



## ASYLUM SEEKER ADVOCACY PROJECT

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84 F.R. 47148

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### **To Whom It May Concern:**

The Asylum Seeker Advocacy Project (ASAP) respectfully submits this comment to 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, DHS Docket No. USCIS-2018-0001, issued September 9, 2019.

### **Interest in the Proposed Rule:**

ASAP provides legal services to individuals seeking asylum in the United States regardless of where they live. Since its establishment, ASAP has provided over 3,500 asylum seekers with critical legal information and prevented over 650 deportations using its unique remote representation model. While ASAP has provided assistance to individuals in defensive asylum proceedings in 40 states, our outreach focuses on supporting individuals in areas with little to no pro bono legal services. ASAP routinely assists asylum applicants in defensive proceedings with the filing of employment authorization (EAD) forms. Since the start of 2019, ASAP has assisted in the preparation and filing of over 40 EADs for asylum applicants.

## Department of Homeland Security Notice:

On September 9, 2019, the Department of Homeland Security (DHS) published a [Notice of Proposed Rulemaking](#) (“the Notice”) on Removal of the 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, DHS Docket No. USCIS-2018-0001, in the Federal Register at 84 F.R. 47148.

Currently, asylum seekers whose asylum applications have been pending without a decision for at least 150 days (“asylum applicants”) are eligible to apply for an EAD unless the asylum applicant has caused delays in their immigration case, in which case they must wait longer. Pursuant to a regulation that has been in place for more than two decades, U.S. Citizenship and Immigration Services (USCIS) is required to adjudicate the I-765, Employment Authorization application (“EAD application”) of an asylum applicant within 30 days of receiving it. Nonetheless, USCIS routinely failed to meet the deadline until July 2018, when a federal court in the case *Rosario v. USCIS* ordered USCIS to comply with the deadline.<sup>1</sup>

This proposed rule (“the Rule”) would remove the existing regulatory requirement that USCIS grant or deny an initial employment authorization application within 30 days of when an asylum applicant files an EAD application. The Rule would also remove a provision requiring that an application for renewal be received by USCIS no more than 90 days prior to expiration of the employment authorization.

### ***Summary of Arguments***

First, the Notice fails to address the Rule’s potential impact on individuals in defensive asylum proceedings. Notably, much of the analysis in the Notice appears to consider only the impact to affirmative asylum applicants, while the proposed changes would also impact individuals in defensive asylum proceedings. Failure to explain and consider how the Rule impacts defensive asylum applicants specifically and differently implicates all of the Notice’s analysis, from its impact on individual asylum seekers to its impact on other government agencies.

Second, it is clear the Rule would also adversely affect asylum applicants, legal service providers, and local communities beyond the loss of wages discussed in the Notice. Without work authorization, asylum applicants will be at increased risk of

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<sup>1</sup> See *Gonzalez Rosario v. USCIS*, 365 F. Supp. 3d 1156 (W.D. Wash. 2018) (enjoining USCIS from further failing to adhere to the 30- day deadline for adjudicating EAD applications for asylum applicants).

homelessness and face difficulties in securing healthcare and legal representation. Local communities and service providers will face substantially greater burdens in trying to provide support for asylum applicants, which will place strain on already limited resources.

Third, the economic analysis in DHS's Notice fails to consider a number of variables and, in the absence of additional information, cannot be trusted as an adequate assessment of the Rule's likely impact. Significantly, the Notice inaccurately estimates the likely lost wages of asylum seekers by assuming the period of delay for EAD processing will be unrealistically low. Moreover, DHS provides no rationale for why it bases all of its analysis as to economic loss on this faulty assumption regarding processing times. Additionally, DHS fails to fully consider the impact of the Rule on businesses and native workers, while omitting altogether analysis of losses as it relates to tax revenue that municipal, city and state governments will incur. Without further research, the true economic impact of the Rule cannot be adequately assessed.

Fourth, the Notice also fails to consider how the new Rule will create additional burdens on other agencies, in particular, how it will impact the work of both the Executive Office of Immigration Review (EOIR), the Internal Revenue Service (IRS), and the Department of Labor (DOL). Removing the 30-Day deadline will result in substantial increases in requests for continuances and create additional backlogs for U.S. immigration courts, which are housed within EOIR. Loss of tax revenue as well as likely increases in unauthorized work will likely create additional investigatory work for the IRS. The increase in unauthorized work will also likely result in a higher incident of wage theft and dangerous work sites, which will require additional investigations and adjudication by the DOL.

Fifth, significantly, the Notice fails to consider a number of viable alternative solutions that could potentially avoid the negative consequences of the Rule. Numerous alternatives, including increased timeframes for EAD processing and e-filing of EAD applications provide reasonable, cost-efficient alternatives that avoid substantial injury to asylum applicants, legal service providers, business and state governments. Notably, DHS even fails to consider the possibility of adopting any of the recommendations on the EAD process within the 2019 USCIS Ombudsman Report.

Sixth, in making it more difficult for asylum applicants to integrate and adjust to life in their new communities, the Rule diverges from both the congressional intent in creating EADs and from international norms concerning the rights of asylum seekers and refugees. Congress granted DHS the ability to issue asylum applicants work authorization in order to help facilitate integration into local communities. The Rule departs from this

intent by making it more difficult for asylum seekers to assimilate successfully and imposing additional barriers for them as they pursue their immigration cases. The Rule also breaks with international law and norms that protect asylum seekers right to work.

Finally, the stated purposes for the regulatory change in the Notice do not support implementing the Rule. Both the changes in EAD document production, and the vetting and national security concerns stated in the Notice have been in place for years, and never previously generated a need for the agency to eliminate the processing timeline. Additionally, the failure to fully consider the viability of either a 60-day or 90-day timeline, therefore, gives cause to doubt that the ostensible reason for the regulatory change — “efficiency” — is stated in good faith. Indeed, when viewed in light of the administration’s clear stated goals of deterring asylum seekers from entering the United States, it is more plausible that the rule change is motivated by a deliberate effort to limit access to asylum in the United States.

