



ASYLUM SEEKER ADVOCACY PROJECT

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DHS Docket No. USCIS-2019-0010
84 FR 62280

December 30, 2019

To Whom It May Concern:

The Asylum Seeker Advocacy Project (ASAP) respectfully submits this comment to the Department of Homeland Security's (DHS's) Notice of Proposed Rulemaking on U.S. Citizenship and Immigration Services (USCIS) Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, DHS Docket No. USCIS-2019-0010, in the Federal Register at 84 F.R. 62280, issued November 14, 2019, with supplemental information published December 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 over 40 states, our outreach focuses on supporting individuals in areas with little to no pro bono legal services. ASAP routinely assists asylum applicants with the filing of applications for asylum and withholding of removal as well as applications for employment authorization (EAD). Since the start of 2019, ASAP has assisted in the preparation and filing of asylum applications for over 80 individuals and EADs for over 40 asylum applicants.

Department of Homeland Security Notice:

On November 14, 2019, the Department of Homeland Security (DHS) published a Notice of Proposed Rulemaking (“the Notice”) on USCIS Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, DHS Docket No. USCIS-2019-0010, in the Federal Register at 84 F.R. 62280. The proposed rule creates substantial fee increases across the board for immigrants filing applications with USCIS. On December 9, 2019, DHS published an informational supplement (“the Supplement”) that extended the deadline for comment and made other changes to the original Rule.¹

In the Notice, DHS proposes to increase the USCIS fees for a number of applications, add significant new fees for a number of filings, and eliminate certain fee waivers.² A number of fee increases affect asylum seekers and, for the first time in the agency’s history, USCIS will establish a fee for the Form I-589, Application for Asylum and for Withholding of Removal (“asylum application”) and Form I-765, Application for Employment Authorization (“EAD application”) for asylum applicants.

Asylum Application Fee

DHS proposes to establish a \$50 fee for an asylum application when that form is filed with USCIS. The Notice indicates that this fee “will not be waived” and does not

¹ While DHS indicates that the reduction in costs presented in the Supplement will likely result in lower fee increases in accordance with reduced costs, the Supplement does not specify which fees would be lowered or by what amount. The Supplement only suggests that some fees listed in Table 21 of the original notice will now be adjusted to fall somewhere in-between the values listed in columns A and B. For asylum applications (Form I-589) filed with USCIS, \$50 is the fee listed in both columns, and so seems unlikely to change based on adjustments in the Supplement. For all EAD applications (Form I-765), Table 21 sets \$490 as the upper estimate and \$455 as the lower limit for potential fees. The Supplement, therefore, suggests that the actual fee for EAD applications will fall somewhere between these estimates. In the absence of any direct indication that the proposed fee schedule has been lowered for EAD submissions for asylum seekers, however, this comment responds to the fee increases stated in the original notice fee schedule. We note also that all of the arguments made here would also apply to a slightly reduced fee schedule for EAD applications as well, even if the fees were set at the Notice’s lowest estimate of \$455.

² See Notice at 62280.

permit deferred payment or payment in installments.³ The Notice also acknowledges that DHS has never previously charged a fee for asylum applications.⁴

The Notice argues that because of “a continuous, sizeable increase in affirmative asylum filings . . . processing backlogs continue to grow,” and DHS must now charge a fee for asylum applications for the first time.⁵ DHS estimates that the cost of adjudicating asylum applications is approximately \$366 per application.⁶ DHS believes that the rule would apply to 163,000 applications, and thus would generate an estimated \$8.15 million in annual revenue.⁷

DHS states that the failure of affirmative asylum applicants to pay the \$50 for asylum applicants to USCIS, will mean that applicants “will have no means of applying for recognition as a person in need of refugee protection and its attendant benefits such as asylum or withholding-based employment authorization, travel documents, or documentation of immigration status.”⁸ DHS “does not want the inability to pay the fee to be an extraordinary circumstance excusing an applicant from meeting the one-year filing deadline in INA 208(a)(2)(B), (D),” indicating that the Rule could prohibit a potential applicant from using inability to pay as a grounds for equitable tolling of the one-year asylum filing deadline.⁹

Work Authorization Fee for Asylum Applicants

The proposed rule would require those who applied for defensive asylum before the Executive Office for Immigration Review (EOIR) or filed an affirmative asylum application with USCIS to pay a \$490 fee for initial filings of EAD applications.¹⁰ Currently, USCIS exempts those with pending asylum applications who are filing their first EAD application under the 8 C.F.R. section 274a.12(c)(8) eligibility category from the EAD application fee if the applicant submits evidence of a pending asylum application and follows other instructions. The agency has not previously charged a fee for initial EAD application adjudication for asylum applicants. USCIS projects that the rule change will

³ *Id.* at 62319. The Notice does not, however, propose to require that unaccompanied minors in removal proceedings pay for I-589 application fees. *See id.* at 62320.

