (Formula 1):

Formula 1: Biometrics Collection Rate (BCR)

$$BCR = \frac{BI}{P}$$

Where BCR represents the Biometrics Collection Rate for a specific form type, BI represents “intensity,” the average number of aliens who currently submit biometrics by that form type in a fiscal year, and P represents the volume of age-eligible benefit requests associated with a form type by fiscal year. The calculations for the BCR for PREV-9 are shown in Table 16. The average biometrics submissions are repeated from Table 15 as the five-year average,

and the average age eligible population is also the five-year average. The results in Table 16 call for explanation.

Table 16. Biometrics Collection Rate by Form Grouping (FY 2013 – FY 2017)			
	Average biometrics submissions	Average age eligible filing population	BCR
PREV-9 set			
I-765	538,187	1,892,366	0.284
I-131	87,838	409,699	0.214
N-400	860,877	839,601	1.025
I-90	727,836	703,707	0.985
I-485	501,815	612,148	0.820
I-821D	209,004	370,838	0.564
I-589	184,212	127,499	1.445
I-751	121,333	164,441	0.738
I-601A	44,560	45,633	0.976
Two added forms			
I-918	43,235	52,805	.819
I-914	1,907	2004	.952
Raw BCR for regrouped set			.8363

The BCR for different form types varies due to the eligibility categories and age characteristics of the filers and dependents. For the Forms N-400 and I-589, the BCR is higher than unity. The reason is that biometrics are currently routinely collected on all principal applicants for these forms as well as derivative family members who generally submit biometrics alongside the principal applicant. Two forms, the I-131 and I-765, have low BCRs, even though biometrics are routinely collected for these forms. But these BCRs are “artificially” low because of concurrent filings; in many cases biometrics are submitted via a concurrent form. As has been stated earlier, the goal is to broadly collect biometrics from (c)(8) I-765 filers, but there will be

exemptions and waivers (that have nothing to do with the proposed rule).¹¹⁴ Hence, a proxy for BCR estimation should be less than unity, but be positive and relatively high, and while some analyst subjectivity is involved in our methodology, given the unknowns, it is a rational approach. The BCRs for the four forms in PREV-9 not discounted immediately above due to “artificially” high/low BCRs are assessed to be reasonable and have a good deal of range, from .564 to .985. Since it is desirable to have as many relevant forms as possible in the proxy collection, we examined the BCRs for the remaining [specific] forms and proceeded to add two, which are the only forms external to PREV-9 that have high BCRs: Form I-914, Application for T Nonimmigrant Status, and Form I-918, Petition for U Nonimmigrant Status. The respective BCRs for these two additional forms, in order, are .952 and .819, as is shown in Table 15. Recalibrating, this rebranded group of 7 forms represent just 9 percent of the form captures under CPMS (including the non-specific types) but nearly half (46 percent) of average biometrics submissions.

For the seven proper forms, we obtain the unweighted average BCR of 83.63 percent. We do not have *a priori* information on which specific forms (or a subgroup of them) would have a BCR closest to the not yet existing, in context, rule population. Similarly, there is no “target” or desired BCR that we seek to impugn to this population under the proposed rule. Hence, we use the raw average as opposed to a weighted one, because the former weights each BCR in the group equally. Scaling the adjusted population of 230,352 baseline biometrics by .8363 yields a projected biometrics submitting population (BSP) of 192,643.

¹¹⁴ Waivers are limited and would apply when there the applicant is unable to provide fingerprints because of a medical condition.

Before estimating the costs of the biometrics requirement, another proxy metric is needed, and hence another formula is required. Not all of the biometrics submissions will involve the \$85 biometric services fee, as there will be applicable exemptions and waivers (that have nothing to do with the proposed rule). To estimate the fee paying population, DHS uses the total volume of biometric services fee payments and the overall volume of biometric submissions to derive a biometrics fee ratio (BFR), a formula identifying the portion of aliens who pay the \$85 biometric services fee out of the total population of those submitting biometrics who may be required to pay the fee (e.g. excluding I-589 applicants because they are not required to pay the corresponding biometrics fee).

The formula for the BFR calculation is provided below (Formula 2):

Formula 2: Biometrics Fee Ratio

$$BFR = \frac{F}{BI}$$

Where BFR represents the Biometrics Fee Ratio, F is the estimated number of aliens who pay the biometric services fee in a fiscal year and BI represents the number of biometrics submissions in a given fiscal year, which was initialized above in the BCR setup. The fee-paying volume for biometrics services is available from FY 2015 to FY 2017 only. The BFR is calculated by comparing the biometric fee paying volumes to total biometrics submissions. In FY 2017, for example, a BFR of 0.77 results by dividing a volume of 2.80 million biometric services fee payments by a total of 3.62 million biometrics submissions.¹¹⁵ Stated somewhat

¹¹⁵ Calculation: 2,801,648 fee-paying volume for FY 2017 / (3,928,588 total biometrics collection volume for FY 2017 – 304,308 Form I-589 biometrics collection volume for FY 2017) = 0.77. The Form I-589 is excluded in the BFR calculations because there is no fee associated with this form.

differently, for every known non-exempt benefit request with a biometrics submission, DHS estimates that about 77 percent of aliens pay the biometric services fee while the remaining 23 percent of aliens receive a fee exemption, a biometric services fee waiver, or fall outside of the current age restrictions for submitting the \$85 biometric services fee. Table 17 provides the BFR calculations for each fiscal year, including the total and three-year average. The generalized BFR that obtains is .755, which is weighted for the volume size each year, since it is derived from the total that will be used for subsequent calculations.¹¹⁶

Table 17. Biometric Fee Ratio, All Forms (FY 2015 – FY 2017)			
Fiscal Year	Fee-Paying Volume	Biometric Submissions (excludes Form I-589)	Biometrics Fee Rate (BFR)
FY 2015	2,765,927	4,029,843	0.686
FY 2016	2,746,261	3,361,885	0.817
FY 2017	2,801,648	3,624,280	0.773
Total	8,313,836	11,016,008	
Average	2,771,279	3,672,003	0.755

Applying the average BFR of .755 to the BSP biometrics population of 192,643 yields an estimated 145,446 biometric services fee payments (BFP) annually.

Having undertaken several steps to develop the appropriate BSP and ensuing BFP, the costs germane to the biometrics requirement can be developed. The submission of biometrics would require that aliens travel to an ASC for the biometric services appointment.¹¹⁷ In past

¹¹⁶ Calculation: 2,771,279 average Fee-Paying Volume / 3,672,003 average biometric collection volume exclusive of Form I-589 biometric submissions = 0.75 (rounded).