#### **I. The Rule Fails to Adequately Consider its Impact on Asylum Applicants in Defensive Proceedings**

While the Rule would impact asylum applicants in both affirmative and defensive proceedings, DHS does not clarify whether its analysis of the impact of the Rule includes both affirmative and defensive asylum applicants. DHS includes data on defensive asylum applicants to show the volume of I-765 applications (initial, renewal and total) in Table 8.<sup>2</sup> However, the remaining analysis in the Notice seems devoted to affirmative asylum applicants. In fact, the only mention of defensive asylum applicants is in the footnotes, where DHS states that there is an ongoing backlog of pending defensive asylum cases at EOIR, “which as of late 2017 had approximately 650,000 cases.”<sup>3</sup> The failure to assess the impact on defensive asylum applicants is significant given that EAD applications from defensive asylum applicants likely make up a significant portion of the total EAD applications filed by asylum applicants. In a 2019 Report DHS stated that EOIR received 119,303 defensive asylum cases in Fiscal Year 2017, making defensive asylum cases nearly half of all new asylum cases filed for the year.<sup>4</sup> By giving short thrift to defensive asylum applicants, the Notice thus fails to adequately address the impact of the Rule.

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<sup>2</sup> See Notice at 47154 n. 15.

<sup>3</sup> See *id.*

<sup>4</sup> See DHS Office of Immigration Statistics, *Annual Flow Report: Refugees and Asylees: 2017* (March 2019) at 7-8 (stating that 119,303 defensive asylum cases were received by EOIR in Fiscal Year 2017, whereas as USCIS received a total of 139,801 affirmative asylum filings).

Because the Notice fails to address such a substantial portion of the affected asylum applicants, its analysis does not accurately reflect the full impact of the Rule. In order to provide reasonable justification for the new Rule, DHS must therefore provide further analysis of (1) any differences in the impact of this rule change on defensive asylum applicants versus those in affirmative proceedings, (2) the impact of the Rule on the additional government agencies implicated in defensive asylum proceedings, as well as (3) a breakdown of how many of the EAD applications from asylum applicants come from those in affirmative proceedings versus defensive proceedings.

## **II. The Notice Fails to Consider the Rule’s Impact on Asylum Seekers and Local Communities**

The Notice fails to consider how the Rule would impact asylum seekers and their local communities beyond lost wages: the Rule would make it more difficult for asylum applicants to pursue their immigration cases, negatively impact asylum applicants’ well-being, health and safety, and create significant hardship for the communities where asylum applicants live.

### ***An Asylum Applicant Explains That Employment Authorization is Key to Integration***

The current 30-day adjudicatory deadline has been essential for asylum applicants seeking to integrate successfully into local communities. The story of ASAP’s client, Adriana<sup>5</sup>, showcases the significance of employment authorization for asylum applicants.

Adriana entered the United States in 2015. She has not yet had an individual hearing on her asylum claim before an immigration judge. Shortly after arriving in the United States, Adriana received a hearing notice from EOIR scheduling her first hearing for 2016. However, during her intake process with ASAP in early 2016, calling the EOIR hotline uncovered that Adriana had missed a hearing and had been deported *in absentia*. Ultimately it became clear that the EOIR notice had been sent with the wrong date – and thus the government’s error caused Adriana to receive an *in absentia* deportation order. ASAP filed a motion to reopen on Adriana’s behalf, which was granted, vacating the *in absentia* removal order. After reopening her case, EOIR scheduled an individual hearing, which is now still more than a year away.

Through no fault of her own, it has taken Adriana years to get this far in her asylum case. Like many asylum seekers, Adriana was forced to accept unlawful employment in order to support herself and her children. Had she not secured her EAD soon after the 180 days her asylum application was pending, she and her family would have faced even

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<sup>5</sup> The name Adriana is a pseudonym used to protect the identity of ASAP’s client.

greater obstacles to integration, such as a lack of health insurance and greater financial instability.

When asked how she felt about the proposed change to the 30-day processing requirement and the possibility of greater delays in the approval of EAD applications for asylum applicants, Adriana stated:

"For me, having work authorization while my asylum case is pending has made a huge difference, not only in my life, but for the lives of my children. There are children that depend on the work of their parents who came to this country to bring them to safety. Before I had work authorization, I worked at a restaurant where I was treated poorly. I couldn't do anything about it because I wasn't working legally. Now, I have a good job and feel I can support my family. Having work authorization also gave me an identity document that helped me be able to get health insurance, not only for me, but for my family as well. And now that I am thinking about moving and renting a new apartment, it helps as well to have an identity document from the United States, without which I would have to pay a much larger deposit."

Many of the asylum seekers ASAP works with have stories similar to Adriana's. For thousands of asylum applicants, the expeditious adjudication of their EADs makes it possible for them to integrate successfully into their local communities and begin their lives in the United States. The Rule, however, will cause significant delays that make integration difficult, if not impossible, with serious consequences for asylum applicants and their local communities.

### ***Impact on Asylum Applicants' Ability to Obtain Immigration Counsel***

DHS fails to address how the Rule would impact the ability of asylum applicants to obtain immigration counsel. ASAP provides asylum seekers in defensive proceedings with pro se assistance filing I-589's and EAD applications. For many of the asylum seekers ASAP works with, obtaining work authorization allows them to save sufficient funds to hire private immigration counsel. In ASAP's experience, the 30-day EAD processing requirement for asylum applicants is critical in order to ensure that asylum applicants have the ability to hire private counsel. Without access to rapidly adjudicated work

authorization, it is likely that asylum applicants will have a more difficult time finding private immigration counsel.<sup>6</sup>

The net result of the regulatory change will be that asylum applicants are simply less likely to find and hire counsel for their immigration cases. Access to immigration counsel is particularly important in the defensive asylum context, in which applicants find themselves in an adversarial proceeding before an immigration judge. Nationwide, only 10% of unrepresented defensive asylum applicants win relief, while thousands of pro se litigants receive deportation orders despite having strong claims.<sup>7</sup>

