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Founded in 1986, the Immigration Reform Law Institute (IRLI) is a public-interest legal education and advocacy law firm dedicated to achieving responsible immigration policies that serve national interests.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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January 13, 2020

VIA Federal eRulemaking Portal

Maureen Dunn
Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
United States Citizenship and Immigration Services
20 Massachusetts Ave. N.W.
Suite 1100
Washington, DC 20529-2140

DHS Docket No. USCIS-2019-0011: Asylum Application, Interview, and Employment Authorization for Applicants

Dear Chief Dunn:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment to the Office of Policy and Strategy, United States Citizenship and Immigration Services (USCIS), in response to the agency's notice of proposed rulemaking (NPRM) published in the Federal Register. 84 Fed. Reg. 62374 (November 14, 2019).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI also provides expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public.

IRLI strongly supports all the elements of this complex but doctrinally cohesive proposed rule. The agency and academic studies cited in the extensive footnotes establish that the NPRM reforms are a carefully considered response to the current crisis in asylum applications and adjudication backlogs. In particular, they are a clear continuation of policies and strategic goals that were developed in response to the last asylum crisis of similar proportions. They are a consequence of changes in humanitarian immigration law under the Refugee Act of 1980, when historically modest inflows metastasized into a surge that was only constrained by the 1995 reforms under the Illegal Immigration and Immigrant Responsibility Act.

The proposed regulations are an appropriate agency response to President's Trump's various proclamations identifying the operational and strategic challenges of the current asylum system crisis, in particular the Presidential Memorandum, *Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System* (April 29, 2019). The proposed reforms carefully track longstanding U.S. policy that balances enforcement and humanitarian protection, and are carefully tailored to the current mass influx. But like that of every prior administration, the Trump policy also correctly emphasizes the integrity of the enforcement regime as the paramount federal responsibility.

A. Ethics of Work Restriction for Pending Asylum Applicants.

The majority of commenters who oppose the NPRM argue that depriving asylum applicants of expedited eligibility for employment is unjust because so many applicants enter the United States as indigents. IRLI would respond that the barriers that the great majority of applicants who are ultimately found ineligible create for the expeditious adjudication of application from the minority of applicants who are *bona fide* refugees is a greater injustice. The NPRM insightfully recognizes and proposes to better manage the profound tension in asylum law between the nation's commitment to humanitarian protection, and the unique incentives for illegal and fraudulent entry that are integral to the current statutory scheme.

Regardless of whether a president takes a loose or strict political position on immigration enforcement, immigration to the United States "cannot provide relief from poverty or oppression to more than a tiny fraction of the world's rapidly growing population." *Amicus Brief of Federation*

for American Immigration Reform (FAIR) Supporting Petitioners, at 6, *Sale v. Haitian Ctrs. Council Inc.*, 425 U.S. 155 (1992). Large-scale migrations no longer provide "a viable solution to economic and social problems" that occur on a global scale, including the problem of persecution. *Id.* at 7. "The public will not allow governments to be generous if it believes they have lost control." David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1269-70 (1990). The effectively unlimited global demand to emigrate, combined with the near-universal availability of international travel to U.S. territory, will continue to produce enormous and unsustainable numbers of inadmissible aliens. There "are millions of people around the world … who face no substantial threat of persecution but who would value a chance at permanent residence in a rich and stable nation." *Id.* at 1268.

The penalties if an inadmissible alien lies in order to qualify for relief from removal are slight and insignificant, compared with the invaluable potential benefits of a grant of asylum after illegal entry. A successful asylum claim has "a singular trumping power" that "overcomes virtually all the other qualifying requirements for immigration to the United States." *Id.* at 1267. Unlike the annual quota for *bona fide* and extensively screened refugees applying for protection from overseas, there is no statutory cap on asylum grants. *Compare* 8 U.S.C. §§ 207(a)-(b) *with* 208(a)(1). A successful claim "moves the applicant to the head of the line for early permanent residence rights, even if the alien first established his presence in the territory in knowing violation of the regular provisions of the immigration laws." Martin at 1267-68.

B. The NPRM is an updated and balanced implementation of longstanding congressional policy to reduce access to employment eligibility for unqualified asylum applicants.

