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U.S. Citizenship and Immigration Services, Department of Homeland Security
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RE: DHS Docket No. USCIS-2019-0011: Comment to U.S. Citizenship and Immigration Services Asylum Application, Interview, and Employment Authorization for Applicants

Dear Ms. Deshommes:

Kids in Need of Defense (KIND) respectfully submits this comment on the November 14, 2019, Notice of Proposed Rulemaking for “Asylum Application, Interview, and Employment Authorization for Applicants” (“Proposed Rule”).¹ USCIS proposes sweeping changes to the eligibility requirements, process, and timeline for employment authorization applications by asylum seekers, including a 365-day waiting period, an unlawful bar on eligibility based on an asylum seeker’s place of entry, and new provisions that permit automatic terminations of asylum seekers’ employment authorization applications. While the Proposed Rule purports to uphold the integrity of the asylum system and to address a national emergency and border crisis,² it instead would dramatically undermine the ability of asylum seekers, including unaccompanied children, to access identification, employment opportunities, and services that are critical to their stability and well-being during the asylum process, and to ultimately secure lifesaving protection. Far from unintended consequences, these effects are integral to the Proposed Rule’s approach.

The Proposed Rule repeatedly invokes larger policy goals, including preventing fraudulent filings and precluding some asylum seekers from entering the U.S., as justifications for changes to the employment authorization process.³ In doing so, it relies on a flawed deterrence approach that mischaracterizes the

¹ U.S. Citizenship and Immigration Services, Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62,374 (Nov. 14, 2019) (Proposed Rule).

² 84 Fed. Reg. at 62,383.

³ See, e.g., *id.* at 62,386 (“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.”); *id.* at 62,383 (“This rule would reduce the incentives for aliens to file frivolous, fraudulent,

motives of asylum seekers and the conditions they are fleeing and sidelines the agency's responsibility to provide a reasoned basis for departing from longstanding policy and practice. KIND believes the changes proposed would erect impermissible and arbitrary barriers to both employment authorization and asylum protection for the most vulnerable, contrary to the aims of the underlying statutes. The Proposed Rule not only fails to provide sufficient justifications for upending a carefully balanced policy framework, but also neglects to meaningfully evaluate how the proposed changes interact with recent executive actions and regulatory proposals of grave concern that similarly seek to curtail asylum seekers' access to the U.S., and to immigration benefits and legal protection. As a result, the Proposed Rule's analysis of costs and benefits and its justifications for the proposed changes are incomplete and defective. Accordingly, we ask that USCIS withdraw the Proposed Rule.

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 20,000 children from 72 countries and has trained more than 50,000 attorneys, law students and paralegals to work with children. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits and relief for which their clients may be eligible. KIND also employs social services coordinators throughout the country, providing unaccompanied children with the support they need outside of the courtroom. KIND promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children.

Many of KIND's clients have fled severe violence and threats to their lives in their countries of origin and may be eligible for asylum. Contrary to the Proposed Rule's assertions, restrictive policies and stricter requirements for obtaining immigration benefits will not deter asylum seekers, including unaccompanied children, from coming to the U.S. KIND's extensive research in the Northern Triangle of Central America and the stories of KIND's clients confirm that extreme violence by gangs and criminal organizations, including sexual and gender-based violence, is a key driver of child migration. Widespread corruption and soaring impunity rates for these crimes leave many children without meaningful protection and with no choice but to flee for safety. The Proposed Rule overlooks and miscasts these realities and proposes to address the arrival of asylum seekers by creating additional burdens and procedural impediments that disincentivize applications for protection and work authorization—an approach at odds with longstanding practice and congressional intent to support those in need of protection in securing stability.

or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization or other forms of non-asylum-based relief from removal. . . .”).

