



ASYLUM SEEKER ADVOCACY PROJECT

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Submitted via www.regulations.gov

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Re: Request for Comments: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (March 29, 2022); U.S. Citizenship and Immigration Services, DHS Docket No. USCIS-2021-0012

Dear Ms. Cutlip-Mason and Ms. Reid:

The Asylum Seeker Advocacy Project (ASAP) respectfully submits the following comment to the interim final rule, Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Mar. 29, 2022) (DHS Docket No. USCIS–2021–0012) [hereinafter “the IFR” or “the interim rule”].

In this interim rule, ASAP commends the agency for taking steps to address the asylum processing backlog and work toward more transparency in the asylum system. However, the initial Notice of Proposed Rulemaking did not include the current expedited timeline that is intended to be implemented beginning on May 31, 2022, thereby depriving the public of the opportunity to comment on its effects. ASAP is

deeply concerned that the interim rule fails to account for how the expedited timeline in the IFR will eliminate the possibility of work authorization for thousands of asylum seekers who rely on it as they await a final determination of their asylum cases. ASAP is also concerned that the codification and expansion of the “applicant-caused delay” framework that limits access to work authorization will have negative effects on both asylum seekers’ cases and their ability to support themselves and their families. To ameliorate the negative effects of the IFR, ASAP proposes that the Departments take steps, outlined below, to preserve access to work authorization for asylum seekers subject to the IFR’s new processing requirements.

I. ASAP’s 300,000+ members have a significant interest in the proposed rule.

The Asylum Seeker Advocacy Project (ASAP) is a non-profit organization with over 300,000 asylum seeker members from over 175 countries. ASAP is the largest organization of asylum seekers in the United States. Because of our mission, and the likely impact of the proposed rule on our current and future members, ASAP is highly invested in the outcome of this rulemaking process.

When someone becomes a member of ASAP, the organization asks: What is one thing you would change about the asylum process? Of ASAP’s first 150,000 members, more than 34,000 asylum seekers from over 150 countries responded.¹ Many of them wrote that being able to work while pursuing asylum was one of their highest priorities:

“We should all have the ability to work honorably while we wait for our asylum hearings.”

— ASAP member from Venezuela

“There should be quick and early grants of work permits so immigrants can contribute meaningfully and financially to the economy of the United States.”

— ASAP member from Nigeria

¹ See *34,000 Members’ Ideas for Change*, ASYLUM SEEKER ADVOCACY PROJECT (Apr. 10, 2022), <https://www.asylumadvocacy.org/5-ways-to-change-the-asylum-process/>.

As a result of this process, one of ASAP's top policy priorities is ensuring that work permits are received faster and made easier for asylum seekers to obtain.

II. Comments regarding work authorization fall squarely within the scope of the IFR.

ASAP's comment addresses the effects of the interim rule on asylum seekers' access to work authorization. Comments regarding work authorization are squarely within the scope of this interim rule and comment process. The interim rule makes clear that a Credible Fear Interview will start the clock for employment authorization.² The new timeline for the adjudication of asylum applications for individuals in expedited removal also has concrete implications for individuals' work authorization eligibility.³ Moreover, comments and considerations regarding work authorization are specifically contemplated as part of the agency's analysis of the IFR's impacts.⁴

III. The IFR fails to address how it will prevent asylum seekers from accessing work authorization during their appeals process.

The IFR fails to address the problems related to work authorization that it creates with its accelerated processing timeline: namely, that it will preclude a significant number of asylum seekers from accessing work authorization, often for years, even where they may ultimately win their asylum cases. This section outlines the procedural implications of the IFR and the harmful consequences for asylum seekers, their families, and their prospective employers. It then lays out ASAP's suggested mitigation strategies.

² "Consistent with the NPRM, DHS is also amending 8 CFR 208.3(a) to provide that the written record of the positive credible fear determination shall be considered a complete asylum application for purposes of the one-year filing deadline at 8 CFR 208.4(a), requests for employment authorization based on a pending application for asylum under 8 CFR 208.7, and the completeness requirement at 8 CFR 208.9(a).]" Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078, 18085 (March 29, 2022) (to be codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235 and 1240) [hereinafter "Interim Final Rule"].