The government's attempts to reduce the "pull" factor created by U.S. asylum laws are longstanding, and, as the Supplementary Information makes clear, date directly to passage of the Refugee Act of 1980. 84 Fed. Reg. at 62384-86. Since passage of the 1980 Refugee Act, IRLI and the organization it supports, the Federation for American Immigration Reform (FAIR), have advocated for sanctions on asylum applicants who enter illegally and avoid applying for asylum until they encounter federal immigration agents.

In hindsight, it is clear that drafters of the United Nations Convention on Refugees failed to anticipate or plan for how asylum (as opposed to refugee) adjudications would work in practice. Congress improvidently grafted this historically defective part of international humanitarian law onto domestic immigration law, as evidenced by the cursory attention given to asylum adjudication by the Senate when it ratified the Convention in 1968. The pivotal 1980 Refugee Act was enacted in the context of a multifaceted overseas *refugee* crisis: A flood of Vietnamese refugees known as the "boat people," the national security concerns raised by refugees from the 1979 Iranian Revolution, and waves of indigent economic migrants from Central America. Arguably the best evidence of congressional failure to create a sustainable asylum adjudication system came just six weeks after enactment of the 1980 Act, when the Mariel Cuban boatlift created a massive asylum crisis that completely overwhelmed an unprepared U.S. immigration agency and federal courts.

It took a decade before asylum adjudication trends would drop toward pre-1980 levels. Regulations implemented pursuant to the Immigration Control and Reform Act (IRCA) provided for employment authorization for asylum applicants in one-year intervals, but also included a rule that created automatic interim authorization if no decision on an Employment Authorization Document (EAD) application had been made within 60 days. 52 Fed. Reg. 16216 (May 1, 1987).

In 1990, when adjudicators were still grappling with the flood of IRCA amnesty and legalization applications, the massive *ABC* amnesty settlement for Salvadoran and Guatemalan civil war victims overwhelmed the system again. Between 1991 and 1995, the number of illegal aliens granted speedy interim work authorization without having to appear before an INS officer (or even establish identity) ballooned. The Bush administration attempted to mitigate the backlog by extending the automatic interim authorization date to 90 days. 56 Fed. Reg. 41767 (Aug. 23, 1991). But by 1992, more than two-thirds of employment authorization applications were not being processed within the 90 day limit, creating a new flood of work authorizations for otherwise illegal entrants. The likelihood that the mere filing of an asylum application would lead to an open-ended period of work authorization, regardless of the unlawfulness of the alien's entry, provoked an explosion of boilerplate asylum applications, some even organized by entrepreneurs seeking to profit from this loophole.

Then, in 1993, Pakistani national Aimal Kasi, a pending asylum applicant, attacked CIA headquarters, an incident closely followed by both the bombing of the World Trade Center by asylum applicants and the Golden Venture incident involving a mass landing of Chinese illegal immigrants, claiming asylum, on Long Island, New York. In March 1993 the CBS news show *60 Minutes* exposed the extent of fraud by arriving asylum applicants at U.S. airports, thus generating nationwide publicity and increased public pressure for corrective congressional action. Critical public scrutiny was being brought to bear on the national security failures caused by the procedural loopholes in the asylum-based employment authorization program.

The number of asylum claims reached a then-record high of 150,000 in 1995, on top of an existing backlog of nearly half a million pending cases. After extended debate, Congress enacted, in IIRIRA, the current asylum regime, including the expedited removal system with its separate credible fear procedures, permanent sanctions for filing frivolous applications, and the one-year filing deadline. In particular, IIRIRA provided for a 150-day waiting period on employment authorization for pending asylees. But, reflecting continuing resistance to the IIRIRA reforms from immigrant interest groups, regulations issued under the Clinton administration authorized automatic issuance of an interim EAD thirty days thereafter, for all still-pending applicants.

The IIRIRA reforms, despite resistance from the immigration bar and many agency staff, reduced the number of new filings from 150,000 in FY 1995 to 30,000 in FY 1999, while the backlog of affirmative asylum cases declined from 464,000 in FY 2003 to 55,000 in FY 2006, bottoming out at about 6,000 in FY 2010. Analysts have noted, however, that a large part of the backlog reduction was attributable to quasi-amnesty legalization provisions of the 1997 Nicaragua and Central American Relief Act, P.L. 105-100 and 105-139 (1997) and the Haitian Refugee Immigrant Fairness Act, P.L. 105-277 (1998).