I. The Proposed Rule Fails to Analyze the Impacts of Several Recent Policies and Regulatory Proposals, and Must Be Withdrawn to Allow for Reevaluation of Costs, Benefits, and Justifications in a Fuller Context

As noted in the Proposed Rule, the proposed changes to the employment authorization and asylum process are intended in part to give effect to an April 2019 presidential memorandum and a February 2019 executive proclamation declaring a national emergency at the Southern border.⁴ The presidential memorandum directed DHS to propose regulations to bar individuals “who have entered or attempted to enter the United States unlawfully from receiving employment authorization before any applicable application for relief or protection from removal has been granted, and to ensure immediate revocation of employment authorization for aliens who are denied asylum or become subject to a final order of removal.”⁵ These measures, however, represent only part of a troubling and far broader effort to narrow the protections and benefits available to asylum seekers. Yet the Proposed Rule fails to meaningfully address the impacts of these recent policies on the number of applications for asylum and work authorization USCIS receives, or the ways in which these policies would interact with the proposed changes. It instead relies on data from prior years,⁶ while omitting context and data that are critical to evaluating the reasonableness and necessity of the proposed changes, their costs and benefits, and potential alternatives. USCIS’ reliance on outdated data and its failure to analyze the impact of recent policies that have dramatically and detrimentally altered the asylum landscape renders the Proposed Rule arbitrary and capricious. The Proposed Rule should be withdrawn to allow for reevaluation of the proposed changes in a fuller, more accurate context.

A. The Proposed Rule Fails to Analyze the Effect of Recent Administrative Policies that Restrict Access to the U.S. Asylum System and, In Turn, Impact the Numbers and Timing of Applications for Asylum and Employment Authorization Received by USCIS

Through a combination of interim final rules, proposed regulations, and policy announcements the Administration has prevented tens of thousands of asylum seekers, including children, from entering the U.S. to request humanitarian protection, and has created new and significant administrative hurdles for those applying for asylum. These policies include metering, a process by which only a small number of asylum seekers are permitted to access U.S. ports of entry to request protection each day, while the remainder are turned back to Mexico to await an opportunity to request protection. Although unaccompanied children are

⁴ See 84 Fed. Reg. at 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); Proclamation No. 9844, Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019).

⁵ *Id.*

⁶ 84 Fed. Reg. 62402-62404 (citing data from 2014-2018 related to EOIR asylum caseloads and decisions and affirmative asylum filings).

not officially subject to metering, KIND’s field missions to the border have revealed that Mexican and U.S. immigration officials frequently misinform unaccompanied children about their rights to seek asylum and prevent them from approaching the ports of entry to request protection.⁷

A series of new polices and proposed rules have further restricted access to asylum. In January 2019, the Administration announced implementation of the Migrant Protection Protocols (commonly referred to as the “Remain in Mexico plan”), which permit the U.S. government to return certain asylum seekers to Mexico to await proceedings in their U.S. asylum cases. Although not officially subject to the policy, some unaccompanied children have nevertheless been returned to Mexico under the policy. To date, more than 55,000 asylum seekers have been forced to wait in Mexico,⁸ including more than 16,000 children and 500 infants.⁹ The Administration has also promulgated an interim final rule that denies asylum seekers eligibility for U.S. asylum protection if they transit through a third country en route to the U.S. without applying for asylum protection there.¹⁰ Further, through recently signed “asylum cooperative agreements” with Guatemala, El Salvador, and Honduras, the U.S. endeavors to return asylum seekers to these countries and bar them from applying for protection in the U.S.¹¹ KIND strongly opposes these policies, which frustrate both due process and access to protection for unaccompanied children and other migrants and asylum seekers.

As a consequence of these policies,¹² thousands fewer individuals, including unaccompanied children, will be able to access U.S. asylum protection, or even enter the U.S. to make such a request. Accordingly, one would expect far fewer applications for employment authorization by asylum seekers. Yet the Proposed Rule

⁷ See Kids in Need of Defense, *Blocked from Safety: Unaccompanied Children Along the U.S.-Mexico Border* (Apr. 29, 2019), <https://supportkind.org/wp-content/uploads/2019/06/Blocked-From-Safety-KIND-Border-Report-FINAL.pdf>; Kids in Need of Defense, *The Protection Gauntlet: How the United States is Blocking Access to Asylum Seekers and Endangering the Lives of Children at the U.S. Border* (Dec. 2018), https://supportkind.org/wp-content/uploads/2019/11/Protection-Gauntlet_12-21-18-FINAL.pdf.

