June 6, 2022

Submitted via www.regulations.gov

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, D.C. 20529-2140


Dear Chief Deshommes,


The Asylum Seeker Advocacy Project (ASAP) believes that asylum seekers can make great change by standing together. We provide our membership of asylum seekers with legal and community support. And we work with our members — over 320,000 asylum seekers — to build a more welcoming United States. ASAP members come from more than 175 countries and live in every U.S. state and territory. Since the fall of 2020, ASAP staff have responded to over 5,000 inquiries from members concerning employment authorization issues.

Comment Regarding Form I-765

USCIS’s proposal to extend the validity of the current version of Form I-765, Application for Employment Authorization, is a missed opportunity to alleviate
processing delays of work permits. Furthermore, the collection and review of information that is irrelevant to the adjudication of the application will exacerbate existing adjudication and processing delays.

The current Form I-765 contains a number of irrelevant questions that do not help USCIS to establish the applicant’s eligibility, and instead cause confusion and exacerbate backlogs. First, as USCIS has already acknowledged, the current version of the form contains a series of unnecessary questions (Questions 30.b–30.g) relating to an asylum seeker’s manner of entry. Second, the current version of the form asks for unnecessary information relating to arrests, in addition to asking for information relating to criminal charges or convictions. These questions were relevant to ascertaining eligibility for employment authorization under the Department of Homeland Security’s final rule entitled Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020) (“2020 EAD Rule”). However, this rule was vacated by the U.S. District Court for the District of Columbia in AsylumWorks v. Mayorkas. The time to appeal the AsylumWorks judgment recently expired, and the court’s judgment of vacatur is now final and unappealable.

Retention of these now-irrelevant questions is confusing for asylum applicants seeking work authorization. Importantly, because Questions 30.b–30.g relate to asylum applicants’ manner of entry and actions taken at the time of entry, these questions incorrectly imply that certain answers may result in the denial of an application for employment authorization or otherwise place applicants in legal jeopardy.

Additionally, inclusion of legally irrelevant questions undermines USCIS’s efforts to reduce adjudication backlogs because USCIS officials will still take time to collect and review the information provided, even if such information does not affect the outcome of the adjudication. USCIS has acknowledged that the size of the Form I-765 backlog is

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3 Under the currently effective regulations, the only relevant criminal history information is whether the applicant for employment authorization has been convicted of an aggravated felony. See 8 C.F.R. § 208.7(a) (2019).
harming work-authorized noncitizens, their U.S. employers, and the economy. Reducing this backlog is one of the agency’s principal objectives. With only 20.7% of initial applications processed during the 30-day period required by federal regulations and with estimated processing times for renewals standing at 13 months, the agency should take every step at its disposal to reduce the administrative burden of adjudicating applications for employment authorization.

For these reasons, it is critical that USCIS return to a two-page form like the previously approved 07/17/17 edition. A shorter form will ease the burden on applicants and likely help reduce the agency’s adjudication backlogs. In the alternative, USCIS should at a minimum revise the form to delete questions 30.b–30.g in their entirety and revise question 30.a to omit reference to arrests.

**Comment Regarding Instructions to Form I-765**

USCIS must change the current form instructions for the Form I-765, which contain several inaccurate paragraphs of information. The inaccurate information should be deleted or revised to reflect current USCIS policy and practice. Revising the instructions to conform to current USCIS policy and practice is particularly urgent because following the instructions as currently written will cause many applications to be rejected or

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7 See USCIS, I-765 - Application for Employment Authorization: Eligibility Category: C08, Pending Asylum: Initial Permission to Accept Employment: Completions by Processing Time Buckets: August 1, 2020 - May 31, 2022: Aggregated by Fiscal Year and Month: Potential Rosario Class Members. A copy of this data is attached to this comment.
8 See USCIS, Processing Time for Application for Employment Authorization (I-765) at Potomac Service Center, https://egov.uscis.gov/processing-times/ (accessed Jun. 6, 2022). The Potomac Service Center only processes renewals in the (c)(8) category whereas other USCIS Service Centers process both initial and renewal applications. The 13-month estimate for renewal processing is also consistent with the experience of ASAP’s members.
9 A copy of the 07/17/17 edition of Form I-765 is attached to this comment.
10 USCIS has updated its website to inform applicants about the effect of the AsylumWorks judgment, including an acknowledgment that applicants do not need to answer Questions 30.b–g. on Form I-765. USCIS Stops Applying Certain EAD Provisions for Asylum Applicants, supra n.2. This announcement also suggests that USCIS is working to “revise this form.” Id. ASAP agrees that the form requires revision and urges the agency to implement the needed revisions now because many applicants are unable to access the announcement on the agency’s website.
delayed, which wastes the agency’s resources and imposes life-changing costs on applicants.