From FY 2010, the volume of affirmative applications, credible fear claims, and backlogs reversed course—both in the USCIS Asylum Division and in the Executive Office for Immigration Review (EOIR) immigration courts. Affirmative asylum applications increased from 28,000 in FY 2010 to 143,000 in FY 2017, with a backlog of pending cases of 320,000 in FY 2018. Credible fear claims made in expedited removal proceedings ballooned from 9,000 in FY 2010 to 79,000 in FY 2017. By FY 2017, the backlog of defensive asylum applications at EOIR reached a record

746,000 pending cases. A key factor in this resurgence has been the chaotic interplay of the Flores Agreement mandate for releasing non-Mexican minors and the 2014-to-present wave of family asylum applications on the southern border.

From the Federal Register summary and the law review articles referenced in its footnotes, it is evident that the NPRM is a carefully researched initiative. The NPRM builds on prior federal responses, by both Congress and the agencies, to confront and manage the "pull factor" of arriving aliens who make asylum claims in order to obtain work authorization, aware that adjudications of cases will stay pending in lengthy backlogs, even if ultimately denied at very high rates. The proposed regulatory changes in the NPRM are neither novel nor arbitrary. The Trump Administration is applying established federal principles of balancing anti-fraud and protection concerns, which have been developed since the 1960s, to the record levels of asylum applications experienced in the past five years.

C. Large infusions of funding, resources, and personnel have not produced sustainable reductions in asylum application backlogs.

Both in the 1990s and during the current crisis, the government has massively increased numbers of enforcement personnel and level of resources for the care of, and the adjudication of requests for humanitarian protection filed by, illegal aliens, without seeing commensurate reductions in fraudulent or otherwise ineligible applicants. Between FY 2013 and FY 2018 the number of asylum officers nearly doubled, from 272 to 520, with a total current authorized force of 687, and Congress increased the Asylum Office budget by more than 55 per cent. The cadre of immigrant judges was increased from 250 in FY 2016 to 350 in FY 2018. None of these massive infusions of expertise and resources has produced significant reductions in USCIS or EOIR backlogs.

As in 1995, the proposed multi-faceted amendments in the NPRM to delay and restrict employment authorization for pending applicants have become the only viable option. The NPRM carefully notes the many other regulatory initiatives it has taken to control asylum fraud and illegal entry, of which the current employment authorization reforms are just one part. While aliens granted asylum are entitled to work authorization, eligibility of pending applicants has always been

at the discretion of the President. Policy history since the 1960s shows that implementation of these restrictions has been effective in reducing new filings of defective applications, at least until the next mass immigration crisis arrived.

D. Analysis of specific NPRM provisions.

The NPRM relies on three general approaches to reducing fraud and adjudication backlogs: (1) the extension of the post-application waiting period for eligibility of pending applicants to file employment authorization requests from 180 to 365 days, (2) improved screening for and exclusion from employment eligibility of EWIs (aliens who have entered without inspection at a place other than a designated port of entry), and criminal aliens, absent a discretionary "good cause" determination, and (3) the closing of various procedural loopholes in the asylum application process. Those loopholes, including the historically lax enforcement of the statutory one-year asylum application deadline, have been exploited by illegal entrants and immigrant rights advocates to facilitate abusive grants and renewals of work authorization. None of these approaches are legally novel, but each of the NPRM proposals adapts existing enforcement regulations to cope with the unprecedented changes in applicant demographics that have emerged during the current southern border crisis.

1. Extension of the post-application waiting period.

IRLI strongly endorses the proposed amendment of 8 C.F.R. §§ 208.3 and 208.7 to clarify that USCIS retains administrative jurisdiction over all employment authorizations based on a pending asylum application, and replace the existing 150 day waiting period and 180 day "asylum clock" with a uniform 365 day waiting period. 84 Fed. Reg. at 62377. The proposed elimination of the practice of issuing "recommended approvals" as a basis for interim benefits, *see* proposed 8 C.F.R. 274a.12.(c)(8), is also a logical and practical application of the goal of increased uniformity in asylum adjudications.