³ See Interim Final Rule, 87 Fed. Reg. at 18115 ("[T]he increased efficiencies of this IFR could also result in fewer individuals who are ineligible for protection receiving employment authorization, if their applications are not granted before the waiting period for employment authorization under 8 CFR 274a.12(c)(8) has run.").

⁴ See, e.g., Interim Final Rule, 87 Fed. Reg. at 18115 ("Section V.B of this preamble estimates the effects, on a per-individual, per-day basis, of individuals receiving employment authorization earlier as a result of efficiencies introduced by the rule.").

a. Procedural impact of shortening processing timeline

ASAP's primary concern is that the IFR's shortened processing timeline will prevent asylum seekers subjected to expedited removal from accessing work authorization altogether. Under the current regulatory framework, asylum applicants are eligible for work authorization 180 days after applying for asylum in order to provide for themselves and their families while their asylum applications are pending.⁵ Asylum seekers are eligible to submit their work permit applications 150 days after applying for asylum.⁶ USCIS uses an automated "clock" (referred to as the "asylum clock" or "EAD clock") to count the required 150-day wait period. After submission, USCIS is required to process the applicant's application for work authorization within 30 days, totaling a wait period of 180 days.⁷ However, the EAD clock stops accruing days toward the 180-day wait period upon the occurrence of any "delay requested or caused by the applicant."⁸ Of particular importance here, an application for employment authorization must be denied if an immigration judge ("IJ") denies asylum before the employment authorization is adjudicated. In short, under current regulations, an asylum applicant will be barred from obtaining work authorization if their asylum application is denied by an immigration judge in less than 180 days, regardless of whether they pursue further appeals.

For individuals in expedited removal, the asylum process begins with a Credible Fear Interview. Under the interim rule, a positive credible fear finding serves as the submission of an asylum application. The IFR's timeline then requires that USCIS conduct an asylum interview within 45 days after the positive fear determination. If the applicant's asylum application is not approved at their interview, their application is referred to an immigration judge, who is then required to conduct a master calendar hearing for the applicant within 35 days of referral and a full hearing on the merits within 65 days after the master calendar hearing.⁹ The judge must then issue a decision – on the date of the final merits hearing or no more than 45 days after the date of the hearing. Under this

⁵ See Asylum EAD Rule 8 C.F.R § 208.7(a)(1) (2011).

⁶ "[A]n applicant for asylum who is not an aggravated felon shall be eligible...to request employment authorization....[T]he application [for employment authorization] shall be submitted no earlier than 150 days after the date on which a complete asylum application has been received." 8 C.F.R § 208.7(a)(1).

⁷ 8 CFR § 208.7(a)(1). Importantly, USCIS often misses the 30-day processing time due to delays.

⁸ "Any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing." 8 CFR § 208.7(a)(2).

⁹ The judge may, if necessary, schedule an additional merits hearing or take any steps necessary to resolve the case. Any subsequent hearing must occur no later than 30 days after the initial merits hearing. See Interim Final Rule, 87 Fed. Reg. at 18224–25.

timeline, an asylum case in the expedited docket will be decided by an immigration judge within 145-190 days after the asylum application is first filed, depending on the length of time the immigration judge takes to issue their decision. The date the immigration judge issues their decision – whether it is before or after 180 days have passed – then becomes crucial to asylum seekers’ work authorization, since under this framework an IJ denial also prevents the applicant from receiving work authorization.

Under the IFR’s proposed timeline, it is likely that virtually all cases will be decided in less than 180 days. Asylum seekers whose cases are denied by an IJ have a right to appeal their cases with the Board of Immigration Appeals, and, if denied there, to petition for review by the federal court of appeals in their circuit. The appeals process can take many years. However, for asylum seekers whose cases are denied by an IJ in less than 180 days, their EAD clocks will stop accruing time and they will thereafter be ineligible for work authorization throughout the pendency of their appeals.¹⁰ This means that tens of thousands¹¹ of asylum seekers with cases before the BIA and courts of appeals will have no means of supporting themselves while living in the U.S. They will be forced to struggle and suffer without work authorization for years even if they are ultimately successful in their asylum claims. Indeed, the Departments can expect the number of case appeals to spike if the unfair timelines in this rule are implemented, just as case appeals nearly tripled from their historical baseline in FY 2019 and FY 2020, as the Trump Administration’s anti-immigrant policies were challenged in removal proceedings.¹²