As just one example, the instructions continue to direct applicants to pay the $85 biometric services fee, but the inclusion of such a fee will result in the rejection of the Form I-765.\textsuperscript{11} Unnecessary rejections not only divert resources to process the rejection notices, but they also spawn avoidable inquiries from applicants seeking assurances from USCIS staff that the form instructions are, indeed, incorrect.

\textbf{Passages Requiring Deletion}

The following passages refer to the now-defunct requirements of the 2020 EAD Rule and should be deleted in their entirety:

From Page 2:

\begin{quote}
\begin{center}
Special Filing Instructions for Those With Pending Asylum Applications--(c)(8)
\end{center}

\textbf{Applicants requesting employment authorization under (c)(8) must:}
1. Wait 365 calendar days from the date you properly file and USCIS or the Immigration Court accepts your asylum application before you file your application for employment authorization;
2. Appear for your asylum biometric services appointment;
3. Appear for your interview with a USCIS asylum officer, or your hearing before an Immigration Judge (IJ), if requested or scheduled; and
4. Appear for your biometric services appointment for your application for employment authorization.

For further information see 8 CFR sections 208.7, 208.9, and 208.10.
\end{quote}

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From Page 2:

\begin{quote}
\begin{center}
Special information about biometric services fee and appointments. All applicants for initial and renewal EADs under the (c)(8) eligibility category must submit biometrics at a scheduled biometric services appointment and pay the biometric services fee. If you fail to appear for your biometric services appointment, you may be ineligible for employment authorization.
\end{center}
\end{quote}

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\textsuperscript{11} See, e.g., USCIS, \textit{Alert: USCIS Stops Applying Certain EAD Provisions for Asylum Applicants and No Longer Requires Biometric Services Fees from Asylum-Based EAD Applicants} (May 18, 2022), https://www.uscis.gov/i-765 ("As a result of the Asylumworks order, effective immediately, applicants for employment authorization in the (c)(8) category \textbf{should not} submit the $85 biometric services fee with your Form I-765. We no longer require the biometric services fee and submitting it may cause us to reject your application for overpayment.") (emphasis in original).
Special information about the one-year deadline to file for asylum. If you file your asylum application on or after August 25, 2020 and file it more than one year after your most recent arrival in the United States, you will not be granted employment authorization under this eligibility category unless and until a USCIS asylum officer or an Immigration Judge determines that you meet an exception for late filing, as provided in section 208(a)(2)(D) of the Immigration and Nationality Act (INA). This one-year filing deadline does not apply to an alien who is an unaccompanied alien child, as defined by section 462(g) of the Homeland Security Act of 2002, 6 U.S.C. 279(g), INA section 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E).

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Special information about lawful entry into the United States through a port of entry. Eligibility for an EAD under category (c)(8) requires that your last entry into the United States was lawful. If you entered or attempted to enter the United States unlawfully on or after August 25, 2020, you are ineligible for employment authorization based on a pending asylum application, unless you demonstrate that: (1) you presented yourself to the Secretary of Homeland Security or his or her delegate within 48 hours of your arrival; (2) you indicated a fear of persecution or torture or an intent to apply for asylum; and (3) you establish good cause for failing to enter lawfully through a port of entry. USCIS will determine whether you meet the exception to the illegal entry bar based on your responses to Item Numbers 30.b. - 30.g. of Form I-765.

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Item Number 30.a. “Have you have EVER been arrested for and/or convicted of any crime?” If you answered “Yes” to Item Number 30.a., refer to Special Filing Instructions for Those With Pending Asylum Applications (c)(8) in the Required Documentation section of the Instructions for information about providing court dispositions.

Item Number 30.b. Lawful Entry. Select “Yes” if you entered the United States lawfully through a port of entry. You must provide evidence of your lawful entry such as a Form I-94 or passport with entry stamp.

Select “No” if you did not enter the United States lawfully through a port of entry. Complete Item Numbers 30.c. and 30.d. - 30.g.

NOTE: Your eligibility for an EAD under category (c)(8) requires that, after August 25, 2020 any entry into the United States was lawful and through a port of entry. However, in limited circumstances, you may qualify for an exception to this requirement under 8 CFR 208.7(a)(1)(iii)(F). In order for USCIS to determine whether you qualify for an exception, you must complete Item Numbers 30.c. and 30.d. - 30.g.

Item Number 30.c. Presenting yourself to the Department of Homeland Security. Select “Yes” if you presented yourself to an officer or agent from the Department of Homeland Security (DHS) within 48 hours of your unlawful entry into the United States and expressed an intention to apply for asylum or expressed a fear of persecution or torture. Presenting yourself to DHS includes presenting yourself to an officer or an agent from: U.S. Customs and Border Protection, U.S. Border Patrol, U.S. Immigration and Customs Enforcement, U.S. Coast Guard, or U.S. Citizenship and Immigration Services.