⁸ NPR, *This Migrant Won In Immigration Court, And The U.S. Sent Him To Mexico Anyway* (Jan. 9, 2020), <https://www.npr.org/2020/01/09/794587498/this-migrant-won-in-immigration-court-and-the-u-s-sent-him-to-mexico-anyway>.

⁹ Reuters, *Exclusive: U.S. migrant policy sends thousands of children, including babies, back to Mexico* (Oct. 11, 2019), <https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1>.

¹⁰ 84 Fed. Reg. 33829.

¹¹ See *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 Fed. Reg. 63994 (Nov. 19, 2019).

¹² Numerous legal challenges to these policies are pending, creating even greater uncertainty about their overall impact. Nonetheless, in the interim, they are already having a substantial impact on asylum processing and significantly altering the reliability of relying on past data.

curiously disregards the cumulative effect of these policies while asserting the necessity of the proposed reforms to safeguard the asylum system's integrity, prevent fraud, and address a continuing humanitarian crisis. The agency cannot have it both ways. The Proposed Rule must be withdrawn and an analysis in light of the anticipated effects of these other policies incorporated into the baseline analysis.

B. The Government Has Proposed Numerous Rules to Weaken Access to Employment Authorization for Asylum Seekers, Creating a Hodge-Podge of Justifications and Theories that Are Not Sustainable In Combination

In addition to dramatic reductions in access to asylum itself, recent proposed rules have targeted aspects of the employment authorization scheme, with no attempt to reconcile or coordinate across wildly differing approaches. Any analysis of the relationship between asylum and work authorization should begin with the principles of the Refugee Convention, as codified in domestic law, and should be informed by the careful balancing that took place in setting up the 1995 U.S. regulatory scheme,¹³ much of which is upended in the Proposed Rule under discussion. Instead, in both the Proposed Rule and other recent regulations proposing eliminating the 30-day EAD processing requirement¹⁴ and promulgating the new proposed fee schedule,¹⁵ DHS simply ignores the rationale that has represented a balancing of the government's and the applicant's interests. In short, the longer an asylum adjudication is delayed, the greater the need for rapid, efficient, and streamlined processing of work authorization so that the asylum applicant can earn a living while waiting for a determination.

Any effort to read the various regulatory proposals affecting EADs that are now pending together is likely to result in confusion because the proposals lack a coherent and sustainable vision of the relationship between asylum applicants and work authorization. For example, in attempting to justify elimination of the 30-day processing requirement, DHS argues that the requirement is untenable in light of the asylum backlog, but never explains why it is excusing the government from any obligation to produce work authorization documents in a timely manner. Similarly, in proposing that asylum seekers should pay a fee for both the asylum application and their initial EAD, DHS acknowledges that asylum applicants cannot be charged the full cost of their application because most could not afford it, but then proceeds to charge the full cost of the initial EAD application—ignoring the obvious conclusion that those who cannot afford their asylum application will have similar trouble paying for an initial EAD application. In the Proposed Rule under discussion, the approach is to downplay any economic hardship in favor of the integrity of the asylum system, arguing that severe restrictions on access to EADs are the only option for reducing alleged fraud. While the remainder of our comments will address the inadequacy of this argument, the broader takeaway is that the Proposed Rule,

¹³ See *infra* notes 24 to 27 and accompanying text.

¹⁴ Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47,148 (Sept. 9, 2019).

¹⁵ U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280 (Nov. 14, 2019)

along with those that came before it, is far less about regulating employment authorization, and far more about creating insurmountable barriers for asylum seekers.

In fact, with each new proposal involving the regulation of employment authorization, it becomes ever more clear that the government intends to decouple the asylum and employment authorization applications, increasing the burdens on asylum applicants by eliminating the likelihood of work authorization. One short example from the Proposed Rule illustrates this problem. DHS proposes requiring a separate biometric submission for each Employment Authorization request, even though asylum seekers are already required, under 8 CFR § 1003.47,¹⁶ to submit biometric data. Another submission is duplicative and unnecessary, wasting applicant and government resources. For unaccompanied children, in particular, it represents a disruptive and costly additional step in an already burdensome and confusing process. While this is a wasteful proposal and should be rejected for that reason alone, it also appears designed to eliminate any relationship between granting an EAD and the existence of a pending asylum application.

