

January 13, 2020

Submitted via www.regulations.gov

Samantha Deshommes, Chief
Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Comments in Response to Proposed Rulemaking: *Asylum Application, Interview, and Employment Authorization for Applicants*: DHS Docket No. USCIS-2019-0011; 84 F.R. 62374

Dear Chief Deshommes:

The Tahirih Justice Center (Tahirih) is pleased to submit the following comments in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (NPRM) and Request for Comment on *Asylum Application, Interview, and Employment Authorization for Applicants*: DHS Docket No. USCIS-2019-0011; 84 F.R. 62374, issued on November 14, 2019.

I. Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence (GBV) over the past twenty-two years. Our clients endure horrific abuses such as human trafficking, domestic violence, sexual assault, forced marriage, and honor crimes. The vast majority are indigent and have very limited support systems to assist them while awaiting employment authorization from United States Citizenship and Immigration Services (USCIS).

DHS' proposals through this NPRM ("the proposed rule")ⁱ to delay and/or prohibit employment authorization for most asylum seekers will severely and needlessly harm survivors of GBV such as our clients. For the reasons outlined below, we strongly oppose the proposed rule and urge DHS to maintain the corresponding regulatory provisions in their current form.

II. The Proposed Rule is Arbitrary and Capricious and DHS' Justifications for It Do not Outweigh the Irreparable Harm the Rule will Cause to Survivors of GBV

A. The Proposed Rule is Arbitrary and Capricious

1. One-Year EAD Delay for Asylum Seekers

ATLANTA

230 Peachtree Street NW
Atlanta, GA 30303
Tel: 470-481-4700
Fax: 470-481-7400
Atlanta@tahirih.org

BALTIMORE

211 E. Lombard Street
Suite 307
Baltimore, MD 21202
Tel: 410-999-1900
Fax: 410-630-7539
Baltimore@tahirih.org

GREATER DC | NATIONAL

6402 Arlington Boulevard
Suite 300
Tel: 571-282-6161
Fax: 571-282-6162
TTY: 711
Falls Church, VA 22042
GreaterDC@tahirih.org
Justice@tahirih.org

HOUSTON

1717 St. James Place
Suite 450
Houston, TX 77056
Tel: 713-496-0100
Fax: 713-481-1793
Houston@tahirih.org

SAN FRANCISCO BAY AREA

881 Sneath Lane
Suite 115
San Bruno, CA 94066
Tel: 650-270-2100
Fax: 650-466-0006
SFBayArea@tahirih.org

tahirih.org

Current regulations require asylum seekers to wait 150 days after filing their asylum applications before applying for an Employment Authorization Document (EAD).ⁱⁱ The proposed rule would increase the waiting period to one year. DHS asserts in the proposed rule that this requirement is necessary to deter bad actors from filing fraudulent and/or frivolous asylum applications that are economically motivated. As noted above, however, DHS already discourages improper filings by making applicants for asylum and/or withholding of removal wait 150 days before seeking EADs. It is therefore unnecessary to increase the EAD application waiting period.

2. EAD Prohibition for those who Miss the One-Year Asylum Filing Deadline

The proposed rule further prohibits those who miss the one-year asylum filing deadline from applying for EADs.ⁱⁱⁱ Those intent on entering the US to commit fraud, however, have every incentive to file immediately to avoid missing the deadline, rather than waiting until it is too late. Furthermore, bad actors who do file frivolous withholding of removal applications after missing the deadline are already subject to robust fraud detection measures conducted by USCIS' Fraud Detection and National Security Directorate.^{iv} There is likewise no legitimate purpose for this provision. Rather, it is purely punitive and will irreparably harm our clients by perpetuating their economic instability and vulnerability as further explained below.

"A" and "E" are Tahirih clients who were so severely traumatized by the persecution they endured that they could not apply for asylum within the one-year filing deadline. "A," from El Salvador, had been physically and sexually abused for many years and suffered debilitating depression and Post-Traumatic-Stress-Disorder as a result. These conditions required ongoing medical intervention while "A" was in immigration custody. "E," from Kenya, was subjected to years of daily beatings and violent rapes at the hands of an older man she was forced to marry. She developed a deep inability to trust and lasting, crippling trauma. She could not recount the horrors she survived for many years, until she encountered a counselor who ultimately connected her with a competent, trauma-informed attorney. Under the proposed rule, both clients would be needlessly stuck in limbo indefinitely with no ability to seek employment even after applying for asylum. This result – and therefore the proposed rule – is arbitrary and capricious with no rational justification.