### ***The Rule's Impact on Asylum Applicants' Well-Being, Safety, and Health***

The inability to legally work will destabilize the financial situation of people already traumatized by the threats and persecution that led them to apply for asylum. The significant collateral consequences of the Rule on asylum seekers will be seen in the areas of health, food security, and housing stability, as evidenced by Adriana's story.<sup>8</sup>

The financial destabilization created by the delay in work authorization will also put asylum applicants at greater risk by increasing the likelihood that they will remain in abusive living situations and predatory employment relationships.<sup>9</sup> ASAP has worked with many asylum seekers who find themselves in vulnerable situations upon arrival in the United States because their access to financial resources is limited. Receiving an EAD is often the key to independence and stability: the ability to work allows an asylum applicant to pay for housing, buy food, pay for medical care, and otherwise participate in their local communities.

Without the ability to work lawfully, however, asylum seekers may be forced to endure dangerous living conditions or abuse in order to be able to live in the United States while awaiting the adjudication of their asylum applications.<sup>10</sup> Human Rights Watch conducted a series of interviews that illustrate this point:

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<sup>6</sup> See Human Rights Watch, *At Least Let Them Work*, (Nov. 12, 2013) [available at: <https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>] [hereinafter Human Rights Watch, *Let them Work*].

<sup>7</sup> See, Transactional Records Access Clearinghouse (TRAC), [Asylum Representation Rates Have Fallen Amid Rising Denial Rates](https://trac.syr.edu/immigration/reports/491/), (Nov. 12, 2017) [available at <https://trac.syr.edu/immigration/reports/491/>].

<sup>8</sup> See Human Rights Watch, *Let them Work* at 26–34 (detailing how lack of work authorization causes “physical and emotional harm,” to asylum seekers, impacts their ability to secure housing and food, and increases their “vulnerability to exploitation.”).

<sup>9</sup> See *id.* at 33–34.

<sup>10</sup> See *id.* at 34.

Forcing asylum seekers to rely on others for subsistence permits, and even encourages, abusive and exploitive relationships. Amina Esseghir, a former caseworker at the International Institute of New Jersey, said that one of her clients, a 21-year-old female asylum seeker, was taken in by a family who provided for her well-being. But this situation created an “odd power dynamic” between family members and the dependent asylum seeker. Members of the family told the asylum seeker that they were going to prostitute her out to make money. Esseghir noted that the client “was in a situation where if she didn’t do what the [family] wanted, she would be homeless.

[...]

Asylum seeker Isabel C.’s boyfriend is physically, verbally, and psychologically abusive. He confines her within his home and away from her cousins. She is afraid to leave because she does not want her daughter to go hungry or live on the streets. She said that she will not be able to support herself and her daughter because she cannot work. Isabel’s lack of work authorization as an asylum seeker is one factor keeping her in a situation of domestic violence. “I am scared for myself and my daughter. There is no place for us. I wonder if I will ever be able to provide a better life for her.”<sup>11</sup>

The ability to work makes it easier for asylum seekers to extricate themselves from dangerous living situations — including situations involving domestic violence.<sup>12</sup>

Further, the Rule threatens the health and wellbeing of asylum seekers while placing an unnecessary strain on the healthcare system.<sup>13</sup> Asylum seekers have no documentation of their authorization to remain in the United States during the pendency of their asylum case, nor do they have a way to seek basic primary health care before the adjudication of their EAD application.<sup>14</sup> As is mentioned above by ASAP’s client Adriana, obtaining an EAD gave her access to private health insurance for herself and her family. Delays in the adjudication of EAD applications could therefore lead to an increase in the number of asylum applicants forced to seek medical care primarily through overburdened emergency room systems. This reliance on emergency medical services

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<sup>11</sup> *Id.* at 33-34.

<sup>12</sup> *See id.* at 34–35.

<sup>13</sup> *See id.* at 15–16 (“[Lack of work authorization] prevents asylum seekers from accessing affordable health care while their claims are pending.”).

<sup>14</sup> *Immigration Status and the Marketplace*, Healthcare.gov, [available at: <https://www.healthcare.gov/immigrants/immigration-status/>].

raises healthcare costs for everyone and denies asylum applicants access to preventive primary care.

### ***The Rule's Impact on Local Communities***

The impact on individuals will also be felt across local communities: it is likely that rates of homeless will increase and resources of community service providers will consequently be stretched thin. Asylum applicants, barred from employment for prolonged and indeterminate lengths of time, will likely be forced to rely on greater community support, including assistance from family members, food banks, shelters, and other local charities. Delays in obtaining work authorization will likely increase the risk of violence and victimization of asylum applicants in the United States; this in turn could lead to greater expenditure of local law enforcement resources to investigate and prosecute instances of violence against asylum applicants. Additionally, public schools may have to shift resources to providing counseling and other psychological services to traumatized children who have witnessed or suffered domestic violence. The Notice also fails to address these potential societal impacts on U.S. citizens and other community members, nor does it address the subsequent financial costs incurred by local communities where asylum applicants reside.

In order to provide reasonable justification for the new Rule, DHS must therefore provide further analysis of how the rule will impact (1) the ability of asylum applicants to integrate; (2) the ability of asylum seekers to obtain immigration counsel, (2) the well-being, health and safety of asylum seekers, and (3) the possible drain on local community resources asylum applicants may turn to while waiting for their work authorization.

### **III. The Notice Fails to Consider the Economic Losses to Asylum Applicants, Businesses, Legal Service Providers, as well as State and Local Governments**

ASAP consulted with multiple economists in order to better assess the likely costs of the Rule. The discussion below reflects ASAP's conclusions about the economic costs in light of those discussions.