⁴ *See id.* at 62318.

⁵ *Id.*

⁶ *Id.*

⁷ *See id.*

⁸ *Id.* at 62320

⁹ *Id.*

¹⁰ *See id.*

force at least 300,000 asylum applicants to pay the EAD application fee each year or forgo the ability to work legally.¹¹

Summary of Argument:

The Asylum Application Fee

First, the fee will create a substantial burden for individual asylum applicants and may prevent many asylum seekers from applying for immigration relief. The fee will therefore effectively deny asylum to individuals who cannot pay the fee, impermissibly discriminating against asylum applicants on the basis of their financial status. The fee may result in a number of asylum applicants missing the one-year asylum filing deadline because of inability to pay. Additionally, all individuals that the fee prevents from filing asylum applications will then in turn be unable to file for work authorization.

Second, the Rule violates the 1951 U.N. Convention Relating to the Status of Refugees and the 1967 U.N. Protocol Relating to the Status of Refugees. International law prohibits conditioning eligibility for asylum on financial means as the proposed rule does. Furthermore, international norms and practices recognize that asylum seekers are often in vulnerable positions with few resources, and therefore nearly all of the United States' peer nations require no fees for initial asylum applications.¹²

The Fee for Asylum Applicant Work Authorization

First, the imposition of a substantial fee for EAD applications will negatively impact asylum seekers. Many asylum applicants will be unable to afford the cost of the EAD application and will thus miss out on opportunities for legal employment and other benefits of having identification issued by the U.S. government because of the fee requirement. The proposed rule will therefore result in lost wages for asylum applicants, lost revenue for businesses that employ asylum applicants, and lost tax revenue for local and state municipalities, none of which the Notice addresses.

Second, making EAD applications cost-prohibitive will also adversely affect communities, and local and state governments. Local communities and service providers

¹¹ See *id.*

¹² Only Iran, Fiji and Australia charge some fee, and each country appears to make fee waivers available. The Notice states that Australia, for instance, charges an equivalent \$25 fee, which it waives for detained asylum applicants. See *id.* at 62319.

will face substantially greater burdens in trying to provide support for asylum applicants, which will place strain on already limited resources.

Third, by making EAD applications cost-prohibitive for many asylum applicants, the proposed rule will force those asylum applicants to engage in unauthorized work to support themselves and their families. Indeed, asylum seekers who are unable to afford the EAD application fee will be forced into the shadow economy where they are more likely to work in precarious and exploitative conditions. Indeed, the proposed rule all but requires this outcome because many asylum applicants would be required to engage in unauthorized work just to raise the money necessary for the initial EAD application fee.

Fourth, by forcing more asylum applicants into the shadow economy, the new rule will also create additional burdens on other agencies, in particular, it will likely impact the work of both the Internal Revenue Service (IRS), and the Department of Labor (DOL). The associated loss of tax revenue as well as inevitable 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, the proposed rule is also in tension with international legal standards that guarantee asylum seekers the right to work and support themselves. The increased fee for EAD applications for asylum applicants will effectively discriminate against asylum applicants based on their financial means and deny the right to work to all but those with means to afford the substantial fee.

The Proposed Rule Exceeds the Agency's Statutory Rule-Making Authority

DHS overall budget estimate is based on an impermissible budget transfer to Immigration and Customs Enforcement (ICE) that exceeds the agency's statutory authority to increase fees for immigration benefits. ICE's work is outside the scope of the statutory scheme that authorizes USCIS to charge immigration fees for the adjudication of immigration benefit applications. Because the fee increases are based on costs associated with a budget transfer to ICE, they exceed USCIS's statutory authority to determine fees, and are therefore unlawful arbitrary and capricious rulemaking.