3. EAD Prohibition for Those who Enter or Attempt to Enter Without Inspection

The rule also proposes to prohibit EADs for asylum seekers who enter or attempt to enter the country without inspection unless "good cause" is shown.^v Adjudicators would determine on a case-by-case basis whether the applicant shows good cause (ie, a "reasonable justification") for such entry.^{vi} A limited exception to the prohibition exists where an individual presents herself without delay to DHS, indicates to DHS an intention to apply for asylum or expresses a fear of persecution or torture, and otherwise shows good cause for the unlawful entry or attempted entry. Notwithstanding this limited exception, the prohibition will in practice serve as a penalty imposed on refugees for unlawful entry that is impermissible under the 1951 United Nations Refugee Convention and 1967 Protocol Relating to the Status of Refugees.^{vii} In the Refugee Act of 1980, Congress expressly incorporated this Convention principle into domestic law, recognizing that those fleeing persecution do not have the luxury of freely deciding where, how, and when to seek refuge.

Congress therefore authorized asylum claims by anyone anywhere, including someone who is “...at a land border...whether or not at a designated port of arrival.”^{viii}

The examples of “good cause” for unlawful entry provided in the proposed rule are extremely narrow - needing immediate medical attention or fleeing imminent serious harm.^{ix} These scenarios are undoubtedly more restrictive than what was contemplated by the Refugee Convention.^x Furthermore, asylum seekers are forced to enter without inspection in many cases to save their lives, due to Administration policies – the so-called “Migrant Protection Protocols,”^{xi} the unlawful practice of “metering,”^{xii} and the third-country transit ban.^{xiii} Asylum seekers are facing severe threats to their safety while waiting in Mexico for their asylum hearings, including kidnapping, extortion, torture, and sexual assault, in addition to a lack of shelter, food, and medical care.^{xiv} Finally, Tahirih and others have encountered many asylum seekers who did express a fear of return at the border, only to be unlawfully turned back by Border Patrol agents and denied their right to seek asylum.^{xv} If the proposed rule is implemented, a very low standard of proof should be applied, and asylum seekers should be given the highest deference in establishing that they did express a fear of return to DHS, and that they had a reasonable justification for unlawful or attempted unlawful entry.

B. Delaying and/or Prohibiting Employment Authorization for Asylum Seekers will Irreparably Harm Survivors of GBV as Financial Independence is critical to their Well-Being

Women and girls fleeing GBV are among the most vulnerable asylum seekers in the world. GBV takes many forms, with government actors, families, and communities targeting women for forced marriage, Female Genital Mutilation/Cutting, honor crimes, rape, domestic violence, femicide, and other human rights abuses. Survivors suffer not only violent retaliation for trying to escape, but economic isolation and severe social ostracization as well. Those who overcome tremendous odds and do manage to escape face further peril as they search for safe haven.

With little if any support system, the vast majority of survivors arrive in the US with nothing. Ineligible for public assistance, they face the chronic threat or lived reality of homelessness, and the hunger and health problems that accompany it for both themselves and their children. According to a nationwide survey of advocates, immigrant women, and service providers Tahirih conducted in late 2017, safe and affordable housing and economic hardship ranked among the top three most urgent and prevalent systemic challenges, respectively, confronting immigrant women in the US.^{xvi} Without an income, survivors will also have no access to much-needed mental and physical health services. If *pro bono* or low-cost legal services are unavailable where a survivor lives, she will be unable to pay for a lawyer. Survivors’ cases are complex, and representation often means the difference between safety or return home to face additional violence or even death.^{xvii}

Nonetheless, the proposed rule would drastically delay and/or limit entirely the ability of asylum-seeking survivors of GBV to earn an income. Even once an applicant can request an EAD, DHS has also recently proposed to eliminate any required timeframe within which USCIS must adjudicate the application. Applicants might be forced to wait for an EAD indefinitely as a result, with no recourse and no end in sight.^{xviii} If implemented, the proposed rule will therefore promote

homelessness, poverty, hunger, unemployment, and exploitation. These outcomes are not only inhumane, but they unnecessarily burden taxpayers in the process.¹ Keeping survivors in poverty further compounds and prolongs healing and prevents them from integrating into society, depriving communities of their contributions and productivity as members of the work force.