#### ***Unrealistic Processing Times Lead to Significant Underestimating of Economic Losses***

DHS bases its estimate of economic losses on the unrealistic and unlikely assumption "that if this Rule is adopted, adjudications will align with DHS processing times achieved in FY 2017 (before the *Rosario v. USCIS* court order)." It is unlikely and unreasonable to estimate that the Rule will result in a return to pre-*Rosario* processing times. First, because DHS rejects a 90-day alternative as not giving USCIS enough flexibility to

adjudicate EADs, it is reasonable to assume processing times will regularly exceed 90 days under the Rule. Second, current EAD processing times can be as high as 570 days<sup>15</sup> (19 months) depending on the category and the service center.<sup>16</sup> Without any required processing timeline there is no guarantee that the processing of asylum applicant EADs will not mirror the longer timeframes of other EAD categories. Third, according to USCIS's own estimates, the processing time of EADs (presumably renewals not covered under *Rosario*) for asylum applicants can be as much as 180 days at the Nebraska Service Center, 135 days at the Potomac Service Center, and 90 days at the Texas Service Center.<sup>17</sup> As such, DHS's calculation of economic losses relies on unrealistic processing timelines, grossly underestimating lost wages and losses to social security and Medicaid.

DHS must either provide a basis for calculating economic loss using pre-*Rosario* processing times or provide a more realistic prediction of processing times under the Rule. Additionally, DHS should provide the following data needed to better judge the reasonableness of estimated processing times under the Rule: average processing times for all EADs (with the exception of those initial EADs filed by asylum applicants), and average processing times for renewals of EADs based on pending asylum applications.

### ***Economic Losses for Companies, Native Workers, and State and Local Governments***

DHS underestimates the impact of the Rule on the private sector. Under the Rule, companies may have insufficient access to labor or bear the costs of attracting and hiring alternative labor. As noted by 1,470 economists in an open letter in 2017, immigrants provide a "significant competitive advantage" to the U.S. economy, heightening levels of innovative and flexibility within industry.<sup>18</sup> The Rule would unnecessarily deny businesses and organizations these advantages provided by asylum seekers' timely involvement in the local economy.

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<sup>15</sup> This calculation assumes 30 days in each month.

<sup>16</sup> As of November 7, 2019, the processing time at the Vermont Service Center for EADs based on category (c)(33) – for those with an approved and concurrently filed I-821D – is between 14.5 and 19 months. Information is searchable on USCIS's website here: <https://egov.uscis.gov/processing-times/home>.

<sup>17</sup> As of November 7, 2019, the processing times for EADs based on category (c)(8) – for those with a pending I-589 – is between 4 and 6 months at the Nebraska Service Center, 2.5 and 4.5 months at the Potomac Service Center, and 3 weeks to 3 months at the Texas Service Center. Information is searchable on USCIS's website here: <https://egov.uscis.gov/processing-times/home>.

<sup>18</sup> New American Economy, *Open Letter from 1,470 Economists on Immigration* (Apr. 12, 2017) [available at <https://www.newamericaneconomy.org/feature/an-open-letter-from-1470-economists-on-immigration/>].

DHS fails to consider that asylum seekers bring a wide and deep range of professional experience to their work, which cannot always be replaced by a native workforce. Recent empirical immigration research suggests that native and immigrant labor are complements, rather than substitutes.<sup>19</sup> Accordingly, the extended delay of asylum applicants from the labor market might actually lead to adverse impacts on native worker prospects,<sup>20</sup> which is not contemplated in DHS's assessment of costs.

DHS estimates of lost wages do not capture the full scope of "lost profits" to companies caused by a delay or shortage of asylum applicant labor. It is reasonable to assume that companies earn profits from the value of asylum applicant labor in excess of wages paid to those workers.<sup>21</sup> As such, calculating lost wages associated with reduced employment will not capture associated profit losses, which is critical to assessing the economic cost of the Rule.

Additionally, the Notice does not attempt to estimate the cost of the Rule as it relates to lost income tax revenue. Local, state, and federal governments will lose income tax revenue from asylum applicants who are delayed in entering the job market or forced to work in the shadow economy. DHS acknowledges that tax losses would vary according to the jurisdiction.<sup>22</sup> However, DHS fails to consider tax revenue lost not only as a result of lost wages, but from corresponding lost profits as well as losses from sales and other consumption-based taxes.

In order to accurately assess the cost of the Rule, DHS must (1) fully consider the cost to the private sector, including estimating loss in profits, (2) address the potential negative impact to a native workforce, (3) attempt to calculate lost income tax revenue, and (4) provide analysis of how the loss in tax revenue would impact federal, state, and local government.

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<sup>19</sup> See, e.g., Jongkwan Lee, Giovanni Peri, Vasil Yassenov, *The Labor Market Effects of Mexican Repatriations: Longitudinal Evidence from the 1930s*, NBER WORKING PAPER, (Oct. 2019) [available at <https://www.nber.org/papers/w26399>].

<sup>20</sup> See G. I. P. Ottaviano & G. Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 152 (2012).

<sup>21</sup> See David Card et al., *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (2018) (indicating that workers are not paid the marginal value of their labor contribution, which means firms are earning additional profits from their labor).

<sup>22</sup> See Notice at 47150.

#### IV. The Notice Fails to Consider the Rule's Impact on EOIR, the IRS, and the DOL

DHS has not properly considered or evaluated the additional burden that the Rule will place on various federal agencies. This is particularly clear as it relates to defensive asylum applicants, who are in proceedings before EOIR, not USCIS.

##### *Increased Backlogs in Immigration Court*

The Rule could inadvertently increase the backlogs in immigration court. Without reliably quick processing of an EAD, a higher number of asylum applicants in defensive proceedings will be unable to pay for private immigration counsel and increasingly forced to seek out pro bono representation. As such, reasonable continuances are more likely to be requested to allow asylum applicants to look for pro bono counsel. Additionally, for those applicants who are forced to proceed pro se, immigration courts will be required to expend more time and resources in eliciting testimony and evaluating evidence in their cases.<sup>23</sup>

Defensive asylum applicants are also currently dissuaded from seeking continuances, because if they do so, they become ineligible for an EAD.<sup>24</sup> The promise of an EAD being processed for asylum applicants within 30 days has likely served as a deterrent to requesting continuances and increasing delays in immigration proceedings. Without the guarantee of a specific adjudication timeline, it seems defensive asylum applicants could weigh the possibility of an EAD at some point in the future as insufficient justification to foreclose seeking a continuance. Moreover, if defensive asylum applicants pursued continuances in greater numbers, it would result in an even longer backlog for an already overburdened immigration court system.