Select “No” if you did not present yourself to an officer or agent from DHS within 48 hours of your unlawful entry into the United States and express an intention to apply for asylum or express a fear of persecution or torture.

Item Number 30.d. Date you presented yourself to DHS. Provide the date that you presented yourself to DHS.

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From Page 24:

<table>
<thead>
<tr>
<th>Item Number 30.e.</th>
<th>Location where you presented yourself to DHS.</th>
<th>Provide the location where you presented yourself to DHS.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item Number 30.f.</td>
<td>Country of claimed persecution.</td>
<td>Provide the name of the country from which you fear persecution or torture.</td>
</tr>
<tr>
<td>Item Number 30.g.</td>
<td>Explanation of why you did not enter the United States lawfully through a port of entry.</td>
<td>You must show good cause for failing to enter the United States lawfully at a port of entry. See 8 CFR 208.7(a)(1)(iii)(F). Examples of good cause include, but are not limited to, needing immediate medical attention or fleeing imminent serious harm. Examples that do not constitute good cause include, but are not limited to, evasion of U.S. immigration officers, circumvention of the orderly processing of asylum seekers at a U.S. port of entry, or convenience.</td>
</tr>
</tbody>
</table>

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From Page 26:

Special Instructions for Those With Pending Asylum Applications—(c)(8). All applicants for an initial or renewal EAD under the (c)(8) eligibility category must submit biometrics and pay the $85 biometric services fee. If you fail to appear for your biometric services appointment, you may be ineligible for employment authorization.

Passages Requiring Substantial Revision

Special Information About Arrests, Charges, and Convictions (Page 3)

The information about criminal bars for a work permit is incorrect in the instructions. While currently effective regulations retain a bar to employment authorization for a noncitizen who has been convicted of an aggravated felony as described in section 101(a)(43) of the Act, the remaining criminal bars for asylum applicants seeking employment authorization have been vacated by the AsylumWorks judgment. Accordingly, USCIS should delete the language highlighted below.

Special information about arrests, charges, and convictions. You cannot receive employment authorization under this eligibility category if:

- You have been convicted at any time in the United States or abroad of any aggravated felony as described in section 101(a)(43) of the Act;
  - You have been convicted on or after August 25, 2020 of a particularly serious crime in the United States;
  - You have been convicted on or after August 25, 2020 of any serious non-political crime outside the United States;
  - There are serious reasons for believing that you on or after August 25, 2020 have committed a serious non-political crime outside the United States; or
  - You are subject to a mandatory denial of your asylum application based on the criminal grounds described in 8 CFR 208.13(c)(6).
The information below concerning applicant-caused delays is now inaccurate in light of the AsylumWorks judgment.

Special information about the impact of applicant-caused delays. Any delays you have caused in the adjudication of your asylum application that are still in effect at the time your initial application for employment authorization is filed will result in USCIS denying your application for employment authorization.

USCIS should replace it with language from the most recent prior version of the Form I-765 instructions concerning the 180-day asylum EAD clock.12

Availability of EAD Renewals and the Elimination of Automatic Termination of Employment Authorization (Page 4)

As a result of the judgment in AsylumWorks, work authorization is renewable during both administrative review before the Board of Immigration Appeals as well as during judicial review of an order of removal in federal court. Additionally, AsylumWorks vacated the provisions of the 2020 EAD Rule that provided for the automatic termination of work authorization upon the final denial of an asylum application. For these reasons, the following language is incorrect:

Special Information About Availability of (c)(8) Employment Authorization During the Asylum Process. If you are granted employment authorization while your asylum application is pending with USCIS or the Immigration Court, you may seek renewal of your EAD as long as the asylum application remains pending (unless your EAD is revoked or terminated).

Additionally, the Office of the Principal Legal Advisor, Immigration and Customs Enforcement has recently announced a policy preferring the dismissal of removal proceedings against those noncitizens who are determined not to be a priority for enforcement.13 USCIS should clarify that under the form instructions,14 an asylum applicant who refiled their asylum application with USCIS after the dismissal of their removal proceedings should file a work permit renewal application – not an initial work

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12 The prior version of the Form I-765 containing accurate information regarding the 180-day asylum EAD clock is available at https://downloads.regulations.gov/USCIS-2005-0035-0160/content.pdf.
permit application – so long as they were previously issued a category (c)(8) EAD and they currently have an asylum application pending before either USCIS or EOIR.\textsuperscript{15}

Specifically, the passage concerning renewal of employment authorization during the asylum process should be edited to read:

**Special Information About Availability of (c)(8) Employment Authorization During the Asylum Process.** If you are granted employment authorization while your asylum application is pending with USCIS or the Immigration Court, you may seek renewal of your EAD as long as the asylum application remains pending, including if you have filed an appeal with the Board of Immigration Appeals, a petition for review with a federal court, or have refiled your asylum application with the asylum office after your removal proceedings were dismissed.