¹⁰ It is also important to note that an EAD application must be processed before the IJ denial in order to be approved, regardless of the 180-day wait period. This means that even if an IJ makes a decision between 180-190 days or more, an asylum seeker may still be precluded from work authorization if USCIS is delayed in processing their work permit, or if they do not file their EAD application exactly 150 days after their asylum application. See 8 C.F.R § 208.7(a)(1).

¹¹ According to EOIR, approximately 40% of all persons who received a decision in removal proceedings had submitted an application for asylum. See *Adjudication Statistics: Asylum Decision Rates*, EXECUTIVE OFFICE OF IMMIGRATION REVIEW (Apr. 18, 2022), <https://www.justice.gov/eoir/page/file/1248491/download> (showing 45,971 asylum completions before Immigration Judges in FY 2021); *Adjudication Statistics: New Cases and Total Completions*, EXECUTIVE OFFICE OF IMMIGRATION REVIEW (Apr. 18, 2022), <https://www.justice.gov/eoir/page/file/1060841/download> (showing 155,568 total case completions before immigration judges in FY 2021). ASAP therefore estimates that 40% of the 83,067 appeals pending with the Board of Immigration Appeals involve asylum applications. Cf. *Adjudication Statistics: Case Appeals Filed, Completed, and Pending* (Apr. 18, 2022), EXECUTIVE OFFICE OF IMMIGRATION REVIEW, <https://www.justice.gov/eoir/page/file/1248501/download>. This figure does not include the additional category of applicants with petitions for review pending before the federal courts of appeals.

¹² See *Adjudication Statistics: Case Appeals Filed, Completed, and Pending*, *supra* note 11 (reflecting 55,977 case appeals filed in FY 2019 and 51,333 case appeals filed in FY 2020).

The IFR acknowledges this result, stating, “We do not know what the annual or current scale of this population is, but it is an expected consequence of this IFR that such individuals would not obtain employment authorizations in the future.”¹³ However, this is a radical departure from the current system, in which most asylum seekers are able to obtain work authorization before their cases are adjudicated by an IJ and may continue to renew their work permits throughout the appeals process.

b. Effects of prolonged lack of work authorization on asylum seekers, families, potential employers, and communities

When asylum seekers are not able to access work authorization, they are not the only ones who suffer. It also harms their families and friends; it hurts potential employers desperate to hire amidst a nationwide labor shortage; and it affects the local communities and resource networks that asylum seekers are forced to rely on.

As part of the recent Temporary Final Rule issued to increase the automatic extension period for employment authorization and documentation, USCIS itself has recently commented on the devastating impact that not being able to work has on immigrants and their families:

“When whole families are threatened, the primary earner may be the first to travel to the United States to establish a new home before bringing the rest of the family. The cost to travel to the United States is high, as is the relative cost of living. In these circumstances, if the asylum seeker is unable to seek employment for extended periods of time, it can not only negatively impact that individual, but the whole family as well.”¹⁴

ASAP members have also shared how difficult it is to support their families without being able to work, stating:

“We have to rely upon others for everything we need, including our essentials and necessities. Example - medical help, my son is 3 years old today and we cannot admit him to school because we cannot afford the cost of preschool, transportation.”

¹³ Interim Final Rule, 87 Fed. Reg. at 18204.

¹⁴ Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants, 87 Fed. Reg. 24414, 26619 (May 4, 2022) (to be codified at 8 C.F.R. pt. 274a).

—ASAP member from India

“It cannot be that we have to wait so long to obtain a work permit, especially if we have children to support. We saved ourselves from oppression to face poverty away from our family and our land.”