Finally, survivors are once again highly vulnerable if unable to afford basic necessities – this time, to exploitation by traffickers and other bad actors. Through no fault of their own, they are forced to participate in the ‘shadow economy’ in order to survive, at the mercy of unscrupulous employers. Some withhold wages, pay much less than originally agreed upon, demand very long hours, impose abusive conditions, or threaten or perpetrate violence against workers in this situation who have, or believe they have, no recourse. Working without authorization also jeopardizes a survivor’s asylum claim, yet the alternative might be living on the streets. In light of the above, it is therefore critical that work authorization be readily available to asylum-seekers.

1. Prolonging Initial EAD Applications Will Irreparably Harm Asylum Seekers Experiencing Domestic Violence in the U.S. in Particular

Work authorization for asylum applicants simultaneously facing domestic violence in the US can literally mean the difference between life or death. It is no surprise, least of all to abusers, that close to 100% of survivors of domestic violence report suffering financial abuse,^{xix} and 75% of women report staying in abusive relationships due to economic barriers.^{xx} The role of financial resources in promoting women’s well-being and safety from violence, including prevention of future abuse, cannot be overstated.¹ Both Congress and USCIS itself have explicitly recognized this, as primary survivor-based immigration petitions have no accompanying fee, survivors can access certain public benefits without penalty, and fee waivers for ancillary survivor-related immigration benefits are mandated.¹

Not only are survivors without an EAD unable to seek employment to secure an income, but they are also unable to open a bank account and obtain a driver’s license. Prolonging an initial EAD puts indigent survivors in an untenable position, serving as a barrier to safety and independence for them, and another tool of manipulation and control for abusers. Survivors forced to forego the ability to earn an income remain at the mercy of abusers, with homelessness as their only alternative in many cases. Continuing to live in a chronically unsafe, threatening situation also exacerbates trauma, and often results in extreme social isolation. This in turn prolongs trauma-induced mental health conditions with taxpayers bearing the burden of both short and long-term treatment. Finally, indigent survivors who do flee their abusers but cannot work risk losing their children to the system if they are deemed unable to protect and provide for them.

Examples of Tahirih clients seeking asylum who would suffer irreparable harm under the proposed rule include:

- “L” from Honduras who was assaulted in the US by her boyfriend. He was ultimately arrested and convicted after she called the police. This was the second time that L suffered domestic violence while waiting for her case to be heard.

- “N,” also from Honduras, was beaten and sexually assaulted by her boyfriend in the US. N’s boyfriend also sexually assaulted her minor daughter. “N” reported her boyfriend to the police and he was arrested and convicted. With an EAD, N is now financially stable and does not need to rely on another provider to support her and her two young daughters. “N” has not been re-victimized since receiving her EAD.
- “C” was abused by her husband, and she reported him to the police. He was arrested and convicted. This was the second time that “C” was assaulted while waiting for her asylum case to be heard. The first time, she was raped by a stranger who broke into her apartment. An EAD has allowed “C” to support herself and her US citizen daughter without relying on her abusive husband. Being employed has been critical to her healing.

a. Prohibiting EADs for those who have Committed Domestic Violence Offenses Will Harm Survivors of GBV, Despite USCIS’ Discretionary Authority to Issue EADs in these Cases

The proposed rule would also bar those who have committed domestic violence offenses from obtaining EADs, subject to a discretionary exception for applicants that USCIS deems to be the victims rather than primary aggressors. The exception notwithstanding, this provision will ultimately punish survivors whose abusers file false claims against them in retaliation for reporting abuse. Tahirih is aware of a case in which an abuser planted drugs in his wife’s car and then smashed her tail light to get her pulled over and arrested. In another case, an abuser set fire to his home himself and called the fire department to report that his wife did it. She was arrested and jailed for weeks. While these examples do not involve allegations that the victims themselves were abusive, they show the insidious lengths to which perpetrators are willing to go in order to silence and intimidate their victims.