There is value and efficiency in closely aligning asylum applications and the corresponding employment authorization documents. From the perspective of unaccompanied children, the knowledge that employment authorization is available can help them to overcome some of the feelings of doubt and uncertainty that arise from their past trauma.¹⁷ From the government's perspective, creating additional adjudicatory steps is a waste of valuable resources better spent on resolving claims than throwing up barriers to asylum seekers. DHS has systematically failed to acknowledge the important role that work authorization plays in ensuring genuine access to the asylum process. Absent a coherent and holistic approach to this issue, the Proposed Rule is fundamentally flawed and should be withdrawn.

C. The Government Fails to Meaningfully Consider Alternatives to the Proposed Rule

Despite advancing significant changes to longstanding processes and policies, the Proposed Rule fails to meaningfully consider alternatives to such action. Amid a host of other policy changes, and while indicating it has very little data on which to base its decision, USCIS could have considered a pilot program to evaluate and gather data on the need for and effectiveness of one or more of the proposed reforms before proceeding to a Proposed Rule. Indeed, the Proposed Rule suggests that the agency has made progress with initiatives already undertaken in an effort to address the asylum backlog.¹⁸ Irrespective of KIND's concerns with these efforts, the Proposed Rule references the agency's return to a last-in first-out ("LIFO") policy for processing asylum applications and notes that "[s]ome offices already report a 25 percent drop in affirmative asylum filings since implementation of the LIFO scheduling system in January 2018."¹⁹ Elsewhere, the Proposed Rule acknowledges that a 5-year average is not provided for time intervals for affirmative asylum filings "because they are directly

¹⁶ See also 8 CFR § 208.10 and 8 CFR § 1208.10

¹⁷ See *infra* notes 39 and 40.

¹⁸ 84 Fed. Reg. 62393.

¹⁹ *Id.*

affected by the change from FIFO to LIFO processing.”²⁰ It states that “[a] key inference is that under LIFO, the majority of DHS affirmative asylum cases were adjudicated in less than one year,” leading to a cost savings in forgone filings by some 7,180 would-be applicants.²¹

The Proposed Rule makes only passing efforts to consider other alternatives to the proposed changes. For example, it states that an alternative to the proposed 365-day waiting period to apply for an EAD is “rescinding work authorization for asylum applicants altogether, which is permissible under INA 208(d)(2).”²² The Proposed Rule ultimately concludes that the proposed waiting period better balances deterrence of abuse with timely protection of those who merit it, but oddly fails to consider other any other alternatives, including a different time period.

II. Requiring a One-Year Wait for Asylum Applicants to Seek Employment Authorization is Arbitrary and Capricious

The primary thrust of the Proposed Rule is to extend the waiting period for asylum applicants to seek employment authorization from under six months to one full year. During this time, bona fide asylum seekers – persons who, by definition, have fled persecution or torture, or a serious fear of imminent harm, often with few resources available to them – would be precluded from supporting themselves through any lawful means. The agency’s effort to justify this change is wholly inadequate under the Administrative Procedure Act and relevant executive orders.

A. The Agency’s Failure to Quantify All Costs, and Inability To Quantify or Define a Single Benefit, Render the Proposed Rule Arbitrary and Capricious

The rulemaking is unable to quantify a single benefit from this change.²³ Moreover, in estimating only the direct fiscal costs of reduced employment, USCIS also fails to estimate the true costs of the rule, ignoring the impact and financial pressure imposed on family, friends, and communities when 305,000 people are unable to achieve self-sufficiency for an additional six or more months.²⁴

²⁰ *Id.* at 62404.

²¹ *Id.* at 62408.

²² *Id.* At 62393.

²³ 84 Fed. Reg. at 62383 (“[T]he benefits potentially realized by the proposed rule are qualitative”); 84 Fed. Reg. at 62400, Table 7 (noting no quantified benefits whatsoever).