¹¹⁷ DHS expects the majority of biometrics appointments to occur in the United States at an ASC. However, in certain instances aliens may submit biometrics at an overseas USCIS office or DOS Embassy or consulate.

rulemakings, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.¹¹⁸ The cost of travel also includes a mileage charge based on the estimated 50 mile round trip at the 2019 General Services Administration (GSA) rate of \$0.58 per mile.¹¹⁹ Because an individual would spend 1 hour and 10 minutes (1.17 hours) at an ASC to submit biometrics, summing the ASC time and travel time yields 3.67 hours. At this point we will also incorporate the added time burden of 15 minutes (.25 hours), for additional Form I-765 questions and instructions, in order to consolidate the costs. The total time is therefore 3.92 hours. At the low and high wage bounds, the opportunity costs of time are \$47.24 and \$142.96. The travel cost is \$29, which is the per mileage reimbursement rate of .58 multiplied by 50 mile travel distance. Summing the time-related and travel costs generates a per person biometrics submission cost of \$76.24, at the low wage bound and \$171.96 at the high wage bound.

The total annual cost for the BSP would be \$14,686,363 at the low end and \$33,127,424 at the high end. Multiplying the estimated BFP by the \$85 fee yields \$12,362,891 annual biometric services fee costs. In addition, DHS is proposing to require applicants with a pending initial or renewal (c)(8) EAD application on the effective date of the final rule to appear at an ASC for biometrics collection; but, DHS would not collect the biometrics services fee from these

However, because DHS does not currently have data tracking the specific number of biometric appointments that occur overseas, it uses the cost and travel time estimates for submitting biometrics at an ASC as an approximate estimate for all populations submitting biometrics in support of a benefit request.

¹¹⁸ See DHS Final Rule, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 FR 535 (Jan. 3, 2013).

¹¹⁹ The General Services Administration mileage rate of \$0.58, effective January 1, 2019, available at: <https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates>.

aliens. Based on the file tracking data as of April 1, 2019, DHS estimates that 14,451 pending EAD applications would be impacted. Multiplying the 14,451 by the BCR provides a pending population estimate of 12,085 (rounded). Since DHS would not collect the biometrics services fee from this population, costs to applicants would only include time-related and travel costs which would range from \$921,389 to \$2,078,200.¹²⁰

Combining the costs to the BSP and fee payments for the BFP, and the costs to the pending population, the costs of the biometrics provision, at the low and high wage, in order, are estimated at \$27,970,644 and \$47,568,515 in the first year and \$27,049,255 and \$45,490,315, annually thereafter.

DHS is also proposing to eliminate the recommended approvals for asylum, under which an asylum applicant can file an EAD request upon initial favorable review by an asylum officer, prior to completion of all background, security, and related checks. No individual having already benefitted from the preferential treatment would be adversely impacted. However, DHS must treat the earnings from recommended approvals that would have occurred in the future as costs because the proposed rule would eliminate these earnings. For the average 3,072 annual recommended approvals, not all applied for EADs, and not all of those that applied were granted EADs. The data reveals that the share of recommended approvals that eventually were approved for EADs was 62.8 percent, yielding 1,930 annual cases. The data was organized by fiscal year

¹²⁰ As previously estimated, time-related and travel costs per person result in \$76.24 at a lower wage and \$171.96 at a higher wage. Therefore, the costs to applicants with pending applications are estimated by multiplying \$76.24 and \$171.96 by the population estimate of 12,085. DHS also notes that this population estimate is based on current volumes and may vary depending on when this rule becomes final.

and the requisite time interval was calculated by subtracting the date of the associated asylum filing from the EAD approval date. The results are presented in Table 18:

Table 18. Impact of Recommended Approvals (average calendar days from asylum filing to EAD approval, FY 2014-2018)			
Fiscal Year	No recommended approval	Recommended Approval	Day Difference
2014	330	246	83
2015	317	262	56
2016	305	264	41
2017	310	268	42
2018	234	193	40
2014 - 2018	average		52

As Table 18 reveals, recommended approvals have benefited by having EADs commence validity an average of 52 days sooner than others. This 52-day raw average day tally translates into a scaled impact of \$3,579 per person at the low wage and (52 -day impact x \$68.83), and \$10,833 at the high wage (52-day impact x \$208.32). Multiplying these costs by 1,930 annual cases yields a total labor income impact of \$6,907,779 and \$20,907,387, in order. Similarly, the reduction in tax transfer payments from employers and employees to the government could range from \$1,056,890 to \$3,198,770 annually, depending on the wage and if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. The midpoint of the range for costs and taxes are \$13,907,387 and \$2,127,830, in order.

DHS is also proposing to revise its regulations prescribing when employment authorization terminates following the denial of an asylum application. Under the baseline, DHS affirmative-asylum denials have concomitant approved EADs terminated within 60 days after the adverse asylum decision or on the date of the expiration of the EAD, whichever is longer. This rule proposes that employment authorization would instead be terminated effective on the date the affirmative asylum application is denied. However, if DHS refers the case to DOJ-EOIR,

employment authorization will be available to the alien while in removal proceedings. DHS analysis of the data reveals that 360 EADs associated with a denied DHS Affirmative asylum application are currently valid that could be terminated earlier than they otherwise would, when the rule goes into effect. In addition to the costs of potentially terminated EADs in the first year, the analysis reveals about 215 EADs have been issued to concomitant asylum denials annually.

For the pool of 360 current EADs, the time remaining between the present date of analysis (a proxy for the rule becoming effective) and the time left on each EAD was calculated. As stated above, under the baseline, the EADs linked to these DHS affirmative-asylum would end within 60 days after the adverse asylum decision, or, on the date of the expiration of the EAD, whichever is longer. For the cases with less than 60 days left, calculating the precise cost of the rule to these cases would require a complex analysis of the interaction between two variables, the asylum decision date and the EAD validity period, as well as the rule proxy date. To make the analysis tractable, we assign these cases the 60-day period, noting that this assignment would likely somewhat overstate the costs to these cases. After the recalibration to 60 days for the cases in with less than 60 days remaining, the average time left on the EADs is 356 days. For the annual flow of 290 EADs, the cost basis is the day-time difference between the adverse asylum decision and the end of the EAD validity. For these cases the average impact is 471 days.