—ASAP member from Venezuela

Furthermore, ASAP members have shared their concerns that asylum seekers without work authorization are more likely to engage in unauthorized employment, putting themselves at greater risk of abuse, labor violations, and wage theft by exploitative employers.¹⁵

“How is anyone expected to survive – during a pandemic of all things – a full year with no income? It’s like we are being cornered to work illegitimately because it’s either that or homelessness/going hungry. And then we continue to be vilified as if we’re bad because we break the law...a vicious cycle that is completely preventable.”

—ASAP member from Lebanon

“I think that you should not wait so long for a work permit, I think that like everything, it should have a filter, but keeping a person for so long without the possibility of working legally allows the rate of illegal jobs and employers to increase. They abuse workers while paying a pittance. And it is the same need that leads people to accept any job for the payment that suits the employer best. I think they should give priority to work permits.”

—ASAP member from Venezuela

In addition to working, accessing a work permit and social security number is essential to asylum seekers’ ability to obtain a driver’s license, to engage in higher education and to be able to access health insurance.

“The wait to be processed, and the inability to work legally to pay for healthcare, rent, and food while I wait to be processed. I have a graduate

¹⁵ See generally Daniel Costa, *Employers increase their profits and put downward pressure on wages and labor standards by exploiting migrant workers*, ECONOMIC POLICY INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-immigration-policy/>.

degree obtained in the States. I can't even work at Safeway or McDonald's. I worry about getting COVID. I worry about getting sick since I am uninsured."

—ASAP member from Hong Kong

Many ASAP members also wrote to us sharing their frustration at having to rely on local communities and networks in the U.S. for support, despite being very interested in working.

"We have been struggling and we have to rely upon others for everything we need, including our essentials and necessities: apartment, car, food, insurance, Driving License, medicaid and other basic necessities of life. We are facing mental pressure and stress.... I have always been independent and helped others since I was 16 years old, however circumstances have changed and I am seeking help from others to survive."

–ASAP member from India

"It is completely arrogant and abusive to [tell] asylum seekers 'We must live on Christian charity' until we get our permits and find decent jobs. Asylum seekers are people who have gone through traumas with deep wounds to the integrity and life of our families. A Protective State should not further violate our lives by submitting and exposing us to illegal working conditions."

– ASAP member from Colombia

ASAP members have also spoken out in the press about the toll of not being able to work legally in the United States, despite wanting to work. Jairo Umaña, an ASAP member from Nicaragua, worried about being able to provide for his two children:

"It is stressful. You're always worried. Being out of work triggers a chain reaction: there's no income, there's no money for rent, there's no food."

– ASAP member Jairo Umaña from Nicaragua to CBS News¹⁶

¹⁶ Camilo Montoya-Galvez, *U.S. immigration agency moves to cut 9.5 million-case backlog and speed up processing*, CBS NEWS (March 29, 2022), <https://www.cbsnews.com/news/immigration-uscis-case-backlog-processing-delays/>.

ASAP member Dayana Vera de Aponte, from Venezuela, also spoke about how being unable to work affected her and her family:

“I had to talk to my daughter about the situation....It's not in my hands. It's frustrating, and how do I explain that to her? I can't buy her Christmas gifts because I'm afraid to spend money...We are not only missing payments and borrowing money from friends and family, we are anxious and depressed.”

– ASAP member Dayana Vera de Aponte from Venezuela to CNN¹⁷

Experiences like these are too common among ASAP's 300,000 members and underscore the urgent need to make work permits more – not less – accessible for asylum seekers.

Preventing asylum seekers from accessing work authorization for years on end also harms employers in an already tight labor market.¹⁸ The effect on employers when immigrants are unable to work has been well-publicized in news outlets ranging from the Wall Street Journal¹⁹ to Vox.²⁰ In the midst of a nationwide labor shortage, the industries suffering the most are essential industries that rely more heavily on foreign-born workers,

¹⁷ Priscilla Alvarez, 'Quite disruptive': Months-long processing delays leave people out of work amid nationwide labor shortage, CNN POLITICS (Nov. 26, 2021), <https://www.cnn.com/2021/11/26/politics/immigration-biden-work-permit-processing-delays/index.html>.

