November 8, 2019

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
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RE: Opposition to Removal of 30-Day Processing Provision of Asylum Application-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47148 (Sept. 9, 2019) DHS Docket No. USCIS-2018-0001

Dear Ms. Deshommes:

Counsel in *Rosario v. U.S. Citizenship & Immigration Servs.*, No. 2:15-cv-00813 (W.D. Wash.), write in response to DHS Docket No. USCIS-2018-0001, the Department of Homeland Security's Notice of Proposed Rulemaking on Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications (Sept. 9, 2019) (hereinafter, "Proposed Rule").

The Proposed Rule will have immediate and harmful effects on asylum seekers and their families as well as the U.S. economy. The Proposed Rule - by delaying adjudication and completion of background checks – would serve only to exacerbate any fraud or national security concerns cited as justification by the Department of Homeland Security ("DHS") U.S. Citizenship and Immigration Services ("USCIS").

Counsel represent a certified nationwide class of asylum applicants seeking initial employment authorization documents ("EADs") pursuant to 8 C.F.R. § 208.7(a)(1). *Rosario v. U.S. Citizenship & Immigration Servs.*, No. 2:15-cv-00813, 2017 WL 3034447 (W.D. Wash. July 17 18, 2017). Faced with lengthy agency delays in adjudicating initial asylum EAD applications, on May 22, 2015, Plaintiffs filed a class action lawsuit seeking to compel U.S. Citizenship and

Immigration Services ("USCIS") to comply with the 30-day regulatory deadline to adjudicate EAD applications. Plaintiffs sought relief in federal court because they were suffering significant harm as a result of the agency's delay. Despite their eligibility for an EAD, Plaintiffs A.A. and Machic Yac were each forced to rely on family and friends for financial support because they were unable to obtain employment. Without evidence of lawful status, Plaintiff Machic Yac was unable to obtain a driver's license and Plaintiff W.H. was unable to renew his driver's license. The harms suffered by the named Plaintiffs were a consequence of USCIS's failure to timely issue initial asylum EADs and are indicative of the harms suffered by members of the class. Attorney Declarations, *Rosario v. U.S. Citizenship & Immigration Servs.*, No. 2:15-cv-00813 (W.D. Wash. Mar. 11, 2016), ECF Nos. 59-3, 59-13.

To remedy these harms and ensure that USCIS complies with the law, on July 26, 2018, the District Court enjoined USCIS from further failing to adhere to the 30-day deadline for adjudicating initial asylum EAD applications. *Rosario v. U.S. Citizenship & Immigration Servs.*, 365 F. Supp. 3d 1156, 1163 (W.D. Wash. 2018). Following the District Court's July 2018 order, USCIS's compliance rate has steadily risen from 81.7% in July 2018, to 91.7% in October 2018, 96.3% in December 2018, and 99% in May 2019. Thus, notwithstanding the agency's repeated claims that it could not comply with the 30-day deadline, *Rosario* class members are no longer unable to financially support themselves or their loved ones because of delays in adjudicating their EAD applications.

Through the Proposed Rule, DHS now seeks to undo the success of the *Rosario* litigation without good cause. In support of the Proposed Rule, DHS repeats and relies on the exact argument rejected by the District Court in *Rosario*—that USCIS cannot adjudicate EAD applications in 30 days or less without undue strain on agency resources. *See Rosario*, 365 F. Supp. 3d at 1163 n.6. Yet again, just as before the District Court, DHS fails to provide adequate support for this assertion. In short, DHS has not shown that the Proposed Rule is necessary to agency functioning.

The harm that would be caused by the Proposed Rule, in contrast, is supported by the record in *Rosario* and the Proposed Rule itself. The Proposed Rule will cause significant and long-lasting negative effects on the ability of *Rosario* class members to support themselves and their loved ones while they are waiting for their asylum claims to be heard.

The Proposed Rule is not in the economic interest of the United States which benefits greatly from the contributions of refugees and asylum seekers. It compounds the impact of the already lengthy 180-day waiting period before asylum seekers are eligible for employment authorization, and is unnecessary given that DHS has shown itself capable of near complete compliance with the 30-day adjudication requirement.

Further, DHS's argument that the Proposed Rule is due, in part, to fraud or national security concerns contradicts the manner in which it desires to process future EAD applications. DHS should want to expedite EAD determinations and quickly vet applications, ***as it currently does***, to detect and investigate any fraud-related concerns, rather than create extensive delays.