The Notice does not address whether the Rule could result in a higher volume of continuances, nor does it consider how increased continuances could strain EOIR's

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<sup>23</sup> See The Vera Institute, *THE CASE FOR UNIVERSAL REPRESENTATION*, (Dec. 2018) [available at <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1>.] (highlighting how having counsel on both sides increases efficiency of immigration proceedings); see also, Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 48–50 & 71 (2015) (detailing the significance of legal representation in immigration proceedings for case outcomes); New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011) (discussing the consequences of lack of adequate legal representation in immigration cases).

<sup>24</sup> See EOIR, *The 180-Day Asylum EAD Clock Notice* [available at: [https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum Clock Joint Notice - revised 05-10-2017.pdf](https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Clock%20Joint%20Notice%20-%20revised%2005-10-2017.pdf)].

limited resources and capacity to timely adjudicate cases. Before implementing the Rule, DHS must consider whether the Rule would negatively impact EOIR, and specifically address the potential for an increased backlog at the immigration courts and the subsequent cost incurred by EOIR.

### ***Additional IRS Investigatory Work***

The Rule would also create additional burdens on the IRS, both as a result of a reduction on taxable income, and increased investigations of tax liability for unauthorized employment. The IRS stands to lose income revenue for asylum applicants who would otherwise be eligible for employment and taxation. Unauthorized work may also result in tax evasion by employers and individuals, requiring additional investigations by the IRS. DHS has not fully considered the tax revenue that would be lost, or the additional investigatory work of the IRS that will follow as a result of limiting taxable work opportunities for asylum applicants. Therefore, DHS must assess the additional burdens the Rule would create for the IRS before implementation.

### ***Higher Levels of Unauthorized Work and Additional Investigatory Burdens for DOL***

The Rule could also create additional burdens for DOL by forcing it to investigate higher incidents of wage theft, and other unsafe working conditions monitored by its agency, the Occupational Health and Safety Administration (OSHA).<sup>25</sup>

DHS does not acknowledge the impact of unauthorized work on DOL. With delays in the adjudication of employment authorization, many asylum applicants will be forced to join the unauthorized workforce in order to support themselves and their families. Studies have shown that immigrants without work authorization are at a higher risk of labor exploitation and wage theft by employers who are more likely to violate federal and state minimum wage and overtime requirements.<sup>26</sup> DOL investigations are also made significantly more difficult as a result of fear among individuals working without

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<sup>25</sup> See Jack Herrera, *What Will Happen if Trump Cancels Work Permits for Asylum Seekers?*, PACIFIC STANDARD (Apr. 30 2019) [available at <https://psmag.com/news/what-will-happen-if-trump-cancels-work-permits-for-asylum-seekers>].

<sup>26</sup> See, e.g., Douglas Massey & Kerstin Gentsch, *Undocumented Migration to the United States and the Wages of Mexican Immigrants*, 48 INT'L MIGRATION REV. 482 (2014); Sally C. Moyce & Marc Schenker, *Migrant Workers and Their Occupational Health and Safety*, 351, 357 (Jan. 24, 2018) [available at: <https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-040617-013714>] (“[R]esearchers found that undocumented workers were more than two times as likely to experience wage violations compared with documented workers.”).

EADs, which makes it easier for employers to mistreat and underpay workers; notably this difficulty has also been found to lower morale of DOL investigators.<sup>27</sup>

The DOL is also required to investigate reported instances of wage theft and expends considerable resources investigating cases where unauthorized immigrant laborers are victimized. Unauthorized workers are subject to many of the protections of the Fair Labor Standards Act, including federal minimum wage guarantees, which are enforced by the Wage and Hour Division of DOL.<sup>28</sup> As such, the delay in EAD processing is likely to force a greater volume of asylum applicants into precarious work situations, and in turn, generate a higher incident of wage theft claims that the DOL will investigate.

Additionally, persons without work authorization are more likely to work in unhealthy and dangerous conditions that violate the parameters of the Occupational Safety and Health Act, which is enforced by OSHA.<sup>29</sup> The Rule will therefore likely also result in an increased need for on-site OSHA inspections, and greater allocation of resources within the DOL to this work.

DHS failed to consider the meaningful impact of the Rule on the DOL as it relates to wage theft and work-site safety inspections. DHS must therefore consider the increased investigatory burden and resource cost the Rule will impose on DOL.

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<sup>27</sup> See Sam Levin, *Immigration Crackdown Enables Worker Exploitation, Labor Depart Staff Say*, *The Guardian* (Mar. 30. 2017) [available at <https://www.theguardian.com/us-news/2017/mar/30/undocumented-workers-deportation-fears-trump-administration-department-labor>].

<sup>28</sup> See, e.g., *Lucas v. Jerusalem Cafe*, 721 F.3d 927, 934 (8th Cir. July 29, 2013) (noting that “FLSA’s sweeping definitions of ‘employer’ and ‘employee’ unambiguously encompass unauthorized aliens”); *Colon v. Major Perry St. Corp.*, 987 F. Supp. 2d 451, 454 (S.D.N.Y. 2013) (collecting cases) (noting that “[c]ontemporary courts...have continued to conclude that” FLSA’s definition of employee extends to unauthorized immigrant workers); see also U.S. Dep’t of Labor, Wage and Hour Div., “Fact Sheet # 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division” (rev. July 2008) [available at: <https://www.dol.gov/whd/regs/compliance/whdfs48.pdf>] (“The Department’s Wage and Hour Division will continue to enforce the FLSA ... without regard to whether an employee is documented or undocumented.”).

