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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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November 8, 2019

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave. NW
Washington, DC 205290-2140

VIA Federal eRulemaking Portal

DHS Docket No. USCIS-2018-0001: Public Comment of Immigration Reform Law Institute Regarding Removal of 30-Day Processing Provisions for Asylum Applicant-Related Employment Authorization Applications

Dear Chief Deshommes:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment to the United States Citizenship and Immigration Service (USCIS) in response to the agency's notice of proposed rulemaking (NPRM) published in the Federal Register. 84 Fed. Reg. 47148 (Sept. 9, 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.

Summary

IRLI supports both proposed amendments to Employment Authorization Document (EAD) processing regulations for asylum applicants.

The three broad operational reasons discussed in the NPRM for removing a hard 30-day processing deadline are clear, lawful, and reasonable: (1) growth in asylum application backlogs; (2) the centralization of EAD document production to improve fraud screening; and (3) the added burdens of national security background screenings. IRLI believes the agency has under-emphasized a fourth factor: the adverse effects of the injunction issued in *Rosario v. USCIS.* The collateral harm to America's immigration enforcement system caused by this judicially-mandated redeployment of scarce and limited personnel and adjudication resources constitutes an independent and urgent justification for the NPRM.

The proposed removal of the 90-day deadline for EAD renewals correctly recognizes that the streamlining authorized under the 2017 AC21 Final Rule is adequate to identify and restrict automatic renewals for applicants whose asylum requests have been denied.

Comments and Analysis

IRLI supports the decision of the Department of Homeland Security to amend 8 C.F.R. 208.7 ("Employment Authorization"). The NPRM would remove the existing requirements in clauses 208.7(a)(1) and 208.7(d), respectively, that: (1) a request for an employment authorization document (EAD) submitted by an applicant for asylum be granted or denied by USCIS within 30 days from the filing date of the employment authorization request; and (2) that an application for renewal be submitted no later than 90 days prior to expiration of the existing request. 84 Fed. Reg. 47148, 47170. The NPRM would amend USCIS regulations in full compliance with the procedures prescribed in 8 U.S.C. §1158(d)(2). By this process the agency has provided the fullest notice-and-comment opportunity available under the Administrative Procedure Act for amendments of regulations. *See* 5 U.S.C. § 553.

The analysis by the agency as to the need for the proposed rule change, its legality, and the reasonableness of the proposed amendments is persuasive. No statutory impediment exists to repeal of either the 30-day processing deadline or the 90-day renewal application deadline. The

INA is clear that while DHS must authorize an "alien *granted* asylum" (emphasis added) to "engage in employment in the United States and provide the alien with appropriate endorsement of that authorization," 8 U.S.C. § 1158(c)(1)(B), an "*applicant* for asylum" is "not entitled to employment authorization," 8 U.S.C. § 1158(d)(2). Congress delegated sole discretion to the Secretary of DHS to provide such authorization "under regulation," but imposed a time limitation on the exercise of that discretion, whereby "an applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum." *Id.*

The agency persuasively describes three significant factors that have imposed major operational strains on the EAD issuance process: (1) the massive growth in both defensive and affirmative asylum applications and adjudication backlogs, which has "grossly outpaced Service Center Operations resources," 84 Fed. Reg. 47154; (2) the Department of Homeland Security's ongoing conversion to centralized application processing and production of tamper-resistant documents; and (3) the expansion in national security-driven vetting requirements since the 9/11 attacks, *id.* The NPRM describes in convincing detail the operational basis for "extended adjudication and processing times for cases with potential eligibility issues discovered during background checks" that did not occur when the current 30-day deadline was implemented in 1994. 84 Fed. Reg. 47155.

However, there is a fourth factor whose adverse impact is not adequately conveyed in the NPRM executive summary: The scale of litigation-driven disruption to USCIS' management of its skilled force of EAD application reviewers. A federal district court in Seattle, Washington granted ongoing nationwide injunctive relief to a class of EAD applicants represented by several anonymous aliens. *See Rosario et al. v USCIS*, C15-813-JLR, Doc. Nos. 127 (Sealed Order) and 128 (Judgment by Court) (W.D. Wa July 26, 2018). In *Rosario*, the Seattle district court evidently compelled rigid literal compliance by USCIS with 8 C.F.R. § 208.7(a)(1)—the 30-day EAD processing deadline for asylum applicants--notwithstanding any of the agency's equally compelling need to delegate limited personnel or resources to the adjudication of numerous other immigration benefit and relief applications. 84 Fed. Reg. 47153.