A survivor may also face charges arising from an act of self-defense or a false counter claim for domestic abuse. When immigrant survivors call 911, even trained police officers can be reluctant to determine which party is the primary aggressor due to language or cultural barriers or manipulation by the perpetrator.^{xxi} USCIS adjudicators who are even further removed from the situation are hardly equipped to make this determination. The proposed rule also fails to detail the evidentiary standards USCIS will apply when reviewing discretionary waiver requests, to the detriment of survivors. In light of the above, we therefore oppose this provision. If implemented nonetheless, we urge USCIS to institute mandatory, specialized training for adjudicators informed by meaningful input from all stakeholders including survivor advocates, to ensure that survivors are not being punished by it.

b. Prohibiting EADs for Applicants who Fail to Appear or Reply to a Notice Harms Survivors of GBV

We are also deeply concerned about the proposed rule’s prohibition on EADs for applicants who fail to appear for appointments, eg, for biometrics, or who fail to reply to a notice from USCIS.^{xxii} Perpetrators of domestic violence notoriously try to interfere in victims’ immigration or other legal matters as a tool of abuse. They will intercept mail and confiscate hearing notices so that survivors

suffer harsh consequences that are not easily rectified. Congress itself recognized this reality through the bipartisan Violence Against Women Act (VAWA) Self-Petitioning process,^{xxiii} which expressly permits survivors to petition for lawful status without the knowledge or cooperation of the abuser involved. This minimizes an abuser's opportunity to obstruct a survivor's case. It is therefore critical that survivors are not penalized if, as the result of abuse, they fail to appear for appointments or fail to respond to notices as the rule proposes.

2. Prohibiting EADs for those Convicted of Serious Non-Political Crimes Outside the US Will Harm Survivors of Human Trafficking

The proposed rule will also needlessly harm survivors of human trafficking by barring them from applying for EADs if they have been convicted of serious non-political crimes abroad. Under the rule, USCIS can exercise discretion though to grant EADs in cases involving any non-political foreign crime and pending arrests or charges.^{xxiv} In practice however, it is unclear how discretion will be applied and what factors and evidence adjudicators will view favorably. It is well-known that traffickers commonly force victims to commit various types of crimes,^{xxv} with the victim's own and their loved ones' safety hanging in the balance. Fearing for their lives, victims may have no choice but to comply under extreme duress. Asylum-seeking survivors of human trafficking in these circumstances should be permitted to apply for EADs as a matter of course.

III. The Proposed Rule Violates the Fourteenth Amendment as it Disproportionately Harms Non-White Immigrants

The proposed rule raises serious equal protection concerns. Asylum seekers typically have fewer economic resources as compared with other prospective immigrants. In light of this, USCIS long refrained from imposing either a fee for an asylum application or for initial EAD applications filed by asylum seekers. The agency, however, recently proposed to introduce such fees.^{xxvi} The proposed rule now imposes new procedural burdens that will operate to preclude many, or even most, asylum applicants from working while their applications are pending. That result will, like the newly proposed fees, punish individuals applying for asylum. And because the NPRM advances no non-arbitrary justification for the rule, the only rational explanation is that USCIS intends to discourage individuals from applying. The NPRM, in other words, seeks to operationalize the animus high-ranking government officials, including the supposed Acting Director of USCIS, have repeatedly expressed about keeping non-white immigrants from places as disparate as Central America, Haiti, Mexico, the Middle East, and Nigeria out of the country.^{xxvii} A policy implemented on that basis violates the Equal Protection Clause of the Fourteenth Amendment.

IV. The Proposed Rule Poses a Significant Burden for Tahirih

By prolonging the period of unemployment for asylum applicants, the proposed rule will increase our clients' needs for longer-term non-legal assistance. Tahirih's social services staff undoubtedly lack the capacity to effectively meet the needs of current and future clients who will now need more help avoiding homelessness and hunger while waiting for an EAD. We will be forced to serve fewer clients as a result.

V. Conclusion

Keeping asylum seekers in a prolonged state of poverty while waiting for their claims to be heard will only serve to punish rather than deter them from escaping life-threatening persecution at home. Fraudulent actors however, are already deterred by the 150-day EAD application waiting period currently in force. The proposed rule is simply unnecessary and confers minimal, if any, benefit for the government, while deepening trauma for survivors who already endure chronic economic instability and for which taxpayers and communities ultimately pay the price. **We urge DHS to abandon the proposed rule and instead maintain the current regulatory framework for EAD applications for asylum seekers.**

We look forward to your detailed feedback on these comments, and please contact me at irenas@tahirih.org or 571-282-6180 for additional information.

Respectfully,



Irena Sullivan
Senior Immigration Policy Counsel

ⁱ <https://www.regulations.gov/document?D=USCIS-2019-0011-0001>

ⁱⁱ 8 CFR §208.7(a)(1).