The Current System Works for 99% of Applicants

The Proposed Rule is a misguided and extreme response to the District Court's ruling in *Rosario*. Since the District Court's Order took effect, USCIS has demonstrated that it *is* able to comply with the existing regulation's deadline. USCIS reports that it is now deciding approximately 99% of EAD applications within the 30-day processing timeline, demonstrating that USCIS is generally able to address fraud and security concerns within the current timeframe and process.

USCIS explains that it seeks to eliminate the 30-day processing deadline because the regulatory deadline does "not provide sufficient flexibility" to address (1) the "increased volume of affirmative asylum applications and accompanying Applications for Employment Authorization"; (2) "changes in intake and EAD document production" over the last two decades; and (3) "the need to appropriately vet applicants for fraud and national security concerns." 84 Fed. Reg. at 47155. Notably, the changes identified by USCIS in intake and document production have been in place for more than a decade and a half—these changes began in 1997 and were fully implemented by 2006. 84 Fed. Reg. at 47154 and n.17. The additional fraud and national security vetting cited by the government were implemented after September 11, 2001, with the creation of the Office of Fraud Detection and National Security (FDNS) in 2004. 84 Fed. Reg. at 47154-55. Despite the existence of these production and vetting changes, and the increase in affirmative asylum applications, USCIS has complied for more than a year with the *Rosario* Court's order requiring it to process initial asylum EAD applications in 30 days.

Furthermore, USCIS's regulations already provide the flexibility to adequately vet each EAD application within the mandatory timeframe. *See* 8 C.F.R. § 103.2(b)(10)(i). The EAD application, USCIS Form I-765, collects information necessary to determine eligibility. If the EAD application is missing required evidence, however, the 30-day clock does not begin to run until the applicant provides the evidence. 8 C.F.R. § 103.2(b)(10)(i). In addition, if USCIS requires additional information, the 30-day clock stops running at the time of any request for additional evidence and only resumes once the agency receives the requested evidence. *Id.* The 30-day deadline, in combination with regulations governing the processing of applications, is sufficiently flexible to permit the agency to obtain the information it needs and make the two discrete eligibility determinations necessary to properly adjudicate EAD applications. *See* 8 C.F.R. § 103.2(b)(10)(i); 8 C.F.R. § 208.7(a)(1).

As such, the Proposed Rule does not provide sufficient justification for abandoning the current, functional process and replacing it with one that permits indefinite delay and only serves to harm asylum seekers, their families, and the community.

Harm to Asylum Seekers

Asylum seekers generally are individuals who flee to the United States for protection after having suffered grave harm, including torture and sexual violence, on account of a statutory protected ground. 8 U.S.C. § 1158. In many cases, asylum seekers are forced to flee their country of origin with few possessions and little support or financial resources. The Proposed Rule will undermine the ability of asylum seekers, including members of the *Rosario* Class, to sustain

themselves and their families. Without the 30-day adjudication deadline, asylum seekers face significant, indefinite delay on their applications. Outside of the initial asylum EAD context, to illustrate, USCIS reports that EADs may be delayed nearly six months. USCIS, Automatic Employment Authorization Extension, https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension (last visited Nov. 2, 2019). USCIS reports that the National Benefits Center is taking up to 11 months to process some EADs. https://egov.uscis.gov/processing-times (last visited Nov. 8, 2019).

Without EADs, asylum seekers would lose wages and benefits as a result of delayed entry into the U.S. labor force, straining their ability to support themselves and their families. USCIS admits that lost compensation to asylum applicants ranges from $255.88 million to $774.76 million in taxable income per year. 84 Fed. Reg. at 47163-64. The loss of income to asylum-seekers will cause an outsized amount of harm to this already-vulnerable community A lack of income means not being able to afford food, housing, medical treatment, health insurance, banking services, or legal representation. Legal representation is necessary even in the strongest of cases. Vulnerable asylum seekers – many who do not speak English – may not able to successfully navigate the complicated immigration bureaucracy alone, even if their applications merit approval. Furthermore, individuals will be unable to secure valid identification, leaving them unable to obtain many social services and increasingly vulnerable to exploitation, trafficking, and underground economic risks.

Lost Tax Revenue for the Government and Increased Strain on Community Resources.

USCIS estimates that all levels of government will lose tax revenue as a result of the proposed rule change. 84 Fed. Reg. at 47152-53. USCIS projects a loss of $39.15 million to $118.54 million per year because delayed work authorization will prevent asylum seekers and their employers from contributing to Medicare and Social Security. 84 Fed. Reg. at 47157-58.