The diversion of resources ordered by the *Rosario* court is impacting the status of millions of non-citizens, in large part lawfully-admitted non-immigrants, whose good-faith compliance with our nation's immigration laws ought to afford them priority in the allocation of limited agency adjudication resources. The entire case file—an essential part of the record on which the NPRM is based—remains (upon the motion of anonymous aliens) sealed and inaccessible for review by the public. Such secrecy undermines the intent and effectiveness of the APA. IRLI finds this opacity particularly harmful to the Secretary's core duties of "enforcement of … laws relating to the immigration … of aliens" and "to control and guard the boundaries and borders of the United States against the illegal entry of aliens … ." 8 U.S.C. §§ 1103(a)(1), (5), 84 Fed. Reg. 47149 (citing § 1103(a)). This unexplained (to the public) judicial intrusion into a field of long-standing executive prerogative is sufficiently adverse to the public interest to independently constitute good cause for the NPRM.

It is notable that the special interests and voluntary agencies (VOLAGs) who oppose the NPRM have not argued that it is *ultra vires* or in any way an abuse of agency regulatory authority. Rather, they simply complain that it is unfair to deny applicants the automatic access to employment and its benefits that Congress purposely limited only to successful asylees. For example, the Florence Immigrant and Refugee Rights Project claims in its comment that "the right to seek safety and protection in the United States is unequivocal."

That premise is simply untrue. Asylum is a discretionary grant by a generous nation. 8 U.S.C. § 1158(b)(1)(A). Commenters like the Florence Project or the Church World Service liken U.S. asylum law to a commons, where the public goods of legal residence can be exploited without limits, regardless of its ultimate unsustainability. "Decreasing access to the tools that allow asylum applicants to meet their basic needs … is undercutting that fundamental right [to protection in the United States]." Public comments of Florence Project, at 3.

Prior to the ongoing judicial micro-management of USCIS' limited adjudication resources under the *Rosario* injunction, the agency reports that it has been able to process less than half of all EAD applications from asylum applicants within the 30-day deadline. 84 Fed. Reg. 47156. However, 78% of EAD applications were completed within 60 days. *Id*. The concerns alleged by

commenters that "EAD applications from asylum seekers will be delayed indefinitely" are thus false. Public comments of the Florence Project, at 3.

Some commenters suggested that the solution is for USCIS to significantly expand its workforce to hire and train additional employment authorization adjudicators and dedicate them to processing EADs for asylum applicants. *See, e.g.*, public comments of Church World Service, at 1 ("DHS does not appear to be interested in hiring additional officers to deal with the backlog …."). What these proposals ignore is Congress' mandate that USCIS benefits processing costs must be funded through user fees. *See* 8 U.S.C. § 1158(d)(3), 8 U.S.C. § 1356.

Fees are not currently collected to process EADs for asylum applicants. But as the NPRM notes, earlier this year President Trump directed DHS to proposed new regulations to impose fees to cover the cost the cost of adjudicating applications. 84 Fed. Reg. 47149 (citing *Presidential Memorandum for the Attorney General and Secretary of Homeland Security on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System* (April 29, 2019)). IRLI believes that the agency should not be compelled to arbitrarily adhere to a rigid and disruptive processing deadline for "guaranteed" 30-day asylum EAD processing, unless and until user-provided fee revenue is available to fully fund the needed dedicated agency personnel and resources.

Elimination of the 90-Day Renewal Application Deadline

IRLI does not oppose the second proposed amendment, to eliminate the current 90-day EAD renewal application deadline. As the NPRM explains, the 2017 AC21 Final Rule amended 8 CFR 274a.13 to provide for the automatic extension of valid existing EADs up to 180 days for a variety of renewal applicants. 84 Fed. Reg. 47150.

IRLI believes the three pre-conditions in the 2017 Rule for automatic extension eligibility will adequately ensure that renewal applications are not automatically granted to applicants whose asylum applications since have been denied. Namely, these are the preconditions that the request: (1) is properly filed before the expiration date; (2) is based on the same status classification as the expiring EAD; and (3) is pursuant to a status classification that does not require adjudication of an underlying application or petition.

Respectfully submitted,

Immigration Reform Law Institute

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