With regard to asylum applicant EAD fees specifically, DHS also lacks the statutory authority to require a fee for applications in excess of the costs associated with adjudicating applications. The Notice's interpretation of the statute — which allows the

agency to ignore this requirement — would make this provision superfluous and violate congressional intent.

I. Asylum Application Fee

a. Burden for Asylum Seekers

The proposed rule would create a substantial financial hurdle for asylum seekers. When fleeing violence to come to the United States, many asylum seekers travel long distances and expend considerable financial resources in order to complete their journeys.¹³ Indeed, according to DHS's own estimates, some asylum seekers may spend nearly \$10,000 in attempting to reach the United States, which for many individuals exceeds the entirety of their life savings.¹⁴ As such, asylum seekers often arrive with few — if any, financial resources — and are forced to spend what limited money they have on the basic necessities of life, such as food, clothing, housing, and medical care.¹⁵ For asylum applicants with limited resources, the new fee forces them to decide between whether to forgo basic medical care and feed their families or pay their asylum application fee.

Additionally, many asylum applicants seek out legal assistance with filing asylum applications — which are complex and time-consuming — and may not be able to afford both legal assistance and the application fee. As such, the imposition of the \$50 may prevent many asylum applicants from being able to file timely I-589 applications and, therefore, functionally deprive them of the right to asylum and the ability to apply for withholding on the basis of their financial status.

¹³ See Human Rights Watch, *“At Least Let Them Work” The Denial of Work Authorization and Assistance for Asylum Seekers in the United States* (Nov. 12, 2013) [hereinafter Human Rights Watch, *Let them Work*]

¹⁴ See Dep't of Homeland Security, *Efforts by DHS to Estimate Southwest Border Security Between Points of Entry* (Sept. 2017) at 13-14, [available at https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf] (estimating some immigrants may pay up to \$9,200 to arrive in the U.S.); see also Philip Bump, *Most migration to the U.S. costs money: there's a reason asylum doesn't*, WASHINGTON POST (Apr. 30, 2019) [available at <https://www.washingtonpost.com/politics/2019/04/30/most-migration-us-costs-money-theres-reason-asylum-doesnt/>]

¹⁵ See Ted Hesson, *Why So Many Asylum Seekers Come to America and Wind Up Homeless*, VICE (Mar. 11, 2016) [available at https://www.vice.com/en_us/article/exqjn4/why-so-many-asylum-seekers-end-up-homeless].

Additionally, because asylum applicants are statutorily ineligible to receive work authorization until after their asylum applications have been pending for at least 180 days,¹⁶ it is impossible for asylum applicants to legally work to raise money to pay for their asylum applications.¹⁷ The new fee, therefore, creates a fundamentally unfair “catch-22” for asylum seekers by requiring them to pay an application fee before permitting them to legally work to raise the money to pay that same fee.

Because asylum seekers are likely to be particularly vulnerable and without resources when they first arrive in the United States, it may be difficult for asylum applicants to pay the fee and meet the one-year deadline. This is evidenced by the fact that currently asylum seekers do not need to pay a filing fee on an asylum application or an initial EAD application, even though they are required to pay to renew their work authorization. The new fee, however, will make it more difficult for asylum seekers to meet even the initial one-year filing deadline for asylum applications when they cannot raise the funds necessary to do so within a year’s time.

The Notice also indicates that the agency does not intend for inability to pay to constitute a ground for equitable tolling of this deadline, which will effectively bar indigent asylum seekers from applying.¹⁸ The proposed rule may therefore end up depriving thousands of asylum seekers from both the right to apply for asylum and the ability to work legally to support themselves.

The Notice fails to consider (1) how the fee increase will impact the number of asylum applications filed, or (2) the number of asylum applicants who will be unable to apply for asylum as a result of the fee imposition. Furthermore, the Notice fails to consider the collateral consequences of forcing asylum seekers to raise \$50 before they are legally authorized to work, i.e., either forcing asylum seekers to take out loans, or, more likely, incentivizing unauthorized work. Before DHS can institute an unprecedented fee for asylum applications it needs to estimate and consider the impact of this fee on asylum seekers, as well as perform a cost benefit analysis of the likely collateral consequences caused by the imposition of the fee.

¹⁶ See 8 C.F.R. § 208.7.