The costs of the provision to end some EADs early can now be tallied, since the appropriate impact metrics have been calculated. For the existing EADs, the cost impact at the low wage bound is \$24,503 each (356 days multiplied by 68.83), which is \$8,821,253 in lost earnings and generates \$1,349,652 in tax transfers. The cost impact at the upper wage bound is \$74,162 each (356 days multiplied by \$208.32), which is \$26,698,291 in lost earnings and

generates \$4,084,839 in tax transfers. These specific costs and tax transfers would be incurred the first year the rule could take effect.

For the annual flow of 215 annual EADs, the cost impact at the low wage bound is \$32,149 each (471 days multiplied by 68.83), which is \$6,970,070 in lost earnings and generates \$1,066,421 in tax transfers. For the annual flow of 215 EADs, the cost impact at the upper wage bound is \$98,119 each (471 days multiplied by 208.32), which is \$21,095,525 in lost earnings and generates \$3,227,616 in tax transfers. These costs and transfers would be incurred annually.

Adding up the costs and transfers for both the existing and future EADs that could be impacted, for the first year the rule could take effect, the costs would be \$15,791,323 at the lower wage bound and \$47,793,816 at the upper wage bound. Similarly, taxes would range from \$2,416,072 to \$7,312,454. The midpoint estimate for total costs and taxes, in order, are \$31,792,569, and \$4,864,263.

Having estimated the costs and tax transfers for the provisions in which costs and transfers could be quantified, we now tally them and present the total quantified costs and transfers of the proposed rule. There are essentially three quantified modules. First is the flow volume of costs that will be incurred in each of ten years. As was shown above, for the proposed biometrics requirement, costs were allotted to the time-related opportunity costs associated with submitting biometrics, the cost of travel, a form burden increase, and the biometrics service fee payments. For the proposal to eliminate recommended approvals, costs were developed as delayed earnings of labor. For the proposal to end some EADs early, cost flows are attributed to forgone future earnings (for DHS affirmative cases only). For the 365-day EAD filing clock, costs were assigned to forgone or delayed earnings as well. For this provision, a robust analysis was offered for the 39,000 DHS affirmative asylum cases that could be analyzed, and a slightly

less robust analysis was presented for DHS referrals to DOJ-EOIR, due to data constraints.

Lastly, a maximum estimate of forgone earnings was estimated for the residual population under the 365-day filing clock. There is also a net cost-savings due to the potential that some current filers may not need to file for an EAD in the future.

Second, with the exception of the biometrics proposal, the other provisions for which quantified cost flows are allocated, above, also incur a reduction in tax transfer payments from employers and employees to the government if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. As a third module, there could be a first year added cost and also a tax transfer applicable to the existing pool of 360 EADs that could be ended early. Table 19 presents the flow costs for the relevant provisions, undiscounted and in order of the low (A) and high wage (B) bounds relied upon. The cost figures for the 365-day EAD wait include the net cost-savings.

Table 19 (A). Annual Flow Costs for Provisions of the Proposed Rule in Which Costs Could be Monetized - Low Wage Bound (undiscounted, 2019 – 2028)						
Year	365 day EAD filing	Biometrics	End Some EADs early	Eliminate Recommended Approvals	Residual (365 day EAD filing)	Annual Total
1	\$269,509,609	\$27,970,644	\$15,791,323	\$6,907,779	\$1,189,561,994	\$1,509,741,349
2	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
3	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
4	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
5	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
6	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
7	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
8	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
9	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
10	\$269,509,609	\$27,049,255	\$6,970,070	\$6,907,779	\$1,189,561,994	\$1,499,998,706
Undiscounted 10-year total	\$2,695,096,086	\$271,413,939	\$78,521,952	\$69,077,788	11,895,619,940	\$15,009,729,703
Table 19 (B). Annual Flow Costs for Provisions of the Proposed Rule in Which Costs Could be Monetized – Upper Wage Bound (undiscounted, 2019 – 2028)						
Year	365 day EAD filing	Biometrics	End Some EADs early	Eliminate Recommended Approvals	Residual (365 day EAD filing)	Annual Total
1	\$815,954,246	\$47,568,515	\$47,793,816	\$20,906,995	\$3,600,390,848	\$4,532,614,420
2	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930

3	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
4	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
5	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
6	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
7	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
8	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
9	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
10	\$815,954,246	\$45,490,315	\$21,095,525	\$20,906,995	\$3,600,390,848	\$4,503,837,930
Undiscounted 10-year total	\$8,159,542,463	\$456,981,350	\$237,653,539	\$209,069,952	\$36,003,908,480	\$45,067,155,790

The data in Table 19 are utilized to attain the discounted costs of the proposed rule. Since the first year of the rule’s effects will include the additional costs applicable to ending some EADs early, the annual effect is not constant across all ten years is not the same, and therefore, the average annualized equivalence cost will be different across interest rates. The total ten-year present values, in order of 3 and 7 percent rates of discount, are \$12,804,752,094 and \$10,544,468,497. In the same order, the average annualized equivalence costs are \$1,501,107,575 and \$1,501,295,092. At the upper wage bound, the total ten-year present values, in order of 3 and 7 percent rates of discount, are \$38,446,589,427 and \$31,659,966,864. In the same order, the average annualized equivalence costs are \$4,507,113,156 and \$4,507,667,019.

Table 20 reports the total quantified tax transfers for the proposed rule, based on the provisions for which quantification is possible.

Table 20. Annual Tax Transfers For Provisions under which Taxes Could Be Estimated and Monetized (undiscounted)		
Provision	Low wage bound	Upper wage bound
365 day EAD filing wait	\$41,307,429	\$125,020,538
Biometrics	\$0	\$0
End Some EADs early	\$1,066,421	\$3,227,615
Eliminate Recommended Approvals	\$1,056,890	\$3,198,770
Residual 365-day filing wait	\$182,002,985	\$550,859,800
Subtotal annual tax transfers	\$225,433,725	\$682,306,7243
Plus: First year added tax of ending some EADs early	\$1,349,652	\$4,084,839
Equals: Total tax transfers in first year	\$226,783,377	\$686,391,562

Finally, this section concludes with Table 21, which collates the monetized impacts of the rule, in terms of both costs (A) and taxes (B), and provides the midrange of them.

