

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY**

**Asylum Application, Interview and  
Employment Authorization for Applicants**

**: [CIS No. 2648-19; DHS Docket No.  
: USCIS-2019-0011]  
: RIN: 1615-AC27**

*Submitted via Federal eRulemaking Portal: [http:// www.regulations.gov](http://www.regulations.gov)*

**COMMENTS OF WHITMAN-WALKER HEALTH**

Whitman-Walker Health (WWH or Whitman-Walker) submits these comments in response to the Department of Homeland Security’s (DHS) notice of proposed rulemaking, “Asylum Application, Interview, and Employment Authorization for Applicants” published in the Federal Register on November 14, 2019 (hereinafter NPRM or Notice). (84 Fed. Reg. at 62374.) WWH strongly opposes the changes in the NPRM because it stringently narrows eligibility for employment authorization documents (EADs) for asylum applicants and will result in substantial financial hardship for immigrants with asylum claims and the organizations that serve them. The NPRM would also undermine national immigration policy by making the asylum process more uncertain, opaque, and difficult to access.

**EXPERTISE AND INTEREST OF WHITMAN-WALKER HEALTH**

Whitman-Walker Health is a community-based, Federally Qualified Health Center offering primary medical care and HIV specialty care, community health services and legal services to residents of the greater Washington, DC metropolitan area. WWH has a special mission to the lesbian, gay, bisexual and transgender (LGBT) members of our community, as well as to all Washington-area residents of every gender and sexual orientation who are living with or otherwise affected by HIV. In calendar year 2018, more than 20,700 individuals received health services from Whitman-Walker. In that year, 58% percent of our health care patients and clients who provided their sexual orientation identified as lesbian, gay, bisexual, or

otherwise non-heterosexual, and 9% of our patients and clients—more than 1,800 individuals—identified as transgender or gender queer.

Since the mid-1980s, Whitman-Walker has had an in-house Legal Services Department. Our attorneys and legal assistants provide information, counseling, and representation to Whitman-Walker patients, and to others in the community who are LGBT or living with or affected by HIV, on a wide range of civil legal matters that relate directly or indirectly to health and wellness – including immigration and asylum cases. Our Legal Services Department, with the assistance of hundreds of volunteer attorneys throughout the area, has provided a wide range of immigration-related services to foreign-born LGBT individuals and families. Many come to the U.S. fleeing persecution in their countries of birth because of their sexual orientation or gender identity. In 2018, 52% of our legal services clients who provided their sexual orientation identified as lesbian, gay, bisexual or otherwise non-heterosexual; 20% identified as transgender or gender queer. Although our patients and clients come from every income level, substantial numbers are lower-income. Because of the difficult circumstances in which they have come to the U.S. – for instance, fleeing persecution in their countries of birth – many if not most of our immigration clients and foreign-born health care patients have limited means, particularly until their employment authorization documents are received and they are able to make new lives for themselves and becoming fully integrated members of our community.

## COMMENTS ON THE PROPOSED RULE

### **THE NPRM WILL CREATE CHAOS AND UNCERTAINTY IN THE ASYLUM PROCESS**

This far ranging NPRM substantially narrows access to EAD for asylum seekers by: :

- Implementing a 365-day EAD filing wait period and removing the “Asylum Clock”,
- Creating additional biometrics requirements for EAD applications and renewals,
- Eliminating asylum officer discretion to recommend approval of asylum applications,
- Reducing EAD validity periods,
- Introducing a 14-day supplementary evidence filing deadline,
- Removing the requirement for DHS to return incomplete I-589 filings in 30 days,
- Proposing a heightened criminal activity bar for EADs for asylum seekers,
- Heightening restrictions on one-year filing deadline, and
- Adjudicating pending (c)(8) applications under the new heightened restrictions.

Based on the Notice, these changes are intended to “reduce incentives for fraudulent, frivolous, and unmeritorious claims.” (84 Fed. Reg. at 62375.) However, the Notice does not demonstrate how these changes will reduce the incentives for unmeritorious asylum claims by applicants seeking employment authorizations. The Notice fails to include any relevant discussion of drivers of unmeritorious asylum claims. The Notice identifies that approximately 20% of asylum claims are successful as evidence of the widespread practice of filing unmeritorious claims. DHS has not conducted an analysis on why asylum claims are unsuccessful. The asylum application process is complex and fraught. Our experience is that access to legal counsel can be determinative of a successful asylum application.

