



# CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

## FAQs on Changes to the Employment Authorization Rules for Asylum Seekers

### 1. What are the new rules that pertain to employment authorization for asylum applicants?

Recently, the administration issued two new rules. On June 19, 2020, the administration [issued](#) a final rule titled Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, and on June 26, 2020, the administration [issued](#) Asylum Application, Interview, and Employment Authorization for Applicants. These rules will change the eligibility criteria and adjudication timeline for employment authorization documents (EADs) based on a pending asylum application. CLINIC submitted comments to both proposed rules [here](#) and [here](#).

### 2. Can an asylum seeker get an EAD?

Yes, an asylum seeker can get an EAD under the category (c)(8), but the rules have changed significantly.

### 3. How long does it now take before an asylum seeker can apply for an EAD?

Under the old rules, an asylum seeker must wait 150 before applying for an EAD. By the time of the EAD application adjudication, the asylum applicant will have waited a total of 180 days. Days based on “applicant caused-delays” do not count towards the 180 days and the government has maintained an asylum clock to count the days towards the required 180 days.

Under the new rule, the asylum applicant must wait 365 days after filing the asylum application before submitting an EAD under the asylum-pending category. After the EAD application is submitted, a United States Citizenship and Immigration Services (USCIS) officer will determine whether there is an unresolved “applicant-caused delay” in place when the EAD application was filed, and whether the application merits a denial based on this delay. 8 CFR § 208.7(a)(1)(ii).

#### 4. What is an “applicant-caused delay”?

The new rule instructs officers to deny EAD applications where there are unresolved or outstanding “applicant-caused delays” in the adjudication of the I-589 when the EAD application is submitted. Thus, even if an asylum applicant has waited the entire 365 days before submitting an EAD application, the officer will still deny the EAD application if there are any unresolved “applicant-caused delays” in the adjudication of the I 589.

The new regulations contain a non-exhaustive list of “applicant-caused delays” that USCIS will consider. These delays include amending an asylum application that causes a delay in adjudication; an unexcused failure to appear at an asylum interview or decision pick-up; failure to appear at a biometrics appointment; not filing supplemental documentation to the asylum office within 14 days of an interview, a request to transfer asylum offices or to reschedule an asylum interview, a request to provide additional evidence, or a failure to provide an interpreter. 8 CFR § 208.7(a)(1)(iv)(A)-(J).

The regulations do not contain any information or guidance as to any applicant-caused “delays” before EOIR such as a motion to continue or motion to change venue. Prior to this rule, EOIR and USCIS issued a joint memorandum “[180-day Asylum EAD Clock Notice](#)” that offered guidance as to delays before USCIS and EOIR that could cause the 180-day clock to stop. Delays before EOIR that would have stopped the 180-day clock include filing a motion to continue and motion to change venue. Thus, it is possible that filing a motion to continue before EOIR, which may still be outstanding at the time of the EAD adjudication, could result in a denial of the EAD.

#### 5. Are asylum applicants who have filed their asylum application beyond the one-year filing deadline eligible for an EAD?

Under the new rules, no. Pursuant to the new rule, 8 CFR §208.7(a)(iii)(F), an asylum applicant who files an asylum application beyond the one-year filing deadline, and is not found by an adjudicator to meet an extraordinary circumstance or changed circumstance exception to the one-year filing deadline, is not eligible for an EAD. Either an asylum officer or immigration judge can determine whether an asylum applicant meets an exception to the one-year filing deadline pursuant to INA § 208(a)(2)(D), but this determination must be made before an asylum applicant is eligible for an EAD. As a practical matter, under current procedures, asylum officers and immigration judges do not decide whether an applicant has met a one-year filing deadline exception until they adjudicate the case on the merits.

This rule does not apply to applications that were filed by unaccompanied minors (UACs) as defined by DHS because they are not subject to the one-year filing deadline. Thus, if an unaccompanied minor loses “UAC” designation, they will be subject to the one-year filing deadline and will not be eligible for an EAD unless they satisfy an exception.

This rule will apply only to asylum applicants who file their **asylum application on or after the effective date of the rule, August 25, 2020**, and filed after missing their one-year deadline.