Table 21(A). Monetized Costs of the Proposed Rule (discounted, \$ millions, 2019-2028)			
	Low wage	Upper range	Range midpoint
3 percent discount (ten-year PV)	\$12,804.8	\$38,446.6	\$25,625.7
7 percent discount (ten-year PV)	\$10,544.5	\$31,660.0	\$21,102.2
3 percent discount (average annual equivalence)	\$1,501.1	\$4,507.1	\$3,004.1
7 percent discount (average annual equivalence)	\$1,501.3	\$4,507.7	\$3,004.5
Table 21(B). Monetized Tax Transfers of the Proposed Rule (\$ millions, 2019-2028)			
	Low wage	Upper range	Range midpoint
3 percent discount (ten-year)	\$1,924.3	\$5,824.2	\$3,874.2
7 percent discount (ten-year)	\$1,584.6	\$4,796.1	\$3,190.3
3 percent discount (average annual equivalence)	\$225.6	\$682.8	\$454.2
7 percent discount (average annual equivalence)	\$225.6	\$682.9	\$454.2

Module 3. Unquantified Costs and Transfers

There are several populations related to specific proposals that would incur costs due to the proposed rule, but, given data constraints, DHS is unable to measure the possible costs and transfer payments in a quantitative fashion.

DHS proposes to exclude, with certain exceptions, aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry from eligibility for (c)(8) employment authorization. The rule also proposes to exclude from eligibility for (c)(8) employment authorization aliens who have been convicted of any U.S. felony or any serious non-political crime outside the United States, or who have been convicted of certain public safety offenses in the United States. DHS is unable to estimate the population

that would be impacted by the provisions dealing with illegal entry and criminality. If any person incumbent to these populations would be delayed in or precluded from obtaining an EAD, the distributional impacts in terms of earnings would apply, as would, potentially, tax transfers.

DHS proposes to apply changes made by this rule to all initial and renewal applications for employment authorization filed on or after the effective date of the final rule, with limited exceptions. DHS would apply two of the proposed ineligibility provisions – those relating to certain criminal offenses and failure to file the asylum application within one year of the alien’s last entry to the US – to initial and renewal applications for employment authorization pending on the effective date of the final rule. DHS estimates 14,451 potentially affected pending applications. DHS estimates an annual renewal population of 104,163. DHS cannot quantify how many of the 14,451 pending EAD filings or 104,163 annual renewals would be subject to the criminal and one-year-filing provisions when the rule goes into effect or how many would be precluded from obtaining an EAD. Lost compensation for pending and renewal EAD applicants precluded from obtaining an EAD would result in costs to businesses and/or distributional impacts in the form of transfers, depending on if the business is able to find replacement labor for the job the asylum applicant would have filled. If businesses are unable to find replacement labor, it would both result in a loss of business productivity and also in a reduction in taxes transferred from asylum applicants and employers to Federal, state and local governments.

DHS also proposes to deny (c)(8) EAD applications filed on or after the effective date by aliens who have failed to file for asylum within one year of their last arrival in the United States, as required by law, unless and until an asylum officer or IJ determines that an exception to the one-year filing bar does not apply. DHS makes about 8,472 such referrals to DOJ-EOIR each year (Table 12). For aliens who are granted an exception to the bar, it is possible that they would

likely face deferred earnings and lost taxes along the lines we have developed for the quantified costs, due to delays in filing subject to the IJ decision. Others would likely not be granted an EAD and would lose earnings altogether. DHS has no data that would enable estimation of these effects as a result of the one-year filing bar provision. Specifically, while DHS does have data on the filing bar referrals and the associated I-765s, we do not have data on the outcome of these filing bar referrals. EADs linked to defensive asylum cases could also be impacted by the filing bar conditions proposed.

As discussed previously, DHS is also proposing to revise its regulations prescribing when employment authorization terminates following the denial of an asylum application. In the above quantified analysis DHS estimates the cost of these changes for asylum cases denied by an asylum officer. DHS discusses here the impacts for asylum cases denied by an IJ. Under the baseline, when an IJ denies an asylum application, the EAD terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review. This rule proposes that for cases USCIS refers to DOJ-EOIR and cases defensively filed with DOJ-EOIR, employment authorization would continue for 30 days following the date that the IJ denies the asylum application to account for a possible appeal of the denial to the BIA. If the alien files a timely appeal, employment authorization would continue, and the alien would be able to file a renewal EAD application. As shown in Table 9, from 2014-2018 DOJ-EOIR denied an average of 14,820 asylum applications annually. However, the data available to DHS does not map DOJ-EOIR case dispositions to DHS employment authorizations, and thus we cannot estimate how many denied or dismissed asylum claims by an IJ or BIA are connected to authorized EADs, either on an annualized flow or current pool basis. For DHS affirmative asylum, the populations (215 and 360, in order) were small. The numbers are likely to be higher for DOJ-EOIR, since

DHS makes so many referrals to them, and, since DOJ-EOIR solely handles defensive cases. Aliens with an EAD who are denied asylum would eventually be out of the labor force even without this rule. Therefore, the cost for an employer to replace the employee (turnover cost) is not a cost of this rule. However, this rule would impact the timing of when such workers would be separated, which could vary. This rule would result in employers incurring such turnover costs earlier than without this rule.

This proposed rule seeks to clarify that aliens with a positive credible fear finding are not eligible to seek immediate work authorization under 8 CFR 274a.12(c)(11), although, historically USCIS has granted many of these requests, an average of approximately 13,000 annually. Such aliens would still be eligible to apply for a (c)(8) employment authorization to become employment authorized subject to the eligibility changes proposed in this rule, including the proposed 365-day waiting period. Accordingly, applicants that apply for an EAD from the current (c)(11) category may experience a delay in earnings. It is possible that some of the applicants under this scenario would have their asylum decision within 365 days and thus would potentially not file for an EAD. It is recalled that an adjustment was made for this possibility in the development of the biometrics requirement provision costs. It is also possible that some may not file as transfers for other reasons. As a result, the actual affected population would most likely be below 13,000. USCIS is unable to develop a cost of lost or delayed earnings for this group because DHS does not have the related asylum information, so DHS does not have the data necessary to correctly segment the costs.

In some cases, the changes in protocol could result in applicant-caused delays in receiving an EAD because the purpose of the rule is to generate disincentives to applicants to cause any delays in the adjudication of their asylum application. Any such delays in earnings

could generate economic hardship to aliens in terms of delayed earnings. The proposed rule would amend existing language to clarify that an applicant's failure to appear to receive and acknowledge receipt of the decision following an interview and a request for an extension to submit additional evidence will be considered applicant-caused delays for purposes of eligibility for employment authorization. DHS further proposes that any documentary evidence submitted fewer than 14 calendar days before the asylum interview (with allowance for a brief extension to submit additional evidence as a matter of discretion) may result in an applicant-caused delay if it delays the adjudication of the asylum application. The purpose of this provision is to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview. The purpose of the rule is to generate disincentives to applicants to cause any delays in the adjudication of their asylum application. While DHS has no way of predicting how the disincentives might take effect, in some cases, the changes in protocol could result in applicant-caused delays in receiving an EAD, and therefore could impose costs. DHS welcomes public input on this topic.