²⁴ *See* 84 Fed. Reg. at 62378 (noting maximum population of 305,000 in first year and 290,000 in out years). While this comment focuses on the extension of the initial waiting period, the other ways the proposed rule burdens asylum seekers through earlier discontinuations of EADs as cases pass through different level review

It is the very nature of the cost-benefit analysis required by Executive Orders 12866 and 13563 that costs and benefits should be quantified and evaluated together.²⁵ The agency's failure to identify a single benefit that offsets billions in direct costs alone renders the rule arbitrary and capricious. *Cf. Ctr. For Biological Diversity v. NHTSA*, 538 F.3d 1172, 1200 (9th Cir. 2008) (finding, in parallel context, that cost-benefit analysis was arbitrary and capricious when the agency did no quantification of benefits that were "certainly not zero"). Courts invalidate agency action that "inconsistently and opportunistically frame[s] the costs and benefits of the rule" or "fail[s] adequately to quantify the certain costs" or benefits, nor "explain why those costs could not be quantified." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011). The Proposed Rule suffers from each such defect in cost-benefit analysis.

This failure to even gesture at a quantifiable benefit suggests the weakness of the agency's stated rationale, which is borne out through an analysis of the reasons that are given. DHS claims that reducing employment eligibility will "reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization."²⁶ And it notes that the overall asylum grant rate is approximately 20%.²⁷ But the rulemaking provides no basis to think that the other 80% of applications are in substantial part frivolous or fraudulent, as opposed to good-faith applications that for one reason or another are not adjudicated in the applicant's favor under applicable asylum law. There is no reason for the agency to seek to deter that latter group of applications, and little reason to think that the loss of the possibility of an EAD *would* deter them from filing to any substantial degree. Yet it is irrational to penalize all good-faith applicants in order to deter an unquantified number of fraudulent or other bad-faith applicants — an error compounded by the lack of any effort to quantify those differently situated groups of applicants. *See Business Roundtable*, 647 F.3d at 1149-50 (rejecting agency analysis that failed to quantify costs and benefits, instead relying on "mere speculation").

The agency did not, apparently, even consider initial vetting to differentiate good-faith from fraudulent applications or exempting applicants who already have a favorable initial screening (such as a positive credible fear finding) from the extended EAD deadline. Such screening techniques could, it stands to reason, accomplish much of the benefit claimed for the regulation at far less cost, if the EAD deadline were only extended for the subset of applicants deemed likely to be fraudulent, rather than simply marginal cases on the merits. It was arbitrary not to consider some such screening approach.

Nor does the government address other benefits that accrue to asylum seekers who are allowed to work. For example, work authorization may allow applicants to afford legal counsel. It is well documented that asylum

would, by the same token, increase the population requiring social support rather than being allowed to contribute economically to the country.

²⁵ "[E]ach agency must . . . propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs." Executive Order 13563, "Improving Regulation and Regulatory Review" (Jan. 18, 2011), sec. 1(b), *reprinted at* 3 C.F.R. p. 215 (2012).

²⁶ 84 Fed. Reg. at 62378.

²⁷ 84 Fed. Reg. at 62385.

seekers represented by counsel are more likely to appear for hearings and interviews, present cases that can be adjudicated more efficiently, and have roughly twice the chance of obtaining relief of unrepresented persons.²⁸ Failure even to acknowledge, much less quantify, these benefits undermine the purported rationale.

None of the agency's stated rationales explain, moreover, why 365 days, as opposed to 10 or 190 or 3,650, strike an appropriate balance between the concerns about incentives and the hardships on applicants. An appropriate examination of the competing interests USCIS claims to be balancing requires a more searching approach to costs and benefits than simply doubling the period and hoping for the best.

B. An Extensive Waiting Period for Work Eligibility Is Inconsistent with the Principles and History That Led to the Refugee Convention and Protocol and Subsequent Regulations.

The United States is a signatory to international treaties protecting the rights of refugees;²⁹ its obligations are codified under the Refugee Act of 1980.³⁰ Central to those protections is the guarantee of access to the asylum process, such that “[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum.”³¹ Historically, one of the measures of this guaranteed access has been the ability to apply for asylum without cost – endangered by an earlier USCIS rulemaking to add an asylum application fee³² – as well as the ability to work if the asylum application remains pending beyond a reasonable initial period.