<sup>29</sup> Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 677 & n. 51 (2003).

## V. DHS Fails to Consider Possible Alternatives

DHS is required to consider feasible and readily identifiable alternatives to the proposed action.<sup>30</sup> At the very least, it must should consider a no-action alternative, leaving the 30-day adjudication timeline in place, and investigate alternative, feasible timelines such as a 60 or 90 day processing requirement. DHS should consider the alternatives presented in this comment, as they are each a reasonable way to further Congress's objectives in creating work authorization for asylum applicants, without the additional costs that would accrue with increased delays.

The Notice also notably fails to consider any of the alternative recommendations that the 2019 DHS Ombudsman Report suggests for addressing EAD processing times.<sup>31</sup> The failure to adequately consider at the very least a few of these alternative actions ignores existing regulations directing agencies to consider the cost and benefits of regulatory alternatives, including their potential benefits and drawbacks.<sup>32</sup>

### *Possible Alternatives*

DHS has proposed no alternative timeline to the 30-day adjudication of EADs filed by asylum applicants. DHS rejects a 90-day timeframe to replace the 30-day timeframe for adjudicating EADs without very little explanation.<sup>33</sup> Even though a 90-day deadline would already be three times the current timeframe, DHS proposes to instead remove a timeframe entirely, suggesting that the agency anticipates these applications being significantly delayed beyond 90 days.

### *90-day deadline*

DHS is wrong to dismiss a 90-day deadline without meaningful consideration. A 90-day deadline would be a reasonable alternative, but DHS asserts only that "it would not provide USCIS with the certainty and flexibility it needs to fulfill its core mission."<sup>34</sup>

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<sup>30</sup> See 5 U.S.C. § 553 (establishing minimum requirements for agency rule making).

<sup>31</sup> See U.S. Citizenship and Immigration Services Ombudsman, *Annual Report 2019* (Jul. 12, 2019) [hereinafter Ombudsman Report] [available at [https://www.dhs.gov/sites/default/files/publications/dhs\\_2019\\_ombudsman\\_annualreport\\_verified.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_2019_ombudsman_annualreport_verified.pdf)].

<sup>32</sup> Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

<sup>33</sup> Notice at 47166-47167.

<sup>34</sup> Notice at 47167.

In the Notice itself, DHS states that in FY 2017, prior to the *Rosario* court order, USCIS adjudicated 92% of asylum applicants' EADs within 90 days.<sup>35</sup>

### ***60-day deadline***

DHS has shown by its past conduct that the agency is capable of adjudicating a majority of EAD applications for asylum applicants within 60 days of submission. In the Notice, DHS states that in FY 2017, prior to the *Rosario v. USCIS* court order, USCIS adjudicated approximately 78% of applications within 60 days.<sup>36</sup> Relying on DHS's assumption that under the new Rule, pre-*Rosario* processing times will be the norm, this statistic demonstrates that, even without the external court-ordered pressure to adjudicate applications within the 30-day deadline, USCIS is capable and able to adjudicate the majority of applications within 60 days.

### ***Alternative deadlines for cases that don't require additional security vetting***

If DHS is not able to meet a 30, 60, or even 90-day deadline in all cases, it could institute a tiered or alternative system of deadlines for cases that require additional security vetting. DHS already uses a similar alternative deadline process when it requests additional documentation from an asylum applicant, stopping the clock on the 30-day processing timeframe.<sup>37</sup> A stop-time mechanism for cases that require additional vetting would be a feasible way to maintain a fixed processing deadline (which would maintain agency accountability and EAD access) without sacrificing the agency's flexibility.

### ***Failure to Consider Recommendations from the 2019 USCIS Ombudsman Report***

The 2019 USCIS Ombudsman Report recommends that the agency take a number of steps to ensure timely adjudication of EADs, including : (1) augmenting USCIS' staff resources to enable Service Centers to devote more production hours to EAD processing; (2) accelerating the incorporation of the Form I-765 into eProcessing; (3) implementing a public education campaign to encourage applicants to file I-765 renewal applications up to 180 days before the expiration of current EADs and verify the addresses provided; (4) establishing a uniform process to identify and expedite processing of Form I-765 resubmissions filed due to "service error."<sup>38</sup> The Notice, however, fails to consider any of these possible recommendations, and does not assess

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<sup>35</sup> Notice at 47167.

<sup>36</sup> Notice at 47149.

<sup>37</sup> Notice at 47153, ft. nt. 9.

<sup>38</sup> Ombudsman Report at 83.

how their implementation might ameliorate any need to remove the 30-day adjudication requirement.<sup>39</sup>

In the Notice, DHS admits it “has not estimated the hiring costs that might be avoided if this proposed rule were adopted,”<sup>40</sup> and thus does not know whether hiring costs would constitute a substantial financial burden. Instead, DHS argues that hiring new employees would not solve their application overload. However, the temporary delay between hiring new employees and their ability to process applications does not require a permanent elimination of a fixed processing timeframe. Furthermore, the promulgation of the Rule will almost certainly yield increased delay times longer than those that could result from any new employee onboarding. Moreover, the 2019 Ombudsman Report rejects concerns that onboarding would cause significant delays, and instead suggests that the hiring of additional staff would be pivotal for DHS to increase its processing times.<sup>41</sup> DHS fails to meaningfully engage in this analysis, providing little to no cost-benefit analysis.

DHS also did not adequately consider the possibility of reassigning existing employees. These reassigned employees could help process application while new employees trained. Even if the possibility of hiring new employees was rejected, DHS should have considered whether reassigning existing employees constituted a feasible and readily available alternative, including by estimating the associated costs of hiring more staff.