In addition to the major provisions being proposed, there are numerous technical changes, clarifications to existing language, and amendments to existing language. DHS seeks to clarify how an asylum applicant's failure to appear for an asylum interview or biometric services appointment will affect his or her eligibility for asylum or employment authorization and proposes a new timeframe and standard for rescheduling an asylum interview for the asylum application. In addition, DHS clarifies that USCIS is not obligated to send any notice to the applicant about his or her failure to appear at a scheduled biometric services appointment or an asylum interview as a prerequisite to denying the asylum application or referring it to an IJ. These amendments are intended to facilitate more timely and efficient case processing when

applicants fail to appear for essential appointments. Finally, the amendments replace references to fingerprint processing and fingerprint appointment with the presently employed “biometric services appointment.”

DHS also proposes to remove the language providing that an application for asylum will automatically be deemed “complete” if USCIS fails to return the incomplete application to the applicant within a 30-day period. There is no impact from this change because USCIS is already returning incomplete applications, and this rule would remove outdated regulatory text that no longer applies.

The rule also codifies certain protocols related to the length of EAD validity and DHS authorities in the asylum process. These amendments and technical codifications outlined above and discussed in more detail in the preamble could impact the specific protocol, timing, and variations in which applicants interact with DHS over the asylum and concomitant EAD process.

b. Benefits

The benefits potentially realized by the proposed rule are qualitative. It is not possible to monetize the benefits. Aliens with bona fide asylum claims will be prioritized because the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization will be reduced. A streamlined system for employment authorizations for asylum seekers would reduce fraud and improve overall integrity and operational efficiency, thereby benefiting the U.S. Government and the public.

The proposed changes will remove incentives for aliens to enter the United States illegally for economic reasons and allow DHS to process bona fide asylum seekers who present themselves at the U.S. ports of entry in an expedited manner. DHS also believes these

administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States, which will reduce injuries and deaths that occur during dangerous illegal entries, and reduce expenditures by government agencies that are charged with enforcing the immigration laws of the United States. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large.

The proposed rule is also beneficial in the context that providing employment authorization to inadmissible and removable undermines the removal scheme created by Congress and incentivizes such aliens to come to and remain in the United States.¹²¹ Doing so also undermines the Administration's goals of strengthening protections for U.S. workers in the labor market.¹²² Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD program.

¹²¹ In a few limited circumstances, Congress has authorized the Secretary to grant employment authorization, as a matter of discretion, to aliens who are inadmissible or deportable and even when they have a final order of removal from the United States. *See, e.g.*, INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3) (discretionary employment authorization for inadmissible or removable aliens with pending removal proceedings); INA sec. 241(a)(7), 8 U.S.C. 1231(a)(7) (discretionary employment authorization for certain aliens with final orders of removal).

¹²² Aliens who file adjustment of status applications even if they do not ultimately qualify for adjustment of status to permanent residence and aliens who are temporarily placed in deferred action, are allowed to apply for EADs. If DHS approves the application for employment authorization, these aliens receive "open market" EADs – meaning that they may accept employment in any field and may be hired by any U.S. employer without the U.S. employer having to demonstrate that there were no available U.S. workers or guarantee that that it will pay the prevailing wage or maintain certain work conditions. As a result, such aliens are more likely to directly compete with U.S. workers for employment.

The proposed biometrics requirement would provide a benefit to the U.S. Government by enabling DHS to know with greater certainty the identity of aliens seeking (c)(8) EADs and more easily vet those aliens for benefit eligibility. This would also provide DHS with the ability to limit identity fraud because biometrics are unique physical characteristics that are difficult to falsify and do not change over time.

c. Impact to Labor Force and Taxes

The proposed rule, when finalized, is not expected to have a significant impact on states or the national labor force. The national civilian labor force is 163,922,000, for which the proposed rule's maximum population of 304,562 (first year) and 289,751 (each year after) would represent just .19, and .18 percent of the labor force, in order.¹²³ It is possible that if all or a large share of the relevant EAD holders were concentrated in a specific metropolitan statistical area, the population relevant to the proposed rule could represent a larger share of the labor force (locally), but DHS does not expect impacts to the labor market.

The provisions would generate costs in terms of distributional impacts in the form of deferred and lost compensation. Additionally, some of the lost tax transfers could be incurred by states. The total reduction in employment tax transfers from employers and employees to the Federal Government could range from \$225.6 million to \$682.9 million annually (annualized at

¹²³ Relevant calculations: $304,888/163,922,000 = .00186$, which is rounded and multiplied by 100 to equal .19 percent, and $289,751/163,922,000 = .00177$, which is rounded and multiplied by 100 to equal .18 percent. The labor force figure represents the civilian labor force, seasonally adjusted, for August 2019, and is found in "Table A-1. Employment status of the civilian population by sex and age," Economic News Release at: https://www.bls.gov/news.release/archives/empsit_09062019.htm.

7%). There could also be a reduction in income tax transfers from employers and employees that could impact individual states and localities.

In addition, some states, municipalities, or other geographic entities could have budgets that assist persons awaiting asylum. Of the period in which asylum applicants wait for an EAD is extended, there could be an impact to those entities, and possibly, to family, social, or other assistance networks.

B. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.¹²⁴

This proposed rule would make significant changes to the process by which aliens seeking asylum in the United States can apply for EADs while their asylum claims are pending either with DHS or DOJ-EOIR. DHS has estimated that rule would cover a maximum quantified population of about 305,000 aliens, with smaller sub-populations applicable to specific, individual provisions. We assess that this rule’s proposed changes do not fall under the RFA

¹²⁴ A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

because they directly regulate individuals who are not, for purposes of the RFA, within the definition of small entities established by 5 U.S.C. 601(6).

As previously explained, several of the provisions being proposed may result in deferred or forgone labor earnings compensation for asylum applicants. In addition, some aliens would not be able to obtain an EAD in the future that otherwise could currently. However, these provisions do not directly regulate employers.

While the RFA does not require agencies to examine the impact of indirect costs to small entities, DHS is unable to identify the next best alternative to hiring a pending asylum applicant and is therefore unable to reliably estimate the potential indirect costs to small entities from this proposed rule but requests comments from the public that would assist in understanding costs not described herein.