¹⁸ See *id.* (“US companies already reeling from a worker shortage are now facing the challenge of employees falling out of jobs because their work permits haven't been renewed on time by the federal government.”); Michelle Hackman, *Add Declining Immigration to Problems Weighing on the Labor Market*, WALL STREET JOURNAL (Apr. 5, 2022), <https://www.wsj.com/articles/add-declining-immigration-to-problems-weighing-on-the-labor-market-11649174837>.

¹⁹ “Millions of immigrants in the U.S. are ...employed across the gamut of industries, from technology to healthcare to truck driving, and their absence has been felt by employers already struggling to hire enough people to fill America's 11.5 million open jobs.” Michelle Hackman, *Immigrants to Get Extension for Expiring or Expired U.S. Work Permits*, WALL STREET JOURNAL (Apr. 5, 2022), <https://www.wsj.com/articles/immigrants-to-get-extension-for-expiring-or-expired-u-s-work-permits-11651579201>.

²⁰ “There were nearly 11 million open jobs as of the end of December, many in industries ranging from tech to trucking that need every worker they can get right now. Those industries heavily rely on immigrant workers, and...the available supply of those workers is smaller than it otherwise would be.” Nicole Narea, *Immigrants could help the US labor shortage – if the government would let them*, VOX (Feb. 16, 2022), <https://www.vox.com/policy-and-politics/22933223/work-permit-uscis-backlog-immigration-labor-shortage>.

such as trucking and healthcare.²¹ One CEO of a nurse staffing company noted that he was short 200 nurses because of delays in work authorization for immigrants.²² Representative Chellie Pingree also recently commented on the role that immigrants could play in lessening the labor shortage in the United States, were it not for rules and delays surrounding their work authorization:

“Here we are in the middle of a worker shortage that people are talking about every day, and Maine has an influx of asylum seekers....They all want to go to work and there are jobs available, but we have this prohibition.”

– Rep. Chellie Pingree, D-1st District to Press Herald²³

Under this IFR, the consequences of completely preventing asylum seekers from working for years while their appeals are pending stand to be much more far-reaching and long-term than the harms due to processing delays alone. Especially in the current labor market, the Departments should consider the effect that this IFR will have not only on asylum applicants and their families, but employers and communities as a whole.

c. Proposed solution

USCIS can prevent the problems associated with depriving asylum seekers of work authorization while they have pending appeals by allowing asylum applicants to continue to accumulate clock days following an IJ’s denial of their asylum application. The Departments should amend the regulations at 8 CFR § 208.7(a)(1) by changing the provision stating that an immigration judge’s denial of an asylum case makes an asylum applicant ineligible for work authorization. Specifically, the Departments should make the following revisions to 8 C.F.R. § 208.7(a)(1):

(a) Application and approval. (1) Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, an applicant for asylum who is not an

²¹ See Hackman, *supra* note 14 (“Industries with above-average levels of foreign-born workers are likelier to have high job-opening rates.”).

²² See Dara Lind, *U.S. Work-Permit Backlog is Costing Immigrants their Jobs*, BLOOMBERG (Mar. 15, 2022), <https://www.bloomberg.com/news/articles/2022-03-15/u-s-work-permit-backlog-costing-immigrants-their-jobs> (“Harold Sterling, chief executive officer of Orange, Calif.-based nurse staffing company Westways Staffing Services Inc., says that his requests for faster processing were denied and that he’s short 200 nurses because of work-permit delays.”).

²³ Rachel Ohm, *Rep. Pingree Submits Bill to Shorten Asylum Seekers’ Wait for Work Authorization*, PRESS HERALD (Feb. 11, 2022), <https://www.pressherald.com/2022/02/11/pingree-introduces-bill-to-shorten-waiting-period-for-asylum-seeker-work-authorization/>.

aggravated felon shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a) of this chapter to request employment authorization. Except in the case of an alien whose asylum application has been recommended for approval, or in the case of an alien who filed an asylum application prior to January 4, 1995, the application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§ 208.3 and 208.4 has been received. In the case of an applicant whose asylum application has been recommended for approval, the applicant may apply for employment authorization when he or she receives notice of the recommended approval. If an asylum application has been returned as incomplete in accordance with § 208.3(c)(3), the 150-day period will commence upon receipt by the Service of a complete asylum application. An applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization, **unless the applicant has filed an appropriate request for administrative or judicial review or the time within which to file such a request has not yet elapsed.** If an asylum application is denied prior to a decision on the application for employment authorization, the application for employment authorization shall be denied, **unless the applicant has filed an appropriate request for administrative or judicial review or the time within which to file such a request has not yet elapsed.** ~~If the asylum application is not so denied,~~ The Service shall have 30 days from the date of filing of the request employment authorization to grant or deny that application, except that no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application filed on or after April 1, 1997.