One particularly glaring omission from the Notice, is DHS’s decision to ignore the Ombudsman’s recommendation of implementing eProcessing procedures and new technologies in order to expedite the review process and improve review for purposes of fraud and national security concerns.<sup>42</sup> The 2019 Ombudsman Report notes that taking these steps would reduce processing times and improve overall efficiency.<sup>43</sup> DHS fails to seriously consider reasonable alternatives, including those recommendations coming from within DHS. The Rule cannot be implemented until these reasonable alternatives have been fully considered and weighed against the costs of the proposed change.

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<sup>39</sup> See generally Notice.

<sup>40</sup> *Id.* at 47149.

<sup>41</sup> See Ombudsman Report at 82–83.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 84.

## VI. The Rule Deviates from Congressional intent and International Norms

Congress created a statute to allow for asylum applicants to receive work authorization pending the adjudication of their cases.<sup>44</sup> This rule change, however, creates the possibility of an indefinite delay in processing the EADs of asylum applicants. Thus, making integration substantially more difficult. Because of this, the Rule is in tension with the underlying Congressional intent allowing for asylum applicant work authorization.

Additionally, the Rule diverges from the international norms protecting the employment rights of asylum seekers and would constitute a departure from these commitments for the United States. This both damages the United States' international standing and undermines the architecture of the international system for the protection of refugees and asylum seekers.

### ***A Rule Change Diverges from both Congressional Intent Authorizing EAD Applications and International Norms***

DHS argues that it has the authority under the INA to determine of its own volition how long it needs to adjudicate EAD applications.<sup>45</sup> However, this logic is undermined by the rest of the statute. Importantly, one of the "chief purposes" of the 30-day deadline was "to ensure that bona fide asylees are eligible to obtain employment authorization as quickly as possible."<sup>46</sup> As noted in *Rosario*, "although Congress has not included a timetable specific to EAD applications, it has stated that the final adjudication of the asylum application 'shall be completed within 180 days after the date an application is filed.'"<sup>47</sup> This timetable syncs up with the regulatory requirements—that after the asylum application has been pending for 150 days, the EAD application should be resolved in 30 days."<sup>48</sup> Congress plainly wrote this statute with the understanding that a reasonable time limit would be placed on the adjudication period, something the agency understood when they promulgated the regulation that the Rule will replace. "The purpose of promulgating the 30-day deadline on top of that 150-day waiting period was to cabin what was already—in the agency's view—an extraordinary amount of time to wait for work authorization."<sup>49</sup>

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<sup>44</sup> See 8 U.S.C. § 1158(d)(2); see also Notice at 47153 n. 11 (acknowledging this as the underlying purpose of the statutory scheme at issue).

<sup>45</sup> Notice at 47149.

<sup>46</sup> Notice at 47153 n. 11.

<sup>47</sup> *Gonzalez Rosario*, 365 F. Supp. 3d at 1162 (quoting 8 U.S.C. § 1158(d)(5)(A)(iii)).

<sup>48</sup> *Id.* at 1162-3.

<sup>49</sup> *Id.* at 1161.

DHS must therefore explain how the Rule conforms with the congressional intent authorizing the creation of EADs for asylum applicants before it can be implemented.

### ***The Rule Departs from International Norms Concerning the Rights of Asylum Seekers to Employment***

Additionally, the Rule is out of sync with the commitments and policies of our peer nations in the international community. Articles 17 and 18 of the 1951 Refugee Convention recognizes that asylum-seekers have a right to self-employment access opportunities that is at least as favorable as the access enjoyed by similarly situated foreigners.<sup>50</sup> The United States has historically maintained policies that mirrored the requirements of the Convention.<sup>51</sup> Our peer nations continue to honor their commitments to the international norms of the Convention. Canada — with whom the United States has signed a Safe Third Country Agreement formed under mutual recognition of the two nations’ “generous systems of refugee protection” and “both countries’ traditions of assistance to refugees” — maintains a system significantly more generous than that of the Rule.<sup>52</sup> Concretely, Canada allows eligible asylum seekers (and their families) who cannot pay for basic needs to access open work permits.

Canada’s more humanitarian commitment, for instance, is mirrored by our peer nations globally. At least 14 nations in the European Union grant asylum-seekers with work authorization before 6 months (and several upon filing).<sup>53</sup> Furthermore at least nine nations in Latin America allow for immediate work authorization upon filing of asylum application.<sup>54</sup> The Rule drives the United States further from international norms and practices, undermining the nation’s commitment to the protection of the asylum-seeker rights and dignity.

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<sup>50</sup> See Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, adopted July 28, 1951, entered into force April 22, 1954, chap. III, <http://www.unhcr.org/3b66c2aa10.html> (accessed Nov. 5, 2019). By acceding to its 1967 Protocol, the United States has bound itself to these provisions of the Refugee Convention; See also, James C. Hathaway, *The Rights of Refugees Under International Law*, (New York: Cambridge University Press, 2005).

<sup>51</sup> See American Immigration Council, *An Overview of U.S. Refugee Law and Policy* (Jun. 18, 2019) [available at <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>].

<sup>52</sup> See Government of Canada, *Types of work permits: You’ve filed a claim for refugee protection*, [available at: [http://www.cic.gc.ca/english/work/apply-who-permit-result.asp?q1\\_options=1i&q2\\_options=2h](http://www.cic.gc.ca/english/work/apply-who-permit-result.asp?q1_options=1i&q2_options=2h)].

<sup>53</sup> UNHCR, *A guide to international refugee protection and binding state asylum systems* at 102, <https://www.unhcr.org/3d4aba564.pdf>.

<sup>54</sup> *Id.* at 102; see also Directive 2013/33/EU, <https://www.refworld.org/docid/51d29db54.html>.

DHS should consider the ramifications of a regulatory change that diverges from international norms before implement implementing the Rule.