¹⁷ Notably, in a different proposed rule, DHS is also proposing to increase the waiting period for work authorization applications to 365 days – the increased waiting period will only compound the burden on asylum seekers waiting to work. See Department of Homeland Security’s Notice of Proposed Rulemaking and Request for Comment on Asylum Application, Interview, and Employment Authorization for Applicants, DHS Docket No. DHS-2019-0011, 84 F.R. 62374, issued November 14, 2019.

¹⁸ See Notice at 62320.

b. Conflict with International Law and Norms

As the Notice acknowledges, the proposed rule would be the first time in history that the United States has made the right to apply for asylum conditional on the ability to pay.¹⁹ In the United States, filing an I-589 is an application for asylum, an application for withholding of removal under the INA, and an application for withholding of removal under the Convention Against Torture. As such, the United States would also be imposing a fee on applications for these other forms of relief.

This unprecedented fee directly conflicts with both the notion that seeking asylum is a basic human right and the doctrine of *non-refoulement*. Article 14 of the Universal Declaration of Human Rights (UDHR) states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”²⁰ While the UDHR extends the right to seek asylum to “everyone,” the Notice proposes to limit the right to seek asylum only to individuals with sufficient financial resources.

The duty of non-refoulement — formally codified in Article 33 of the 1951 Convention Relating to the Status of Refugees — requires that states do not expel refugees unless they present a danger to the security” of the United States or have been “convicted by a final judgment of a particularly serious crime.”²¹ Non-refoulement is considered a fundamental principle of international refugee law and may be a *jus cogens* norm binding on all states.²² Requiring asylum applicants to pay a fee effectively violates the principle of non-refoulement because it would likely result in the expulsion of potential refugees merely on the basis of their financial status. And since the imposition of the asylum application fees would also be a barrier to apply for relief under the Convention Against Torture, it also conflicts with U.S. treaty commitments and should be rejected.

The imposition of a fee for asylum applications also diverges from international norms and the practices of the United States’ peer nations. The Library of Congress

¹⁹ See *id.* at 62318.

²⁰ Universal Declaration of Human Rights, art. 14, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

²¹ Convention Relating to the Status of Refugees, adopted July 28, 1951 art. 33, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (entered into force 22 April 1954) [hereinafter 1951 Convention].

²² See Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMM. L. J. 1 (2008).

survey of 147 signatory countries to the 1951 Convention cited in the Notice found that only Iran, Fiji, and Australia charge some fees for initial asylum applications, but unlike the proposed rule, those three allow for fee exemptions in at least some circumstances.²³ The vast majority of parties to the 1951 Convention require no fee at all for initial asylum applications. If anything, the fact that the vast majority of state parties require no fee for asylum applications (or allow for waivers in cases of indigents) suggests that international law requires — as a matter of state practice and *opinion juris* — that no such fee be required.²⁴

The Notice fails to consider the international law implications of imposing an unprecedented fee for asylum applications. At a minimum, the agency must justify how the proposed rule does not conflict with U.S. treaty commitments and the United States' international legal obligations before it can enter into effect.

II. Work Authorization Fees for Asylum Applicants

a. *The Fee for EAD Applications Harms Asylum Seekers*

The substantial fee for asylum applicant EAD applications will prevent many asylum applicants from being able to apply for work authorization. As discussed above, many asylum applicants come to the United States with few, if any, remaining financial resources. The requirement of a substantial fee for initial work authorization will likely prevent thousands of asylum applicants from being able to submit EAD applications. The Notice does not consider how the newly imposed fee will impact asylum applicants' ability to apply for work authorization, nor does it estimate the direct costs of lost wages and other collateral consequence that are likely to result from the proposed rule.

Work authorization is also essential for asylum applicants in terms of their ability to successfully integrate into local communities. The story of ASAP's client, Adriana²⁵, featured below showcases the significance of employment authorization for asylum applicants.

²³ See Notice at 62319 (citing The Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee Convention*, (Dec. 2017) [available at <https://www.loc.gov/law/help/asylum-application-fees/asylum-application-fees.pdf>]).