The Notice’s discussion of “pull factors,” primarily higher wages and stable economic conditions, is insufficiently analyzed to justify the sweeping changes included in the NPRM. The Notice provides no information or research to form the basis of why DHS believes the NPRM will improve the functioning of the asylum system. On the contrary, the NPRM’s changes are likely to increase the time and expense of processing asylum applications and dramatically decrease the ability of asylum applicants to access housing, food, and healthcare.

U. S. Citizenship and Immigration Services, (USCIS) a branch of DHS, does not collect adequate information on outcomes for applicants, for example on the outcomes for unrepresented applicants, or erroneous denials later granted on appeal, which limits their ability to implement evidence-based immigration policies and procedures.

The Notice’s account of the historical reforms of the asylum system notes that the number of asylum applicants has increased since the reforms in the Immigration Reform and Control Act of 1986, despite Congressional limitations on employment for asylum seekers. (*Id.* at 62385.) DHS’ reasoning narrowly analyzes the regulatory environment, without considering other contextual factors that contribute to asylum trends. Confounding factors, like more accessible transcontinental travel, partisan violence in Colombia, and political unrest in Venezuela, must be analyzed to understand how they contribute to trends in asylum applications. For example, DHS notes that they received increasing numbers of asylum applications since 2016. (*Id.* at 62385.) A more expansive analysis would reveal that an increase in asylum applications during this time is expected, as the global number of refugees and asylum seekers has been increasing since 2009 and reached unprecedented levels in 2018.<sup>1</sup>

#### **THE NPRM WILL STRAIN THE RESOURCES OF NON-PROFIT IMMIGRATION ORGANIZATIONS**

The NPRM substantially changes the requirements for both filing deadlines and amending applications. The provisions, which institute 14-day filing deadline for supplementary evidence, and treat amending applications as an applicant-caused delay, purport to incentivize completeness when filing asylum applications. When implementing deadlines, USCIS must be

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<sup>1</sup> *Global Trends Forced Displacement In 2018*, UNHCR, available at <https://www.unhcr.org/en-us/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>. “Over the past decade, the global population of forcibly displaced people grew substantially from 43.3 million in 2009 to 70.8 million in 2018.”

mindful of the impact of USCIS delays and backlogs on applicants. USCIS's profound asylum backlog means that many applicants are waiting several years before an Officer adjudicates their claim. We have clients with asylum claims who, under the "Last In, First Out" (LIFO) system have been pending for more than 5 years. Practitioners have had to adapt to this extremely unfortunate reality. Supplementing the filing within closer proximity to the actual interview ensures that the Officer has more accurate, up-to-date, and complete evidence to consider. USCIS schedules interview notices 3 weeks before the interview. The 14-day filing deadline does not allow sufficient time for applicants to prepare and submit evidence after receiving the interview notice. Due to mail processing times, applicants have less than 7 days between receiving the interview notice and the 14-day filing deadline for supplementary evidence. Less than 7 days is insufficient notice for due process purposes. The filing deadline restricts an applicant's ability to provide supplementary evidence, likely requiring applicants to request a rescheduled interview, further delaying processing and adjudication.

It is common practice in non-profit legal immigration practice for LGBT clients to file the initial asylum application with the Form I-589 and additional evidence available at that time, which is supplemented at a date closer to the actual interview. This practice is beneficial to practitioners and their clients because it enables asylum applicants to begin the lengthy USCIS process of obtaining protection from persecution and torture, meet the one-year filing deadline or file within a reasonable time after a material changed circumstance, and continue to gather evidence and documentation required to demonstrate a meritorious claim. Providing supplementary evidence of material changes is beneficial to USCIS. Filing supplemental evidence closer to asylum interviews also preserves the resources of non-profit immigration

practices, which are routinely required to prioritize emergent crises with limited resources. We recommend that USCIS eliminate the 14-day filing deadline for supplementary evidence.

### **THE NPRM WILL HAVE A DISPROPORTIONATE EFFECT ON LGBT ASYLUM APPLICANTS**

The NPRM doubles the time period an applicant is required to wait in order to apply for an EAD attendant to asylum, remove access to EADs for applicants who miss the One-Year Filing Deadline (1YFD), and proposes to restrict access to asylum derivative EADs for people with a range of unresolved criminal charges. These restrictions will disproportionately impact LGBT asylum seekers. LGBT asylum seekers are more likely to be poor, more likely to be criminalized in their home countries, and more likely to not file their asylum applications by the 1YFD due to the process of coming out.<sup>2</sup>