## VII. The Stated Justifications in the Notice Do Not Support Adopting the Rule

DHS's stated justifications for a rule change do not support adopting the Rule as it stands. First, the scope of proposed regulatory changes does not correspond to the reasons given for the Rule in the Notice. Both the changes in EAD document production and vetting and national security concerns stated in the Notice have been in place for years, and never previously generated a need from the agency to eliminate the processing timeline. Second, despite DHS's own stated belief that it will be able to process the vast majority of EAD applications on a 60-day timeline, the new Rule would eliminate any processing timeline all together. The failure to fully consider the viability of either a 60-day or 90-day timeline, therefore, gives reason to doubt the ostensible motivations stated for the regulatory change. Last, if DHS was really concerned with efficiency, it could have considered adopting the proposed recommendations of the 2019 USCIS Ombudsman's Report.

### *The Notice's Stated Purposes for the Rule Do Not Make Sense*

The stated reasons for the rule change do not make sense. DHS explains that it seeks to eliminate the 30-day processing deadline because it does "not provide sufficient flexibility" to the agency 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."<sup>55</sup>

Notably, however, the changes DHS identified 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.<sup>56</sup> Also, of note, the additional fraud and national security vetting DHS identified as necessary was implemented after September 11, 2001 and the creation of the Office of Fraud Detection and National Security (FDNS) in 2004.<sup>57</sup> Despite the existence of these production and vetting changes, USCIS has been able to comply for more than a year with the *Rosario* court's order requiring it process initial EAD applications in 30 days. Also, if the agency requires additional documentation from the applicant, USCIS can and does send a request for evidence

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<sup>55</sup> Notice at 47155.

<sup>56</sup> See *id.* 47154 n.17.

<sup>57</sup> See *id.* 47154-55.

(RFE), which pauses the 30-day timeframe clock until the requested additional documentation is received.

DHS's rejection of a 90-day alternative timeline is confusing and undermines confidence in DHS's assertion that the rule change would return processing times to pre-*Rosario* timeframes. In the Notice, DHS states that "[w]ith the removal of the 30-day adjudication timeline, DHS anticipates similar outcomes to those achieved in FY 2017 [prior to *Rosario* order]."<sup>58</sup> Prior to the court's ruling in *Rosario*, USCIS adjudicated 47% of initial EAD applications within 30 days, an additional 31% of applications within 60 days, and 22% of applications in more than 60 days. However, DHS then rejects the 90-day timeline as inflexible, suggesting that, in fact, it anticipates processing delays well-beyond the pre-*Rosario* timeframes.

Furthermore, DHS's rejection of any timeline does not promote its goal of increased efficiency. Processing times under *Rosario* suggest that mandatory timelines lead to increased efficiency and expedited processing times, forcing the agency to coordinate resources more effectively to meet deadlines. Refusing to establish any alternative deadline therefore removes the incentive for increased agency efficiency. As such, the proffered justifications in the Notice, do not support the changes to the rule.

Instead, the Rule should be viewed in light of both the Administration's stated goals of making it more difficult to pursue asylum in the United States, and its open hostility towards immigrants more generally.

### ***The Lack of Reasoned Justifications Implies Other Motivation***

Because the rule change diverges from congressional intent, and the stated justifications for the Rule do not make sense, it is necessary to consider other potential motivations for the rule change. The third-country transit bar,<sup>59</sup> Migrant Protection

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<sup>58</sup> *Id.* at 47162.

<sup>59</sup> See Human Rights First, *Trump Administration Third-Country Bar is An Asylum Ba that Will Return Refugees to Danger*, (Sept. 2019) [available at <https://www.humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf>]

Protocols (MPP)<sup>60</sup> and expedited processing for “family unit” asylum cases<sup>61</sup> are evidence that this Administration is attempting to make it harder for individuals who seek safe haven at the Mexico-U.S. border to win asylum and get on a path to citizenship.<sup>62</sup> Indeed, journalists have reported that the Administration is also considering issuing an outright ban on asylum applicant work authorization.<sup>63</sup> As such, the rule change could be viewed as part and parcel of these same efforts.

## VIII. Conclusion

Asylum applicants reside in the United States legally; that is, they are in the country with the knowledge and acquiescence of the federal government. In recognition of this fact, Congress granted work authorization to asylum applicants so they would be able to integrate and assimilate into local communities expeditiously. The Rule diverges from this purpose, and instead, creates the possibility of indefinite waiting periods for asylum applicants to receive work authorization.

For the reasons listed above, it is in the interest of asylum applicants, and in the interest of the United States that asylum applicants are not delayed from entering the documented workforce. As such, ASAP strongly recommends that DHS withdraw the portion of the Rule that would eliminate the 30-day processing requirement for USCIS to adjudicate initial EAD applications from asylum applicants.

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<sup>60</sup> See Human Rights Watch, *We Can't Help You Here: US Returns Asylum Seekers to Mexico*, (2019) (“The Trump administration has pursued a series of policy initiatives aimed at making it harder for people fleeing their homes to seek asylum in the United States, separating families, limiting the number of people processed daily at ports of entry, prolonging detention, and narrowing the grounds of eligibility for asylum. In January 2019, the administration expanded its crackdown on asylum with a wholly new practice: returning primarily Central American asylum seekers to several border towns in Mexico where they are expected to wait until their US asylum court proceedings conclude, which could take months and even years.”) [available at [https://www.hrw.org/sites/default/files/report\\_pdf/us\\_mexico0719\\_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf)].

<sup>61</sup> See Jeffery S. Chase, *EOIR Creates More Obstacles for Families*, (Dec. 13, 2018) (A former immigration judge stating that the FAMU docket is an effort at “gaming of the system to deny more asylum claims for [the Administration’s ] own political motives”) [available at <https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families>].

<sup>62</sup> See Nicole Narea, *The Demise of America’s Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019) [available at <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp>].

<sup>63</sup> See Julia Ainsley, *Trump Administration Weighs Restricting Asylum-Seekers from Working*, NBC News (Nov. 4, 2019) [available at <https://www.nbcnews.com/politics/donald-trump/trump-administration-weighs-restricting-asylum-seekers-working-n1076146>].

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Conchita Cruz". The signature is fluid and cursive, with a prominent loop at the end.

Conchita Cruz  
Co-Executive Director  
Asylum Seeker Advocacy Project (ASAP)