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

The rule is being proposed in order to reform the asylum application and associated employment authorization application process in order to prioritize bona fide claims and reduce frivolous and non-meritorious asylum filings. The proposed rule is necessary because it has been a long time since significant statutory changes have been made to the asylum provisions that would effectively address the current aspects of the immigration laws that incentivize illegal immigration and frivolous asylum filings. Furthermore, the rule could address several of the “pull” factors that encourage aliens to enter the United States without being inspected and admitted or paroled and to file non-meritorious asylum claims to obtain employment authorization or other non-asylum based forms of relief from removal. These “pull” factors have led, in part, to a significant increase in illegal immigration and in asylum filings, which has generated a severe backlog of cases and an overwhelming volume of non-meritorious cases.

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

The objective of the proposed rule is to disassociate employment authorization from asylum applications and minimize the abuse of the asylum process by inadmissible or removable aliens who are not eligible for asylum but seek to prolong their stay in the United States for economic reasons. The proposed changes will remove incentives for aliens to enter the United States illegally for economic reasons and allow DHS to process bona fide asylum seekers who present themselves at U.S. ports of entry in an expedited manner. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States.

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 he deems necessary for carrying out such authority.

(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 change aspects of the asylum process related to how and when asylum applicants can apply for and obtain EADs, when asylum applicants' employment authorization is terminated, as well as their eligibility for EADs. The rule would delay asylum applicants' employment authorization, remove certain aliens' eligibility for employment, and terminate certain aliens' employment eligibility earlier than without this rule.

This rule does not directly regulate small entities and thus the number of small entities to which the proposed rule would directly regulate is zero. However, this rule would indirectly impact small entities that may employ affected EAD holders. DHS does not have information on where affected aliens obtain employment and thus is unable to estimate the number of small entities that may be indirectly impacted by this rule.

(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 proposed 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. DHS is the sole administrator of employment authorization applications. DOJ may issue conforming changes to its regulations at a later date. DHS is also in the process of drafting proposed rulemaking broadening biometrics collection. Although the Form I-765 is involved in this separate broad biometrics collection proposal, the present proposed rule focuses specifically on the I-765(c)(8) eligibility category. There could be some overlap between the two proposed rules, but such overlap is not expected to create new costs or burdens.

(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, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, 110 Stat. 847, 868 et seq. Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the final rule's publication, whichever is later.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

The Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector.

Because this proposed rulemaking does not impose any Federal mandates on State, local, or tribal governments, in the aggregate, or the private sector, this rulemaking does not contain such a written statement.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this proposed rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This 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.

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 will delay the ability for initial applicants to work and limiting or prohibit some from working based on criminal and

immigration history, which will decrease disposable income of those applicants with families. A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. DHS does not know how many applicants contribute to family disposable income. The total lost compensation to the pool of potential asylum applicants could range from about \$319 million to \$930 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.

I. National Environmental Policy Act (NEPA)

DHS analyzes actions to determine whether NEPA applies to them and if so what degree of analysis is required. DHS Directive (Dir) 023-01 Rev. 01 and Instruction (Inst.) 023-01-001 rev. 01 establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023-01-001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023-01-001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023-01-001 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger

action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023-01-001 Rev. 01 section V.B(1)-(3). This proposed rule would amend the administrative procedure for filing an affirmative asylum application in the United States, and strengthen eligibility requirements for employment authorization based on a pending asylum application.

DHS analyzed this action and has concluded that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis. Nevertheless, if NEPA did apply to this action, the action clearly would come within our categorical exclusion A.3(d) as set forth in DHS Inst. 023-01-001 Rev. 01, Appendix A, Table 1.

This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

J. National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (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.

K. Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights)

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.

L. Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks)

Executive Order 13045 requires agencies to consider the impacts of environmental health risk or safety risk that may disproportionately affect children. DHS has reviewed this 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.

M. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)

Executive Order 13211 requires agencies to consider the impact of rules that significantly impact the supply, distribution, and use of energy. DHS has reviewed this 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.

N. Paperwork Reduction Act (PRA)

Under the Paperwork Reduction Act of 1995, Public Law 104-13, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. Table 19 shows a summary of the forms that are part of this rulemaking.

Table 19: Summary of Impacts to USCIS Forms			
Form	Form Name	New or	General Purpose of Form

		Updated Form	
I-589	Application for Asylum and for Withholding of Removal	Update – revises and adds instructions for employment authorization while asylum application is pending.	This form is used by applicants to apply for asylum or withholding of removal under the Act or the Convention Against Torture (CAT).
I-765	Application for Employment Authorization	Update – revises and adds instructions and questions for aliens seeking employment authorization under the (c)(8) eligibility category	This form is used by applicants to request employment authorization from USCIS.

USCIS Form I-589

DHS invites comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the Federal Register to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615-0067 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. Public Participation** section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

1. Evaluate whether the collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of information collection:

- (1) *Type of Information Collection:* Revision of a Currently Approved Collection.
- (2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal
- (3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I-589; USCIS.
- (4) *Affected public who will be asked or required to respond, as well as a brief abstract:*
Primary: Individuals and households. The data collected on this form will be used by USCIS to determine if the alien is eligible for asylum or withholding of removal.
- (5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I-589 is 114,000 and the estimated hour burden per response is 12 hours; the estimated total number of respondents for the information collection Biometrics is 110,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,496,700 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this information collection is \$46,968,000.

USCIS Form I-765

DHS invites comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615-0040 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and **I. Public Participation** section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

5. Evaluate whether the collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

6. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

7. Enhance the quality, utility, and clarity of the information to be collected; and

8. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other

technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of information collection:

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I-765; USCIS

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals and households. USCIS requires an alien seeking employment authorization to file the Form I-765. The data collected on this form will be used by USCIS to determine if the individual seeking employment authorization qualifies under the categories of aliens who may apply for employment authorization under 8 CFR 274a.12.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I-765 is 2,036,026 and the estimated hour burden per response is 4.75 hours; the estimated total number of respondents for the information collection biometrics is 346,589 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection Form I-765WS is 41,912 and the estimated hour burden per response is .50 hours; the estimated total number of respondents for the information collection passport-style photographs is 2,036,026 and the estimated hour burden per response is .50 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 11,115,602 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this information collection is \$669,852,554.

List of Subjects

8 CFR Part 208

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

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend parts 208 and 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

AUTHORITY: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

2. Amend § 208.3 by revising paragraph (c)(3) to read as follows:

§ 208.3 Form of application.