As long as average adjudication periods significantly exceed the agency's regulatory waiting period for employment authorization, a powerful and abusive incentive will exist for unqualified arriving entrants to file asylum applications in order to qualify for the extraordinary

benefits and opportunities the interim authorization provides, at virtually no risk or cost to the applicant. Processing these unqualified applications unfairly increases the burden of seeking protection on entrants who are *bona fide* refugees. The NPRM correctly recognizes that the adjudication-authorization processing gap creates a vicious circle. When this dysfunctionality reaches the scale of the current crisis, the experience in backlog reduction after the 1980, 1991, and 1995 crises demonstrates that extending the waiting period to better approximate the actual average adjudication completion periods, when combined with a "last-in first-out" processing priority, is by far the most effective remedial approach. Elimination of the agency workload created by the arcane "asylum clock" process, moreover, will undoubtedly improve the productivity of Asylum Division personnel.

IRLI fully supports the multiple NPRM proposals that would restrict exceptions in the proposed 365-day waiting period. The proposal routinely to deny employment authorization if the file indicates unresolved applicant-caused delays as of the date the employment request is adjudicated, *see* proposed 8 C.F.R. § 208.7(a)(1)(v), and the elimination of the USCIS practice of issuing recommended approvals in affirmative asylum cases before the identity and background screening investigations have been completed, *see* current 8 C.F.R § 274a(c)(8)(ii), should prove to be particularly helpful.

2. Improved screening and exclusion of EWIs, criminal aliens, and failed applicants.

IRLI strongly endorses the proposed amendments to make EWIs and expanded classes of criminals ineligible for work authorization, absent good cause shown. The three proposed acceptable grounds for a good cause showing are broad and generous. These exceptions promote the appearance of asylum applicants at designated ports of entry, where their asylum applications or credible fear claims can be most efficiently filed and processed, and where the safety and health of the alien, immigration officers, and third parties can best be protected. IRLI agrees with the agency's view that this approach is fully consistent with the *nonrefoulement* requirements of the Protocols to the U.N. Refugee Convention as ratified by the United States.

The goal of reducing illegal entries at the southern border is distinct from but fully consistent with the goal of deterring fraudulent and unfounded asylum applications. It is IRLI's

understanding that the success rate of asylum applications made by aliens who appear at a port of entry on the southern border is much higher than that of applicants who enter without inspection. Any reduction in illegal entry rates as a consequence of the proposed bar will have positive effects for all persons crossing the border, in that it will necessarily free up Customs and Border Patrol officers for other inspection, enforcement, and custodial work.

IRLI also supports the more comprehensive in-person biometric collection requirements, which are intended to increase the effectiveness of agency screening for disqualifying criminal conduct. 84 Fed. Reg. 62390, proposed 8 C.F.R. §§ 208.7(a), 274a.12(c)(8). In particular, IRLI observes that the proposed list of disqualifying crimes includes many types of domestic violence and child abuse that often qualify a victim for protection under the Violence Against Women Act. 8 C.F.R. § 208.7(a)(iii)(D). That protection, in IRLI's view, provides justification to treat these offenses as particularly serious crimes, at least for the purposes of employment authorization.

The agency has asked whether additional public safety-related crimes should be included as bars to EAD eligibility. In IRLI's view it would be appropriate to wait for six months to a year, to assess the effects of the proposed list of disqualifying criminal activity, before expanding the proposed list, *see* proposed 8 C.F.R. § 208.7(a)(iii)(A)-(D).

The shared focus of these NPRM provisions appears to be that applicants who are illegal entrants, or excludable criminals, should not obtain any advantages through asylum application that would blur the important distinction between their otherwise inadmissible status and the status of applicants who have made every effort to submit to inspection and refrain from predicate acts for inadmissibility since filing their asylum applications. Giving administrative priority to this latter class of cases is highly appropriate.

Accordingly, IRLI recommends that the final rule include a provision limiting employment authorization of pending applicants to employers who are registered with and participate in the E-Verify program for online employment authorization verification.

As a policy matter, the agency could also designate EWI and criminal applicants as subject to special registration under 8 U.S.C. § 1303(a)(5), or bar employment authorization to employers located in sanctuary jurisdictions, where local law enforcement and other officials are subject to a ban on communication or cooperation with federal immigration authorities. Jurisdictions that resist

federal immigration enforcement are unsuitable as places of employment for illegal entrants and excludable criminals, as these jurisdictions aggressively assist aliens in eluding federal authorities responsible for monitoring and removing unsuccessful and ineligible asylum applicants.