As is well known, the Refugee Convention and Protocol arose out of the global experience of displaced persons during and following the World Wars, resulting in both U.S. legislation and eventually the international instruments to address what President Truman then called “a world tragedy.”³³ The Immigration and Nationality Act, as amended by the 1980 Refugee Act, implements U.S. obligations under those instruments. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). In the early years under the modern asylum system created

²⁸ See, e.g., Ingrid Eagly & Steven Shafer, American Immigration Council, “Access to Counsel in Immigration Court” (Sept. 28, 2016), at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> (finding that detained immigrants were twice as likely, and never-detained immigrants five times as likely, to obtain relief if they have counsel).

²⁹ UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011, available at: <https://www.refworld.org/docid/4ec4a7f02.html> [accessed 22 December 2019].

³⁰ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of titles 8 & 22, U.S.C.).

³¹ 8 USC § 1158(a)(1).

³² U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280 (Nov. 14, 2019).

³³ U.S. Holocaust Memorial Museum, Holocaust Encyclopedia: United States Immigration and Refugee Law, 1921–1980,” available at <https://encyclopedia.ushmm.org/content/en/article/united-states-immigration-and-refugee-law-1921-1980>.

by the 1980 Act, the government anticipated that asylum applications would be processed quickly, and created a 180-day processing deadline to ensure that employment authorization could be rendered “as quickly as possible.”³⁴

In abandoning a relatively timely application and adjudication period for a full yearlong wait, USCIS fails to engage with the careful compromise forged by DOJ in the 1994 rules creating the current asylum work authorization system. While USCIS suggests that many asylum applications can simply be adjudicated within a year, obviating the need for a separate employment authorization process, there is no quantitative evidence presented that it can succeed in doing so. The result is a system that provides neither a quick adjudication of the underlying application, *nor* employment authorization “as soon as possible” to offset the burden of an extended adjudication period. It is arbitrary and capricious to reject all of the reasons involved in the 1994 rules without engaging with the concerns that animated them or the way the current balance was reached.

C. The Proposed Rule Fails to Consider the Burden on Unaccompanied Children’s Access to Non-Work Resources

By doubling the wait for an EAD, the Proposed Rule substantially burdens unaccompanied child asylum applicants; yet the Notice fails even to consider these hardships.³⁵ Unaccompanied children may face wait times of up to two years or more for their asylum claims to be decided. EADs are often the only proof of lawful residence asylum-seekers can provide.³⁶ Unaccompanied children need EADs to receive Social Security Number (SSNs), which are common prerequisites for accessing long-term educational opportunities, qualifying for vocational and technical programs, obtaining health insurance, and receiving preventative care.³⁷ For example, unaccompanied children in Georgia who do not have SSNs are ineligible for PeachCare, the state-wide child healthcare program,³⁸ and the same is generally true for state identification documents and access to physical and mental health treatment nationwide. KIND’s social service staff have observed that an SSN is a prerequisite for obtaining a driver’s license in New York, opening a bank account as a teenager in Massachusetts, obtaining a driver’s license or state ID in Texas, receiving an independent living

³⁴ INS, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10318 (Mar. 6, 1997).

³⁵ It has been KIND’s experience that many of the recent policy practices, such as LIFO, have exacerbated waiting times for those clients already in the backlog. The inability to timely adjudicate asylum applications should not become an excuse for prolonging the wait for employment authorization.

³⁶ See Mass. Registry of Motor Vehicles, *Massachusetts Identification (ID) Requirements*, <https://www.mass.gov/guides/massachusetts-identification-id-requirements>.

³⁷ See U.S. Social Security Admin., *Applying for Your Social Security Number While Applying Your Work Permit*, https://www.uscis.gov/sites/default/files/USCIS/Working%20in%20the%20US/EBE_Flyer_Apply_for_your_Social_Security_Number_While_Applying_for_Your.pdf.