_Evidence of Arrests (Pages 4-5)_

After AsylumWorks, the only criminal history information relevant to the adjudication of Form I-765 is evidence relating to a conviction for an aggravated felony. There is no circumstance under which an arrest, without a conviction, can lead to the denial of Form I-765 under category (c)(8). Additionally, the current instructions request more information than is reasonably necessary to determine whether a conviction is for an aggravated felony. In the typical case, all that is required is a certified copy of the final disposition.

(continued on next page)

\textsuperscript{15} ASAP is aware of many asylum applicants whose proceedings have been dismissed who intend to refile their asylum applications with USCIS. Cf. Refugee, Asylum, & Int’l Ops. Directorate, *One-Year Filing Deadline 20* (May 6, 2013), available at https://www.uscis.gov/sites/default/files/document/lesson-plans/One_Year_Filing_Deadline_Asylum_Lesson_Plan.pdf (stating that such filings would be viewed as timely).
Accordingly, USCIS should delete the instructions below:

6. Evidence of Arrests and Convictions. You must submit certified police and court records for any criminal charges, arrests, or convictions you may have.

A. If you were EVER arrested or detained by a law enforcement officer for any reason in any country, including the United States, and no criminal charges were filed, you must submit:
   (1) An original or certified copy of the complete arrest report; and
   (2) Either an official statement by the arresting or detaining agency or prosecutor’s office OR an applicable court order that indicates the final disposition of your arrest or detention;

B. If you were EVER charged for any reason (even if you were not arrested) in any country, including the United States, you must submit:
   (1) An original or certified copy of the complete arrest report; and
   (2) Certified copies of BOTH the indictment, information, or other formal charging document AND the final disposition of each charge (for example, a dismissal order or acquittal order);

You must disclose all arrests and charges, even if the arrest occurred when you were a minor. An adjudication of juvenile delinquency is not a “conviction” under U.S. immigration law, but a juvenile can be charged as an adult for an offense committed while a juvenile. If you were convicted as an adult, there is a conviction, regardless of whether you were tried before a criminal court or a juvenile court. An adjudication of juvenile delinquency could also be relevant to the exercise of discretion. If you claim that an arrest resulted in adjudication of delinquency, and not in a conviction, you must submit a copy of the court document that establishes this fact.

In general, you do not need to submit documentation relating to traffic fines and incidents that did not involve an actual physical arrest if the penalty was only a fine of less than $500 or points on your driver’s license. However, you must submit such documentation if the traffic incident resulted in criminal charges or involved alcohol, drugs, or injury to a person or property.

If you are not able to obtain certified copies of any court disposition relating to Items A. - D., please submit:

1. An explanation of why the documents are not available, including (if possible) a certificate from the custodian of the documents explaining why the documents are not available;
2. Any secondary evidence that shows the disposition of the case; or
3. If secondary evidence is also not available, one or more written statements, signed under penalty of perjury under 28 U.S.C. section 1746, by someone who has personal knowledge of the disposition.

Instead, USCIS should replace the language above with the following:

Evidence of Convictions. You must submit certified court records for any criminal charges or convictions you may have. If you were EVER charged for any reason in any country, including the United States, you must submit certified copies of the final disposition of each charge.
The passage below should be revised to reflect that payment by credit card is now available for forms filed at a USCIS Service Center.

**Payments by Credit Card**

If you are filing your form at a USCIS Lockbox facility, you can pay your filing fee and biometric services fee (if applicable) using a credit card. Please see Form G-1450, Authorization for Credit Card Transactions, at [www.uscis.gov/G-1450](http://www.uscis.gov/G-1450) for more information.

**CONCLUSION**

The current version of Form I-765 and its instructions cannot be extended without revision. The judgment in *AsylumWorks* requires the changes outlined in this comment. These changes are urgently needed, yet USCIS has so far failed to take the steps needed to implement them. As recently as last week, USCIS made changes to the Form I-765 instructions regarding premium processing, while keeping the incorrect instructions for asylum seekers intact. And when other rules have been vacated, associated forms have been amended or rescinded within a matter of days. Because the current version of the form both exacerbates the agency’s adjudication backlogs and confuses applicants, USCIS should act expeditiously to make the required revisions.

Thank you for your careful attention to these matters.

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16 See USCIS, *Forms Updates* (June 1, 2022), [https://www.uscis.gov/forms/forms-updates](https://www.uscis.gov/forms/forms-updates) (reflecting that Form I-765 was updated on May 31, 2022).

Respectfully submitted,

Conchita Cruz  
Co-Executive Director

Zachary Manfredi  
Litigation Director

Bradley Jenkins  
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