8 CFR § 208.7(a)(1) was developed in the context of much longer processing times for asylum cases, and should be amended. These longer processing times afforded asylum seekers more time to become eligible for work authorization prior to their cases being seen by an immigration judge. Under the IFR, many asylum seekers in expedited removal will have their cases heard and decided by an immigration judge in less than 180 days. Then, where asylum seekers are unable to adequately present their cases or represent themselves, they will engage in the appeals process, but with no ability to work and support themselves as they do.

Departments should amend 8 CFR § 208.7 so that adherence to the IFR's timeline, coupled with an IJ's denial, does not stop the EAD clock and preclude asylum seekers

from work authorization. Taking this action would ensure work authorization is available to those who continue to pursue their asylum claims before the Board of Immigration Appeals or the federal courts.

IV. The Departments should abandon the “applicant-caused delays” framework, at least in the context of the IFR’s expedited timeline.

The IFR contains provisions that, for the first time, codify in federal regulations certain circumstances that are deemed to be “a delay caused by the applicant” which stops the accrual of days on the asylum EAD clock under 8 C.F.R. 208.7(a)(2). Neither of the circumstances identified by the Departments should *per se* be considered an applicant-caused delay. Further, due to the unfairness and administrative burden caused by the applicant-caused delay framework, the Departments should abandon it entirely, in favor of simply granting work authorization after 180 calendar days have elapsed from the filing of the asylum application. Even if the Departments are unwilling to abandon the “applicant-caused delays” framework entirely, it is clear that this framework presents particularly grave problems in the context of the IFR’s expedited timeline, and as such should ensure that asylum applicants subject to expedited processing are not penalized for seeking a small amount of time to obtain counsel or gather necessary evidence.

a. Impact of codifying specific applicant-caused delays

Not appearing to receive or acknowledge an asylum officer’s decision should not be considered an applicant-caused delay.²⁴ In ASAP members’ experience, there are many common factors and reasons that contribute to an asylum applicant’s inability to receive their asylum decision in person, including insufficient notice from USCIS, lack of transportation, lack of resources to travel to the asylum office, miscommunication by USCIS, misunderstanding due to language barriers, and more. Notably, there is a breadth of case law from the BIA detailing the importance of overturning *in absentia* removal orders issued for missing hearings in the immigration court context.²⁵ Here, unlike with *in absentia* removal orders, applicants have no means of challenging the automatic determination of an applicant-caused delay. Applicants should not be

²⁴ The IFR specifies that “[a]n applicant’s failure to appear to receive and acknowledge receipt of the [asylum officer’s] decision will be treated as delay caused by the applicant for purposes of § 208.7.” Interim Final Rule, 87 Fed. Reg. at 18217.

²⁵ See, e.g., *Herbert v. Ashcroft*, 325 F.3d 68, 72 & n.1 (1st Cir. 2003); *Matter of Haim*, 19 I&N Dec. 641, 642 (BIA 1988); *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir. 2002).

prevented from working merely because they are unable to appear at the asylum office in person to receive their decision.

Likewise, a brief extension requested in order to submit evidence or supplement an asylum application should also not be considered an applicant-caused delay, especially given the speed of the IFR's asylum process.²⁶ Under the IFR's tightened timeline, codifying these grounds for an applicant-caused delay discourages asylum applicants from requesting the time they need to gather enough evidence for their case, because doing so could prevent them from getting work authorization. Asylum cases are complex and fact-intensive, and often require applicants to retrieve evidence from their home countries, to conduct country conditions research, and to gather other documentation.²⁷ Rather than encouraging asylum applicants to gather the evidence necessary for fair adjudication of their cases, the IFR punishes applicants who request time to do so. Thus, considering requests for more time as applicant-caused delays forces asylum applicants to choose between effectively presenting their case and being able to work and support themselves and their families while their case is pending.