* * * * *

(c) * * *

(3) An asylum application must be properly filed in accordance with 8 CFR part 103 and the filing instructions. Receipt of a properly filed asylum application will commence the 365-day period after which the applicant may file an application for employment authorization in accordance with § 208.7 and 8 CFR 274a.12 and 274a.13.

* * * * *

3. Amend § 208.4 by revising paragraph (c) to read as follows:

§ 208.4 Filing the application.

* * * * *

(c) *Amending an application after filing.* Upon the request of the alien, and as a matter of discretion, the asylum officer or Immigration Judge with jurisdiction may permit an asylum applicant to amend or supplement the application. Any delay in adjudication or in proceedings caused by a request to amend or supplement the application will be treated as a delay caused by the applicant for purposes of § 208.7 and 8 CFR 274a.12(c)(8).

4. Revise § 208.7 to read as follows:

§ 208.7 Employment authorization.

(a) *Application and decision.* (1)(i) *In General.* Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, and except as otherwise provided in paragraphs (b) and (c) of this section, an applicant for asylum who is in the United States may apply for employment authorization pursuant to 8 CFR 274a.12(c)(8) and 274a.13(a)(2) of this chapter. The applicant must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions, and must submit biometrics at a scheduled biometrics services appointment. USCIS has exclusive jurisdiction over all applications for employment authorization and employment authorization documentation based on a pending application for asylum under 8 CFR 274a.12(c)(8), regardless of whether the asylum application is pending with USCIS or the Executive Office for Immigration Review. Employment authorization is not permitted during any period of judicial review of the asylum application, but may be requested if a Federal court remands the case to the Board of Immigration Appeals. USCIS may grant initial

employment authorization under 8 CFR 274a.12(c)(8) for a period that USCIS determines is appropriate at its discretion, not to exceed increments of two years.

(ii) *Period for filing.* An applicant for asylum cannot apply for initial employment authorization earlier than 365 calendar days after the date USCIS or the immigration court receives the asylum application in accordance with 8 CFR part 103 or 8 CFR 1003.31, respectively, and the filing instructions on the application. If an asylum application is denied by USCIS before a decision on an initial or renewal application for employment authorization, the application for employment authorization will be denied.

(iii) *Asylum applicants who are ineligible for employment authorization.* An applicant for asylum is not eligible for employment authorization if:

(A) The applicant was convicted in the United States or abroad of any aggravated felony as described in section 101(a)(43) of the Act;

(B) The applicant was convicted in the United States of any felony as defined in 18 U.S.C. 3156(a)(3);

(C) The applicant was convicted of any serious non-political crime outside the United States. USCIS will consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses, warrant a favorable exercise of discretion for a grant of employment authorization;

(D) The applicant was convicted in the United States of a public safety offense involving:

(I) Domestic violence, domestic assault, or any other domestic or spousal battery-type offense unless the applicant has been subjected to extreme cruelty, is not and was not the primary perpetrator of the violence in the relationship, and is not otherwise ineligible. If an applicant has

unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(2) Child abuse, child neglect, or any other offense against a child, regardless of an element of sexual or inappropriate touching. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(3) Controlled substances, including possession, possession with intent to distribute, or delivery. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(4) Driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the arresting, charging, or convicting jurisdiction classifies the offense. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(E) An asylum officer or an Immigration Judge has denied the applicant's asylum application within the 365-day period or before the adjudication of the initial request for employment authorization;

(F) The applicant filed his or her asylum application beyond the one-year filing deadline, unless and until the asylum officer or Immigration Judge determines that the applicant meets an exception for late filing as provided in section 208(a)(2)(D) of the Act and 8 CFR 208.4 and 1208.4, or unless the applicant was an unaccompanied alien child on the date the asylum application was first filed;

(G) The applicant is an alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry, unless the alien demonstrates that he or she:

(1) Presented himself or herself without delay to the Secretary of Homeland Security or his or her delegate;

(2) Indicated to the Secretary of Homeland Security or his or her delegate an intention to apply for asylum or expresses a fear of persecution or torture; and

(3) Has good cause for the illegal entry or attempted entry, provided such good cause does not include the evasion of U.S. immigration officers, convenience, or for the purpose of circumvention of the orderly processing of asylum seekers at a U.S. port of entry.

(iv) *Applicability.* Paragraphs (a)(1)(iii)(A) through (D) of this section apply to applications that were filed prior to and remain pending on [effective date of final rule].

(v) *Delay.* Any delay requested or caused by the applicant on his or her asylum application that is still outstanding or has not been remedied when USCIS adjudicates the application for employment authorization under 8 CFR 274a.12(c)(8) will result in a denial of such application. Examples of applicant-caused delays include, but are not limited to the list below:

(A) A request to amend or supplement an asylum application that causes a delay in its adjudication or in proceedings as permitted in 8 CFR 208.4(c);

(B) Failure to appear to receive and acknowledge receipt of the decision as specified in 8 CFR 208.9(d);

(C) A request for extension to submit additional evidence fewer than 14-days prior to the interview date as permitted by 8 CFR 208.9(e);

(D) Failure to appear for an asylum interview, unless excused by USCIS as described in 8 CFR 208.10(b)(1) for the failure to appear;

(E) Failure to appear for scheduled biometrics collection on the asylum application;

(F) A request to reschedule an interview for a later date;

(G) A request to transfer a case to a new asylum office or interview location, including when the transfer is based on a new address;

(H) A request to provide additional evidence for an interview;

(I) Failure to provide a competent interpreter at an interview; and

(J) Failure to comply with any other request needed to determine asylum eligibility.

(b) *Renewal and termination--(1) Renewals.* USCIS may renew employment authorization under 8 CFR 274a.12(c)(8) in increments determined by USCIS in its discretion, but not to exceed increments of two years. Employment authorization is not permitted during any period of judicial review, but may be requested if a Federal court remands the case to the Board of Immigration Appeals. For employment authorization to be renewed under this section, the alien must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions. USCIS will require that an alien establish that he or she has continued to pursue an asylum application before USCIS, an Immigration Judge, or the Board of Immigration Appeals and that he or she continues to meet the eligibility criteria for employment authorization set forth in 8 CFR 208.7(a). For purposes of renewal of employment authorization, pursuit of an asylum application before an Immigration Judge or the Board of Immigration Appeals is established by submitting a copy of the referral notice or Notice to Appear placing the alien in proceedings, any hearing notices issued by the immigration court, evidence of a timely filed appeal if the alien appealed the denial of the asylum application to the

Board of Immigration Appeals, or remand order to the Immigration Judge or Board of Immigration Appeals.