LGBT people will be disproportionately impacted by limitations on access to employment because many are unable to rely on traditional safety nets, such as family, for housing and other basic needs due to widespread family and societal rejection. LGBT people are more likely to be without financial resources necessary to hire a private attorney or to provide food, housing, and clothing for the pendency of their applications. Restricting access to employment for asylum applicants while their application is processing severely detracts from the applicant's ability to provide for themselves and to participate in and integrate into their host communities. Inability to work is particularly harmful for LGBT asylum applicants, many of

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<sup>2</sup> *RAIO Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*, 52 (Nov. 16, 2015) "In many instances an individual does not "come out" as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently "come out," this may qualify as an exception to the one-year filing deadline based on changed circumstances. [...] LGBTI individuals who suffer from internalized homophobia and transphobia or who may have been subjected to coercive mental health treatment to "cure" them in their home countries may find it especially difficult to seek the mental health treatment they may need to proceed with their applications. Also, many LGBTI asylum-seekers in the United States live with extended family members or with members of the very community they fear."

whom experience family rejection and social marginalization and are extraordinarily vulnerable to labor and sex trafficking in the United States.

We are concerned with DHS' proposal to consider unresolved domestic charges or arrests that involve domestic violence when granting EADs. This proposal could allow for malicious parties to impede applications for victims of domestic violence by filing baseless domestic temporary restraining orders or protective orders. These short-term court orders have lower evidentiary burdens and allowing them to influence USCIS adjudications removes due process protections for applicants.

Given USCIS's tremendous backlogs in adjudicating asylum claims, applicants are often waiting for several years before receiving a decision in their case and it is essential that they have access to authorized employment in order to care for their basic needs during these extended periods. Access to a valid EAD that reflects a transgender applicant's name and gender identity is a critical lifeline to these individuals, providing protective effects against violence and discrimination. Restrictions like the ones proposed will result in further exploitation of already vulnerable populations. Consequently, we expect the NPRM, if enacted, to exacerbate the inequities of housing insecurity, food insecurity, and lack of access to healthcare for LGBT immigrants.

#### **THE NPRM REMOVES ACCOUNTABILITY MECHANISMS FROM USCIS**

We are concerned that the NPRM removes the asylum clock and the 30-day notice requirement for incomplete applications without adequate replacements. Under the NPRM, instead of a 180-day EAD clock, there's a 365-day waiting period before asylum applicants can file an EAD. Additionally, the NPRM filed September 9, 2019 "Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,"

(84 Fed. Reg. 47148), removed the 30-day EAD adjudication requirement. With the removal of the asylum EAD clock and no replacement process, there is no mechanism for applicants to hold USCIS accountable to a timeline for adjudicating their applications. The Asylum Clock and the 30-day notice requirement for incomplete applications are two sources of certainty for asylum seekers. By removing these steps, USCIS provides no certainty or accountability mechanisms for asylum applicants and places the burden of USCIS' delays onto applicants. These changes undermine the asylum system by removing USCIS' incentives to reduce delays and reduces public trust in the fair and regular adjudication of asylum applications.

We are concerned that the NPRM removes recommended approvals and adds biometric collection and fees to the asylum derivative EAD applications and renewals. Removing recommended approvals increases the wait time for asylum applicants to receive EADs with no demonstrable benefit to the efficiency of the asylum process. We are opposed to implementing biometric collection for EAD renewals because requiring more frequent and costlier filings presents additional barriers for applicants, who likely have difficulty paying the fees and accessing transportation to and from USCIS processing facilities.

We are very concerned that USCIS will apply the changes retroactively to pending asylum claims. The NPRM's changes which bar EADs for applicants that miss the 1YFD would terminate pending applicant's EADs until the exception is adjudicated by an immigration judge or asylum officer. The officer or judge determines if an exception applies at the final determination of the asylum claim. Under the LIFO system, our clients with applications pending for years are unlikely to get their asylum claims approved for many more years. The inevitable result is pending applicants are unlikely to access EADs until asylum is granted, leaving them unable to work and reliant on charity or vulnerable to exploitation.



## CONCLUSION

WWH finds that these changes will create chaos and uncertainty for asylum applicants and strain the resources of non-profits who serve them. The NPRM will have severely adverse consequences on pending asylum applicants, in particular LGBT applicants who experience widespread discrimination and family rejection. The Notice's restrictions on legal employment will create economic conditions of desperation for vulnerable populations of applicants. For these reasons, Whitman-Walker Health opposes the NPRM and recommends that the Administration promptly rescind it.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Brooks".

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