b. Effects of lack of work authorization on asylum seekers

In ASAP members' experience, having an application for work authorization denied or delayed due to an applicant-caused delay causes confusion, stress, and prevents many asylum seekers from working altogether. Issues with applicant-caused delays and restarting the EAD clock are complex and confusing, especially for pro se asylum seekers.²⁸ Often, asylum seekers are not aware that a particular request or action on their part, such as requesting to move their case to a different asylum office, will have the effect of pausing their EAD clock. ASAP frequently receives messages from asylum applicants who are alarmed and desperate to find out that their EAD clocks have been paused, and who do not know how to restart them.

"The Los Angeles asylum office also said my asylum clock stopped in the past due to the failure to appear at my biometrics appointment. However,

²⁶ The IFR states, "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)...[An asylum officer] 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." Interim Final Rule, 87 Fed. Reg. at 18216.

²⁷ See *What evidence can I submit to support my asylum case?*, ASYLUM SEEKER ADVOCACY PROJECT, <https://help.asylumadvocacy.org/faqs-asylum-application/#evidence> (last visited May 31, 2022).

²⁸ See *The 180-Day Asylum EAD Clock Notice*, Executive Office for Immigration Review, USCIS (May 9, 2017), https://www.uscis.gov/sites/default/files/Asylum_Clock_Joint_Notice_-_revised_06-08-2018.pdf.

the truth is the asylum office mailed my biometrics appointment letter to an address that does not exist, not the one I typed on my asylum application.”

–ASAP member from Saudi Arabia

“We filled out the I-765 form, but we received a letter informing us that the request was denied since we had not completed the 150 days from the moment of our application for asylum. In the same communication they told us that the days they count are “clock days,” and I am not very clear on what that means, since in counting out our days I took into account all the calendar days including Saturdays, Sundays and holidays.”

–ASAP member from Colombia (translated from Spanish)

In addition, USCIS’s own recent comments on the importance of work authorization to asylum seekers noted the challenges they face during the initial 180-day waiting period that applicant-caused delays stand to lengthen:

“The situation for asylum applicants is especially dire because of the significant time that asylum applicants must wait to become employment-authorized in the first place....This initial wait time exacerbates the often-precarious economic situations asylum seekers may be in as a result of fleeing persecution in their home countries. Many lacked substantial resources to support themselves before they fled, or spent much of what they had to escape their country and travel to the United States. Those with resources may have been forced to leave what they had behind because they lacked the time to sell property or otherwise gather what they owned.”²⁹

This IFR is poised to prevent asylum applicants from working precisely during this vulnerable period when they have recently arrived in the United States. And as noted above, without mitigation measures, a delay during this initial period will inevitably deprive some asylum seekers of the ability to work for far longer – they will be forced to survive without employment authorization for the years that their appeals process could take.

²⁹ Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants, 87 Fed. Reg. at 26619.

c. Proposed solution

The Departments can mitigate these problems by eliminating the use of the “applicant-caused delay” framework altogether. To do so, instead of counting “clock days,” USCIS should count regular calendar days. Currently, the automated EAD clock may stop for a number of reasons, delaying or preventing an asylum seeker’s eligibility for work authorization. However, the Immigration and Nationality Act does not require the Departments to utilize a complex rule to track applicant-caused delays.³⁰ The Departments should simplify the system. Instead of using the automated clock tool, USCIS should simply permit asylum applicants to receive work authorization 180 calendar days after their asylum application is received. Eliminating applicant-caused delays and switching to calendar days will ameliorate some of the hardships caused by the IFR while simplifying and streamlining the process for asylum seekers, court administrators who field calls from confused applicants, and USCIS adjudicators alike.