(i) *Referrals to an Immigration Judge.* Employment authorization granted after the required 365-day waiting period will continue for the remaining period authorized (unless otherwise terminated or revoked) if the asylum officer refers the alien's asylum application to an immigration judge . In accordance with 8 CFR 208.7(b)(1), the alien may be granted renewals of employment authorization while under such review by the Immigration Judge.

(ii) *Appeals to the Board of Immigration Appeals.* If the Immigration Judge denies the alien's asylum application, any remaining period of employment authorization will continue for the period authorized (unless otherwise terminated or revoked) during the period for filing an appeal with the Board of Immigration Appeals under 8 CFR 1003.38(b) or, if an appeal is timely filed within such period, during the pendency of the appeal with the Board of Immigration Appeals. In accordance with 8 CFR 208.7(b)(1), the alien may be granted renewals of employment authorization during these periods while the appeal is under review by the Board of Immigration Appeals and any remand to the Immigration Judge.

(2) *Terminations.* The alien's employment authorization granted pursuant to 8 CFR 274a.12(c)(8) will automatically terminate effective on the date the asylum officer denies the asylum application, thirty days after an Immigration Judge denies the asylum application unless timely appealed to the Board of Immigration Appeals, or the Board of Immigration Appeals affirms or upholds a denial, regardless of whether any automatic extension period pursuant to 8 CFR 274a.13(d)(3) is in place.

(c) *Severability*. The provisions in this section are intended to be independent severable parts. In the event that any provision in this section is not implemented, DHS intends that the remaining provisions be implemented as an independent rule.

5. Amend § 208.9 by adding subject headings for paragraphs (a) through (c), revising paragraphs (d) and (e), and adding subject headings for paragraphs (f) and (g) to read as follows:

§ 208.9 Procedure for interview before an asylum officer.

(a) *Jurisdiction*. * * *

(b) *Requirements for Interview*. * * *

(c) *Conduct of Interview*. * * *

(d) *Completion of the interview*. Upon completion of the interview:

(1) The applicant or the applicant's representative will have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require its submission in writing.

(2) USCIS will inform the applicant that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision will be treated as delay caused by the applicant for purposes of 8 CFR 208.7.

(e) *Extensions*. The asylum officer will consider evidence submitted by the applicant together with his or her asylum application. The applicant must submit any documentary evidence at least 14 calendar days in advance of the interview date. As a matter of discretion, the asylum officer may consider evidence submitted within the 14-day period prior to the interview

date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence. Any such extension will be treated as a delay caused by the applicant for purposes of § 208.7.

(f) *Record.* * * *

(g) *Interpreter.* * * *

* * * * *

6. Revise § 208.10 to read as follows:

§ 208.10 Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application.

(a) *Failure to appear for asylum interview or for a biometric services appointment.* (1)

The failure to appear for an interview or biometric services appointment may result in:

- (i) Waiver of the right to an interview or adjudication by an asylum officer;
- (ii) Dismissal of the application for asylum;
- (iii) Referral of the applicant to the immigration court; or,
- (iv) Denial of employment authorization.

(2) There is no requirement for USCIS to send a notice to an applicant that he or she failed to appear for his or her asylum interview or biometrics services appointment prior to issuing a decision on the application. Any rescheduling request for the asylum interview that has not yet been fulfilled on the date the application for employment authorization is adjudicated under 8 CFR 274a.12(c)(8) will be treated as an applicant-caused delay for purposes of 8 CFR 208.7.

(b) *Rescheduling missed appointments.* USCIS, in its sole discretion, may excuse the failure to appear for an interview or biometrics services appointment and reschedule the missed appointment as follows:

(1) *Asylum Interview*. If the applicant demonstrates that he or she was unable to make the appointment due to exceptional circumstances.

(2) *Biometrics services appointment*. USCIS may reschedule the biometrics services appointment as provided in 8 CFR part 103.

PART 274a – CONTROL OF EMPLOYMENT OF ALIENS

7. The authority citation for part 274a is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599.

8. Amend § 274a.12 by adding the phrase “, unless otherwise provided in this chapter” at the end of the last sentence in paragraph (c) introductory text and revising paragraphs (c)(8) and (11).

The revisions read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR parts 103 and 208, whose application has not been decided, and who is eligible to apply for employment authorization under 8 CFR 208.7 because the 365-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of 8 CFR 208.7 of this chapter in increments to be determined by USCIS but not to exceed increments of two years.

* * * * *

(11) Except as provided in paragraphs (b)(37) and (c)(34) of this section, 8 CFR 212.19(h)(4), and except for aliens paroled from custody after having established a credible fear or reasonable fear of persecution or torture under 8 CFR 208.30, an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.

* * * * *

9. Amend § 274a.13 by revising paragraphs (a)(1) and (2) and (d)(3) to read as follows:

§ 274a.13 Application for employment authorization.

(a) * * *

(1) Aliens seeking initial or renewed employment authorization under 8 CFR 274a.12(c) must apply on the form designated by USCIS with prescribed fee(s) and in accordance with the form instructions. The approval of applications filed under 8 CFR 274a.12(c) is within the discretion of USCIS. Where economic necessity has been identified as a factor, the alien must provide information regarding his or her assets, income, and expenses.

(2) An initial employment authorization request for asylum applicants or for renewal or replacement of employment authorization submitted in relation to a pending claim for asylum, in accordance with 8 CFR 208.7 and 8 CFR 274a.12(c)(8), must be filed on the form designated by USCIS in accordance with the form instructions with prescribed fee(s).

* * * * *

(d) * * *

(3) *Termination.* Employment authorization automatically extended pursuant to paragraph (d)(1) of this section will automatically terminate the earlier of up to 180 days after the expiration date of the Employment Authorization Document (Form I-766), or on the date USCIS

denies the request for renewal. Employment authorization granted under 8 CFR 274a.12(c)(8) and automatically extended pursuant to paragraph (d)(1) of this section is further subject to the termination provisions of 8 CFR 208.7(b)(2).

* * * * *

10. Amend § 274a.14 by:

- (a) Removing “or” at the end of paragraph (a)(1)(ii);
- (b) Removing the period and adding in its place “; or” at the end of paragraph (a)(1)(iii); and
- (c) Adding paragraph (a)(1)(iv).

The addition reads as follows:

§ 274a.14 Termination of employment authorization.

(a) * * *

(1) * * *

(iv) Automatic termination is provided elsewhere in this chapter.

Kevin K. McAleenan,
Acting Secretary.

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