The Proposed Rule would burden and stretch the capacity of charities and non-profit service providers: if asylum-seekers are unable to obtain an EAD in a timely manner, they would be forced to rely on other forms of support, including organizations that provide financial, housing, medical, legal, or other forms of assistance.

This is far too high a cost to be justified in the name of purported agency "flexibility."

The Proposed Rule Underestimates the Economic Harm

The cost of the Proposed Rule is certain to be higher than USCIS estimates. First, USCIS's estimated cost assumes that average EAD processing times would increase only by about 30 days if the deadline were eliminated, reflecting average timelines of Fiscal Year ("FY") 2017. However, initial asylum EAD applications have grown significantly, year after year, and since FY2017. Also, EAD processing time for other applicants has ballooned to over six months or more. If this Proposed Rule is enacted, asylum seekers will likely see delays well beyond the 60 days estimated by USCIS, and the costs therefore will be significantly higher than estimated.

Secondly, USCIS suggests that lost tax revenue might be replaced by other workers, assuming that others would be hired in place of asylum seekers. However, with unemployment at a historic low of about 3.5% this assumption is questionable. It is possible, if not probable, that employers may simply not hire for these positions.

Finally, USCIS's analysis appears to consider only employment taxes, ignoring income taxes at the federal, state and local levels. By ignoring significant tax revenue loss at the local, state, and federal level, USCIS significantly underestimates the tax loss the Proposed Rule would cause.

Based on incorrect assumptions and incomplete analysis, USCIS has significantly underestimated the negative economic impact of this Proposed Rule.

Increased Delay Contrary to National Security Interests

USCIS's expressed concern about fraud and national security should favor prompt decisions on EADs, rather than endlessly delayed resolution that will be the result if the proposed regulation is finalized. In the notice, USCIS makes frequent reference to a rise in national security threats as a reason to spend more time and resources on each decision, but fails to address the fact that it is able to commence these fraud/national security checks as soon as the asylum application is filed, 150 days before the application for work authorization can be filed. *See* 84 Fed. Reg. at 47150, 47153, 47154-55. In addition, USCIS has reported that it has been able to decide over 99% of EADs within the 30-day timeframe for over the past year. *Rosario v. U.S. Citizenship & Immigration Servs.*, No. 2:15-cv-00813 (Dkt. No. 146). Therefore, USCIS has proven its ability to adequately vet and adjudicate the requests in a timely fashion. Moreover, in urging that more time and resources are needed to ensure that fraud is not perpetrated, USCIS ignores its own belief that permitting cases to linger and create a backlog undermines national security and the integrity of the system. USCIS, *USCIS To Take Action to Address Asylum Backlog* (Jan. 31, 2018), https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog (last visited Nov. 2, 2019). The agency already has sufficient time to complete any background checks because it can initiate these checks upon the filing of the asylum application five months before the application for work authorization is filed. Were consistency and thorough processing an actual priority for USCIS, it would utilize a procedure that more efficiently decides EAD application, as opposed to one that enables endless delay that is not justified by individualized facts.

Proposed Alternatives

Current law mandates that asylum seekers wait 180 days before USCIS may grant their applications for employment authorization. By regulation, asylum seekers cannot submit an initial EAD application until 150 days have lapsed since the filing of their asylum application. 8 C.F.R. § 208.7(a)(1). If USCIS's goal is to gain additional time to process each request so that it may increase flexibility and free up resources to work on other applications, then it could instead propose a change to the regulation that would permit asylum applicants to submit their EAD applications earlier. For example, if USCIS seeks 60 days to adjudicate EAD applications, then it should allow applications to be submitted after 120 days, rather than 150.

In addition, USCIS could immediately begin the necessary background checks for EADs on receipt of the asylum application. USCIS already begins background checks soon after an asylum application is filed. If any separate or additional background checks are delayed until an EAD is filed, then USCIS could initiate such checks on the filing of the asylum application. USCIS can and should immediately start the requisite background checks on receipt of the asylum application, thereby relaxing the impact of the 30-day deadline for EAD adjudication.

USCIS significantly underestimates the economic cost of the Proposed Rule. The Proposed Rule relies on incorrect assumptions as to how quickly USCIS would adjudicate initial asylum EADs without a deadline, fails to consider the impact of low unemployment, and ignores the impact on federal, state, and local tax income tax revenue. USCIS should revise its economic analysis so that it is accurate and enables a full and fair consideration of the true economic cost of the Proposed Rule.

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For the aforementioned reasons, DHS should not implement the Proposed Rule, and USCIS should continue to adjudicate initial asylum EAD applications in accordance with the *Rosario* Court's order. Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your consideration.

Respectfully submitted,

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