³⁸ *Id.*; GA. DEP’T OF HUM. SERVS., *MEDICAID MANUAL*, § 2215 (last revised Feb. 2019), available at <http://www.georgiamedicaidlaw.net/gamedicaid/2215.pdf>.

stipend for long term foster care recipients in Washington state, and in dozens of other state programs in our areas of service.

The importance of ensuring access to healthcare cannot be overemphasized. The act of seeking asylum in itself can be both traumatic and psychologically taxing, over and above the traumas and injuries many child asylum seekers suffered in their countries of origin that prompted their travel here.³⁹ Children entering the country are unsure whether they will get to safely remain in the U.S. or be sent back to the violence, sexual abuse, persecution, or extreme poverty that they fled. The proposed rule would compound that uncertainty and worsen existing psychological damage by inhibiting access to treatment.⁴⁰ Instead of creating a sense of safety and security, prolonged delays in obtaining the EAD could easily contribute to a failure to address their uncertainty and insecurity, heightening the fears and anxieties that already plague many child asylum-seekers.

III. Denial of Eligibility for Employment Authorization to Asylum Seekers Who Flee Across the Border Between Ports of Entry is Inconsistent with the Asylum Statute

Congress has been exceedingly clear that the asylum process is to be available to noncitizens who flee persecution across our borders, no matter how they arrive. In particular, and consistent with international obligations, the asylum process is available to any noncitizen “physically present in the United States or who arrives in the United States whether or not at a designated port of arrival . . . irrespective of such alien’s status.” 8 U.S.C. § 1158(a)(1).

The Trump Administration has previously attempted to circumvent this clear statutory mandate through a different rulemaking and accompanying presidential proclamation, which purported to bar substantive asylum *eligibility* where migrants entered between ports of entry to seek protection.⁴¹ This regulation was promptly and appropriately enjoined, and neither the Court of Appeals nor the Supreme Court has been willing to stay

³⁹ Kiara Alvarez and Margarita Alegria, *Understanding and Addressing the Needs of Unaccompanied Immigrant Minors*, AM. PSYCHOLOGICAL ASS’N (June 2016), at <https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors>.

⁴⁰ Human Rights Watch, *At Least Let Them Work*, (Nov. 12, 2013) (“[Asylum seekers] who had survived egregious persecution in their home countries said that being barred from work made them feel that they were re-experiencing persecutory or discriminatory treatment.”), available at <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>.

⁴¹ Department of Homeland Security and Department of Justice, *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018).

that injunction. *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (preliminary injunction), *stay denied*, 909 F.3d 1219 (9th Cir. 2018), *stay denied*, 586 U.S. ___, No. 18A615 (Dec. 21, 2018).

The Proposed Rule attempts to recreate the deterrent effect of the enjoined bar on asylum applications by imposing an absolute bar to employment authorization for the same group of applicants.⁴² The entirety of the agency's justification consists of two sentences, both unavailing: "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."⁴³ *First*, this justification mischaracterizes the asylum statute, which provides eligibility to qualified applicants who establish their eligibility to a more appropriate standard of proof; "truly in need" is to the best of our knowledge not a standard found in any part of immigration law. *Second*, the second sentence does not follow from the first at all. Interim employment authorization exists for purposes somewhat separate from the underlying benefit, and allows, *inter alia*, for bona fide applicants to be self-sufficient, for children to access health care, and the other EAD purposes discussed above.

Third, the purported rationale fails to engage with the provision at issue in the *East Bay Sanctuary Covenant* case, where the courts have been clear that Congress meant for asylum to be open to applicants regardless of their means of entry – in part because flight across borders is recognized, in the international agreements that form the basis for the domestic protections, as a frequent concomitant of a bona fide need for asylum. See *East Bay Sanctuary Covenant*, 909 F.3d at 1248-49. While it is true that employment authorization is a separate exercise of administrative discretion from the grant of asylum, both are clearly governed by the Act's basic provision of eligibility irrespective of manner of entry. For that reason, the proposed regulation is arbitrary and capricious, as well as statutorily impermissible because it is inconsistent with the express terms of the asylum eligibility provision.