**Example:** Maria arrived in the United States in 2016. She has not yet applied for asylum because she is not yet comfortable talking about her sexual orientation. If Maria applies for asylum before August 25, 2020, this portion of the rule, 8 CFR § 208.7(a)(1)(iii)(F), will not apply to her and she will still be able to apply for an EAD under the old rules. However, if she files her asylum application on or after August 25, 2020, the new rule will apply to her and she will not be eligible for an EAD unless an adjudicator determines that she meets an exception to the one-year asylum filing deadline.

**6. Are asylum seekers who entered the United States without inspection (EWI) eligible for an EAD?**

Under the new rules, no. Pursuant to the new rule, 8 CFR § 208.7(a)(1)(iii)(G), asylum applicants who enter the United States between ports of entry on or after August 25, 2020 are ineligible for an EAD.

There are exceptions. If an asylum applicant enters the United States without inspection and presents themselves to a DHS official within 48 hours, claims a fear of persecution or torture, and establishes “good cause” for entering between ports of entry, the rule will not apply. A USCIS officer can determine what is or what is not “good cause” on a case-by-case basis, but some examples given in the discussion of the final rule include need for medical attention or fleeing imminent serious harm, but do not include evasion of U.S. immigration officers or to circumvent orderly asylum processing. 8 CFR § 208.7(a)(1)(iii)(G)(1)-(3).

**7. Are asylum seekers who have come into contact with law enforcement eligible for an EAD?**

Asylum applicants who have an aggravated felony conviction will continue to be ineligible for an EAD under 8 CFR § 208.7(a)(1)(iii)(A). The new rules expand asylum-pending EAD ineligibility to those who have been convicted of a particularly serious crime or committed a serious non-political crime outside the United States on or after August 25, 2020. 8 CFR §

208.7(a)(1)(iii)(B) & (C). Further, the new rule states that if “the applicant fails to establish that he or she is not subject to a mandatory denial of asylum to any regulatory criminal grounds under 8 CFR § 208.13(c),” they will not be eligible for an EAD.<sup>1</sup> See 8 CFR § 208.7(a)(1)(iii)(D).

Asylum applicants who file EAD applications on or after August 25, 2020, will have to provide biometrics for their initial and renewal EAD applications.

**Example:** Joe arrived in the United States in March 2020 and applied for asylum in May 2020. His asylum application is still pending. On July 31, 2020, he was convicted of assault with a deadly weapon, a particularly serious crime. While he may be barred from asylum, he should still be eligible for an EAD while his asylum application is pending.

## 8. Are there any new rules on EAD terminations?

Yes, there are rules that pertain to EAD terminations. The old rule allowed for an EAD to be valid for 60 days after an asylum officer denies an asylum application or on the date the EAD expires — whichever is longer. Under the new rule, an EAD will automatically terminate on the day the asylum application is denied. Additionally, if the asylum application is denied during the 365-day waiting period for an EAD application or before USCIS actually adjudicates the initial request for an EAD, the pending EAD application will be denied.

If the asylum application is referred by the asylum office to immigration court, the asylum application is deemed to be pending, thus the EAD will continue to be valid and an asylum applicant can continue to renew the EAD. 8 CFR § 208.7(b)(1). Likewise, time will continue to accrue towards the 365 days after the asylum application is referred to immigration court.

If the immigration judge denies asylum, the EAD will automatically terminate 30 days after the decision unless the applicant submits a timely appeal to the Board of Immigration Appeals (BIA). If the applicant timely files an appeal, the EAD will remain valid, and renewals will be granted until the BIA decision. If the BIA denies or dismisses the appeal, the EAD will automatically terminate as of the date of the BIA decision. 8 CFR § 208.7(b)(1)(i)-(ii).

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<sup>1</sup> This section of the rule pertains to the new proposed regulatory criminal grounds under 8 CFR 208.13(c) *Procedures for Asylum and Bars to Asylum Eligibility*, 84 FR 69640 (Dec. 19, 2019). They do not include mandatory bars found at INA § 208(b)(2)(A)(1)(i) (persecutor bar), (iv) (danger to national security), or (v) (terrorist activity).

EADs are now prohibited during the federal court appeal process unless the case is remanded to the Executive Office of Immigration Review (EOIR) for a new decision.

#### **9. Are there new rules regarding extensions of EADs?**

Yes, there are new rules. If an asylum applicant's EAD will expire before the date of an Asylum Office (AO), IJ or BIA decision, the asylum applicant may file an EAD renewal. If the EAD renewal is timely, the previously issued EAD will automatically be extended for 180 days or until the date of the final decision on EAD application.