ⁱⁱⁱ See Proposed Rule: §208.7(a)(iii)(F).

^{iv} <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate>

^v See proposed Rule: §208.7(a)(iii)(G).

^{vi} *Id.*

^{vii} Art. 31(1). <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>; see also <https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

^{viii} <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf> (emphasis added); <https://casetext.com/statute/united-states-code/title-8-alien-and-nationality/chapter-12-immigration-and-nationality/subchapter-ii-immigration/part-i-selection-system/section-1158-asylum> (emphasis added); see also UNHCR, “Legal considerations on state responsibilities for persons seeking international protection in transit areas of ‘international’ zones at airports” (Jan. 17, 2019), available at <https://www.refworld.org/docid/5c4730a44.html>.

^{ix} See Discussion of the Proposed Rule at V. (G).

^x *Id.* at 31; see also www.unhcr.org/en-us/3b66c2aa10 (“being a refugee with a well-founded fear of persecution is generally accepted as sufficient good cause . . .”).

^{xi} <https://msmagazine.com/2019/10/15/what-survivors-of-gender-based-violence-are-facing-at-the-border/>

^{xii} <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports>

^{xiii} See <https://www.tahirih.org/wp-content/uploads/2019/08/Tahirih-comments-8.15.19-IFR-Asylum-Eligibility-and-Procedural-Modifications.pdf>

^{xiv} *Id.*; See also Human Rights First, “Orders from Above: Massive Human Rights Abuses under Trump Administration Return to Mexico Policy” (October 2019), available at www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf

^{xv} https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/challenging_custom_and_border_protections_unlawful_practice_of_turning_away_asylum_seekers_declarations_of_asylum_seekers_turned_away_by_cbp_in_support_of_the_motion_for_class_certification.pdf

^{xvi} <https://www.tahirih.org/pubs/nationwide-survey/>

^{xvii} <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>

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- ^{xviii} <https://www.govinfo.gov/content/pkg/FR-2019-09-09/pdf/2019-19125.pdfapp>; See also <https://www.tahirih.org/wp-content/uploads/2019/11/Tahirih-Comments-Elimination-of-30-Day-Employment-Authorization-Document-Deadline.pdf>
- ^{xix} See, e.g., Postmus, J. L., Plummer, S. B., McMahon, S., Murshid, N. S., & and Mi Sung Kim, M. S. (2012). Understanding economic abuse in the lives of survivors. *Journal of Interpersonal Violence*, 27(3),411–430, Adams, A, Sullivan, C, Bybee, D, & Greeson, M. (2008), Development of the scale of economic abuse. *Violence Against Women*, 13, 563-588.
- ^{xx} The Mary Kay Foundation. (2012). 2012 Mary Kay Truth About Abuse Survey Report available at: <http://content2.marykayintouch.com/Public/MKACF/Documents/2012survey.pdf>
- ^{xxi} <https://journals.sagepub.com/doi/abs/10.1177/0886260517739290?journalCode=jiva&>; Finn, M. A., & Bettis, P. (2006). Punitive action or gentle persuasion: Exploring police officers’ justifications for using dual arrest in domestic violence cases. *Violence Against Women*, 12, 268-287.
- ^{xxii} See proposed Rule: §208.7(a)(v).
- ^{xxiii} 42 U.S.C. §§ 13701 through 14040.
- ^{xxiv} See proposed Rule: §208.7(a)(iii)(C).
- ^{xxv} <https://womenintheworld.com/2019/03/25/u-k-police-are-punishing-trafficking-victims-for-crimes-they-were-forced-to-commit-says-rights-group/>
- ^{xxvi} See Comments on the NPRM from Tahirih at <https://www.tahirih.org/pubs/tahirih-comments-opposing-fee/>
- ^{xxvii} See, e.g., Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://perma.cc/F7LT-A8MC>; President Donald Trump, Remarks on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018), <https://perma.cc/F4DX-RZ84>; Jeff Sessions, U.S. Att’y Gen., Remarks on Immigration Enforcement, Las Cruces, NM (Apr. 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement> (Last accessed Dec. 12, 2019), <https://perma.cc/DT3U-X4UG>; Rebekah Entralgo, *Conservatives want a man who compared immigrants to rats to lead DHS* (Apr. 11, 2019), <https://thinkprogress.org/conservatives-cuccinelli-dhs-immigrants-trump-7233d8f6f1ce/>