IV. The Proposed Rule's Treatment of Termination of Authorization Requires Clarification for Unaccompanied Children, and Unjustly Prevents Access to Judicial Review

The Proposed Rule substantially changes the conditions for terminating an EAD at various points in the adjudicative process. KIND focuses on two particular deficiencies in this part of the Proposed Rule but notes that in general the rule provides an inadequate justification for the stricter termination provisions. To the extent that the rule as a whole is motivated by a desire to disincentivize fraudulent filings, it is not clear how that interest is furthered by abruptly terminating an already-granted EAD. The agency should revise the Proposed Rule, and republish it for comment, with appropriate justifications for these provisions.

⁴² 84 Fed. Reg. at 62,392; proposed 8 C.F.R. § 208.7(a)(1)(iii)(G).

⁴³ *Id.*

A. The Proposed Rule Requires Clarification with Respect to the Termination of EADs for Applications Filed by Unaccompanied Children

As the Proposed Rule notes, the Trafficking Victims Protection Reauthorization Act of 2008 creates special procedures for unaccompanied children who are in removal proceedings to pursue asylum before the Asylum Office, a hybrid between the “affirmative” and “defensive” asylum procedures that apply in all other cases.⁴⁴ The Proposed Rule appropriately, therefore, exempts such unaccompanied children from its imposition of a one-year filing deadline, as unaccompanied children are per se exempt from that deadline on their asylum applications.⁴⁵

It is unclear, however, how the termination provisions apply to unaccompanied children whose applications are not granted by USCIS. Under the explanation of the proposed rule, “when a USCIS asylum officer denies an alien’s request for asylum,” an associated EAD is “automatically terminated”; but when an 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.”⁴⁶ Under the TVPRA, when an unaccompanied child’s case is denied by USCIS, the case reverts to immigration court, where the child can again seek asylum defensively before an immigration judge. Is this to be deemed a denial or a referral, for purposes of EAD continuation, under the Proposed Rule?

Clearly the appropriate determination, consistent with the TVPRA, is for the EAD to continue, since the same asylum application remains pending. This is not, however, entirely clear from the preamble or from the proposed rule text. Accordingly, if the Proposed Rule is finalized, KIND suggests that proposed paragraph 208.7(b)(1)(i) be revised expressly to state that unaccompanied children’s applications are to be treated the same as the other “referrals” covered by that paragraph.

B. The Proposed Rule Would Deny Access to Judicial Review

The Proposed Rule’s termination provision precludes extension of the EAD to cover the time that a petition for review is pending in federal court, until the case is remanded back to EOIR for further proceedings.⁴⁷ The agency’s stated reason is that allowing EADs to last through judicial review would invite abuse of the appeals process. This seems a wholly insufficient reason to preclude individuals from any ability to make a showing that theirs is a bona fide pursuit of meaningful review and amounts to a denial of access to the constitutional guarantees provided by the Due Process Clause and the Suspension Clause. While the agency may have reasons to reevaluate the exercise of discretion in particular cases where there appears to be abuse of an appeals process, it is unreasonably obstructive of individuals’ access to justice to entirely preclude EADs during

⁴⁴ 84 Fed. Reg. at 62387 n.59.

⁴⁵ 84 Fed. Reg. at 62386 n.54; *id.* at 62390.

⁴⁶ 84 Fed. Reg. at 62391.

⁴⁷ 84 Fed. Reg. at 62391.

the pendency of a federal appeal. USCIS should reverse this arbitrary and capricious determination and consider alternative approaches that allow it to address possible abuses while retaining meaningful access to court for applicants.

Conclusion

For the foregoing reasons, the Proposed Rule should be withdrawn and, if not withdrawn, revised and published for further public comment with data, quantitative analysis, and a consideration of alternatives sufficient to justify DHS's burden under the Administrative Procedure Act and applicable executive orders. If a version of the Proposed Rule is ultimately published, the termination provisions' applicability to unaccompanied child asylum filers should be clarified.

Should you have further questions about this comment, please contact Mary Giovagnoli at (202) 318-0592.

Sincerely,

/s/

Jennifer Podkul

Vice President for Policy and Advocacy