The new rule clearly states at 8 CFR § 208.7(b)(2), however, that an EAD will automatically terminate when an asylum application is denied, unless there is a BIA appeal, or when the automatic extension expires, whichever is earlier. Thus, regardless of whether the EAD had previously auto-extended, it can still be terminated upon the denial of an asylum application. See 8 CFR § 274a.13(d)(3).

#### **10. How do the new regulations affect unaccompanied minors?**

The asylum office has initial jurisdiction over an asylum application filed by an unaccompanied minor in removal proceedings who meets the "UAC" definition as defined by DHS. A UAC is a child who: a) has no lawful status; b) is not yet 18 years old; and c) has no parent or legal guardian to provide custody and care. If an asylum officer denies asylum to an accompanied minor, the case is then transferred back to the IJ for adjudication. This transfer back to the IJ will not be considered a "denial," but will be treated more like a referral to the IJ. Thus, an unaccompanied minor's EAD will not automatically terminate upon the asylum officer's decision not to grant asylum and will only terminate 30 days after an IJ denies asylum if a BIA notice of appeal has not been filed.

If the unaccompanied minor is in lawful status when the asylum application is denied, and the case is not transferred or referred to immigration court, the EAD will automatically terminate under 8 CFR § 208.7(b)(2).

#### **11. What is the validity period for an EAD?**

The new rule, 8 CFR § 208.7(a)(1)(i), states that USCIS may grant an initial EAD for up to two years in the discretion of the officer.

#### **12. Can asylum seekers who have established a Credible Fear or Reasonable Fear and who have been paroled from detention obtain an EAD?**

No. The new rule, 8 CFR § 274a.12(11), states that asylum seekers who have passed the protection screening process and are paroled from detention, will not be eligible for an EAD based on the (c)(11) category. These asylum seekers will have to file an asylum application with the immigration judge and establish eligibility for an EAD under the (c)(8) category. It seems this section of the rule will be implemented immediately.

This portion of the new rule purportedly clarifies an existing rule that arriving aliens who are paroled from detention after passing a credible fear interview were never eligible to obtain employment authorization based on that parole status.<sup>2</sup>

### 13. Are there any other procedural changes regarding asylum applications?

Yes.

**Rejected asylum applications.** The regulations at 8 CFR § 208.3, which previously stated that an I-589 will be deemed complete and properly filed if USCIS fails to return an incomplete I-589 within 30 days, are amended. The amended rule no longer requires that USCIS return a rejected asylum application within 30 days, and an incomplete asylum application will be considered incomplete regardless of when USCIS rejects the application. Thus, the 365 days would not actually start until the application has been accepted and receipted. This is significant because USCIS has been rejecting asylum applications based on insignificant omissions on the form such as a missing middle name. Applicants are required to write “N/A” in every blank or risk an application rejection.

**Recommended approvals.** The regulations no longer include language of “recommended approvals.” Thus, asylum officers will no longer issue recommended approvals for asylum applications lacking final results on background and security checks. 8 CFR § 274a.12(c)(8)(ii).

### 14. What are the new rules pertaining to USCIS’s obligation to adjudicate an asylum application within 30 days?

The new regulation, 8 CFR § 207.8(a)(1) will no longer require that USCIS officers adjudicate initial EAD applications based on a pending asylum application within 30 days. The new regulation also no longer requires that renewal EAD applications based on a

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<sup>2</sup> See Asylum Application, Interview, and Employment Authorization for Applicants, Discussion of the Final Rule at page 69.

pending asylum application be received by the USCIS 90 days prior to expiration of the employment authorization. **This rule will go into effect on August 21, 2020.**

**15. How does this new 30-day rule affect *Rosario* class members?**

USCIS is required to adjudicate initial asylum applicant EAD applications within the 30 days pursuant to a court order in *Rosario v. USCIS*, a certified nationwide class action. 365 F. Supp. 3d 1156 (W.D. Wash. 2018). The *Rosario* order requires USCIS to comply with its own regulations. Therefore, USCIS will not be required to process EAD applications within 30 days on or after **August 21, 2020**. Please see a [Practice Alert](#) by class counsel here.