3. Closure of significant procedural loopholes that abusively expand the adjudication backlog.

IIRIRA enacted important reforms to work eligibility standards for asylum applicants, in particular the one-year filing deadline, and the severe sanctions for filing a frivolous application. IRLI strongly agrees that the one-year deadline period created by Congress is a sufficient period for *bona fide* applicants to file a claim with USCIS or EOIR, and endorses the various measures in the NPRM aimed at better enforcement of these long-neglected eligibility standards.

The proposal tightly to restrict employment authorization when the applicant fails to meet the one-year filing deadline will create a significant disincentive for several abusive applicant practices. *See* proposed 8 C.F.R. § 208.7(a)(1)(iii)(F),

Perhaps the most important effect of the proposed regulation will be to close a seemingly arcane loophole; the filing by longtime unlawfully present aliens of frivolous affirmative asylum claims that they know will be denied, followed by referrals to immigration courts for section 240 removal proceedings, in which the alien files defensively for cancellation of removal. USCIS Asylum Division has indicated that the incidence of these maneuvers is significant: In FY 2016, 21,000 asylum applications were filed by aliens with a U.S. entry date at least ten years old. An additional 1,600 applications listed entry dates between eight and nine years old. Asylum Division staff believed these applications were tactics to take advantage of delays in asylum adjudication that would allow the alien to accrue the ten years' continuous unlawful presence required for cancellation of removal eligibility. Looking to the cumulative backlog, the agency recently estimated that as many as 40,000 backlogged asylum cases were filed more than ten years after the alien's date of entry. Staff Comments, *USCIS Asylum Division Quarterly Stakeholder Meetings* (Feb. 6, 2017 and Aug. 7, 2018). All of these cases unnecessarily consume limited adjudication resources.

The proposed elimination of the automatic treatment of an asylum application as presumptively complete unless USCIS returns the Form I-589 packet to the alien within a 30-day period will also give the agency badly needed additional control over its screening process. *See* proposed 8 C.F.R. § 208.3(c)(3).

IRLI concurs with the proposed formalization of the current practice of endorsing the Form I-94 issued to an alien who has been paroled into the United States under 8 U.S.C. § 1182(d)(5), on the basis of a favorable credible fear determination and a finding that the alien has confirmed his identity and is not a flight or public safety risk, to indicate that employment has *not* been authorized pursuant to status under 8 C.F.R. § 274a.12(c)(11). IRLI agrees with the agency that parole-based employment authorization should only be available for parolees who enter for foreign policy, law enforcement, or national security reasons, and only after filing the same application required from asylum applicants under 8 C.F.R. § 274a.12(c)(8). Asylum is the most expeditious route for an unlawfully present alien to obtain permanent legal residence. By contrast, parolees are statutorily barred from obtaining any change in status incident to the grant of parole. The blurring of the distinctions between the two classifications is not authorized by Congress, and the agency's employment authorization policy should maintain those distinctions and not create yet another incentive to "game the system."

The proposal to terminate the practice of granting a sixty-day grace period before terminating the employment authorization of applicants who have been denied asylum by a USCIS asylum officer is also a modest but useful administrative reform. IRLI supports the proposal to instead institute automatic termination as of the date of asylum denial, or thirty days after denial by an immigration judge. *See* proposed 8 C.F.R. § 208.7(b).

Finally, IRLI notes that DHS has never developed a standard definition of what constitutes a "frivolous" asylum application. IRLI urges USCIS to attempt to formulate a regulatory definition, preferably in a joint effort with EOIR. The definition might use the established "totality of the circumstances" approach, and list examples of abuses like those addressed in this NPRM, or egregious cases showing multiple types of abuses, as rendering applications frivolous. At the least, the agency should add language to 8 C.F.R. § 208.7(a)(1)(iii) indicating that filers of applications deemed frivolous are ineligible for employment authorization.

E. Conclusion.

Congress granted the Secretary of Homeland Security the discretionary authority to bar pending applicants for asylum from employment authorization altogether. 8 U.S.C. § 1158(d)(2). Even against the backdrop of a major crisis in asylum processing that has become even more chronic over the past five years, DHS has elected carefully to balance its paramount duty to protect the integrity of the U.S. asylum system from those who seek to subvert it for economic gain against the equally urgent duty to provide more timely protection to applicants who are *bona fide* refugees and merit such protection. IRLI respectfully submits that the proposed amendments in the NPRM will strike a more just and effective balance than exists at present between those two ongoing duties.

Respectfully submitted,

Immigration Reform Law Institute

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