The Departments are well within their authority to eliminate or modify the EAD clock and the system of applicant-caused delays. The clock tool was developed to safeguard against the possibility of immigrants filing frivolous asylum applications and delaying their adjudication in order to get and use work authorization. However, to continue a court hearing or postpone an asylum interview, an applicant is already required to show “good cause.” It is at the discretion of an immigration judge or asylum officer whether to grant the continuance. Their authority is an adequate safeguard against unnecessary delays and abuse of the asylum system; an automated safeguard – especially one that automatically pauses the clock, regardless of whether good cause is shown – is unnecessary. Removing the clock system and system of applicant-caused delays will help to ameliorate the hardships to bona fide asylum seekers caused by the interim rule.

In the alternative, if the Departments are unwilling to abolish applicant-caused delays altogether, the Departments should exempt applicants subject to the IFR’s expedited timeline from the requirements of 8 CFR § 208.7(a)(2). The IFR’s expedited timeline and strict regulation of the circumstances under which additional time will be permitted already substantially accomplish the goal of the “applicant-caused delay” policy: to prevent asylum applicants from delaying their asylum case solely for the purpose of obtaining employment authorization. It is therefore unnecessary to punish

³⁰ Instead, the INA delegates to the Attorney General the authority to promulgate regulations concerning the availability of employment authorizations provided that “[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.” INA § 208(d)(2).

applicants whose cases are mandatorily expedited by additionally withholding from them the ability to work and support their families while they pursue their asylum applications. For this reason, 8 CFR § 208.7(a)(2) should be amended to state:

(2) The time periods within which the alien may not apply for employment authorization and within which USCIS must respond to any such application and within which the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with §§ 208.3 and 208.4. **Unless the asylum application was filed as provided in 8 C.F.R. §§ 208.3(a)(2),** any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing. Such time periods shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.

V. The Departments should reconsider their decision to eliminate parole as an independent basis for work authorization.

ASAP continues to disagree with DHS's decision to eliminate parole as an independent basis for work authorization for individuals paroled out of detention. Under the IFR, parolees who receive a Credible Fear Interview ("CFI") or a Reasonable Fear Interview ("RFI") will continue to be eligible to apply for work permits on the basis of parole.³¹ However, those who do not get a CFI or RFI when they are granted parole do not have the same opportunity. Although asylum seekers may be able to apply for work authorization based on their asylum applications, applications for work authorization based on parole can be submitted immediately, instead of being subject to the 180-day waiting period and the possibility of applicant-caused delays. In this way, parole-based work authorization can serve an important gap-filling function that helps to mitigate the harms caused by the IFR for those who are eligible.

Instead of eliminating a basis for work authorization, DHS should act in line with ASAP members' priorities by rescinding the Trump-era work authorization rules and fully

³¹ See 8 C.F.R. § 274a.12(c)(11). Note that due to the court order in *Asylumworks v. Mayorkas*, Civil Action 20-cv-3815 (BAH) (D.D.C. Feb. 7, 2022), the current governing regulation is the 2012 regulations, available at <https://www.govinfo.gov/content/pkg/CFR-2012-title8-vol1/pdf/CFR-2012-title8-vol1-sec274a-12.pdf>.

restoring parole-based EADs for all asylum seekers who receive parole. ASAP strongly urges DHS to reconsider the change to section 235.3(b)(4)(ii) and to make sure future regulations ensure that a grant of parole may continue to serve as an independent basis for employment authorization.

VI. Conclusion

For the above reasons, the Departments should revise the interim rule and 8 CFR § 208.7 to:

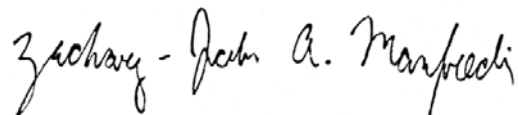
- (1) state that an IJ's denial of an asylum application does not stop an asylum applicant's EAD clock;
- (2) eliminate the use of applicant-caused delays that pause an asylum applicant's EAD clock, at least for those asylum applicants who are subject to the IFR's expedited timeline; and
- (3) permit all paroled noncitizens to obtain employment authorization.

These steps are reasonable mitigation measures that will ameliorate the harms to asylum seekers' work authorization caused by this interim rule. The ability to work is essential to survival for asylum applicants and their families, and amidst a nationwide labor shortage, it is essential to our economy and communities now more than ever.

Sincerely,



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Co-Executive Director



Zachary Manfredi
Litigation Director



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