²⁴ See, e.g., Niels Petersen, *Customary Law without Custom - Rules, Principles, and the Role of State Practice in International Norm Creation* 23 AM. U. INT'L L. REV. 275 (2007-2008); for the argument that state practice and opinion juris support treating non-refoulement as a jus cogens norm, see, Farmer, *supra*, note [22](#),

²⁵ The name Adriana is a pseudonym used to protect the identity of ASAP's client.

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 been able to later secure her EAD, she and her family would have faced even greater obstacles to integration, such as a lack of health insurance and greater financial instability. In discussing the significance of her grant of work authorization, 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 ability to apply for EADs at no cost makes it possible for them to integrate successfully into their local communities and begin their lives in the United States. The proposed rule, however, will effectively deny many asylum applicants the ability to apply for work authorization, with serious consequences for asylum applicants and their local communities.

The inability for many asylum seekers to apply to legally work in the United States will destabilize the financial situation of individuals and families already traumatized by the threats and persecution that led them to apply for asylum. The significant collateral consequences of the proposed rule on asylum seekers will be seen in the areas of health, food security, and housing stability, as evidenced by Adriana’s story and those of many others.²⁶

The proposed rule threatens the health and wellbeing of asylum seekers while placing an unnecessary strain on the healthcare system.²⁷ 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.²⁸ For ASAP’s client, Adriana, obtaining work authorization gave her access to private health insurance for herself and her family. Restrictive fees preventing asylum applicants from even applying for work authorization 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 raises healthcare costs for everyone and denies asylum applicants access to preventive primary care.

The Notice does not address the collateral consequences of this EAD application fee for asylum applicants, nor does it consider the impact of the proposed rule on public and private hospitals. The government must address the impact of this provision on asylum seekers and the healthcare system before it can implement the proposed rule.

b. The Proposed EAD Fee Will Adversely Impact Local Communities, Business, and State Economies

The impact of the new fee on asylum applicant EADs will also impact local communities by forcing them to expend greater resources on supporting asylum applicants who cannot work legally. Asylum applicants, barred from legal employment because of their inability to pay the EAD application fee, will likely be forced to rely on greater community support, including assistance from family members, food banks,

²⁶ 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.”).

²⁷ See *id.* at 15–16 (“[Lack of work authorization] prevents asylum seekers from accessing affordable health care while their claims are pending.”).

²⁸ See *Immigration Status and the Marketplace*, Healthcare.gov, [available at: <https://www.healthcare.gov/immigrants/immigration-status/>].

shelters, and other local charities. The cost-prohibitive nature of the proposed EAD application fees will also likely increase the risk of violence against 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 crimes against asylum applicants. Additionally, public schools may have to shift resources to provide counseling and other psychological services to traumatized children who have witnessed or suffered domestic violence.

By making it cost prohibitive for many asylum applicants to apply for work authorization, the proposed rule will have negative consequences for domestic businesses and local economies. In an open letter in 2017, 1,470 economists noted that immigrants provide a “significant competitive advantage” to the U.S. economy, heightening levels of innovation and flexibility within industry.²⁹ The proposed rule would unnecessarily deny businesses and organizations the economic advantages provided by asylum seekers’ who cannot afford the EAD application fee. Moreover, 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.³⁰ Accordingly, restricting asylum applicants from the labor market because of their inability to pay initial EAD application fees might actually lead to adverse impacts on native worker prospects,³¹ which is not contemplated at all as a potential consequence of the new fee.

The Notice does not consider the additional costs that the proposed rule will impose on local communities in the form of additional support it will necessitate that they provide to asylum applicants. Until these considerations are taken into account, the true cost of the proposed rule cannot be estimated properly. The government must take these collateral costs into account and should remove the initial EAD application fee for asylum applicants from the proposed rule in light of these collateral costs.

²⁹ 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/>].

³⁰ 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>].

³¹ See G. I. P. Ottaviano & G. Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS’N 152 (2012).

c. *The High EAD Application Fee will Force Many Asylum Applicants to Engage in Unauthorized Work, Under Precarious and Exploitative Conditions*

The financial destabilization created by the inability of asylum applicants to obtain 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.³² 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.³³ Human Rights Watch conducted a series of interviews that illustrate this point:

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

³² See Human Rights Watch, *Let them Work* at 33–34.

³³ See *id.* at 34.

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.”³⁴

The ability to work makes it easier for asylum seekers to extricate themselves from dangerous living situations,³⁵ and exploitative working conditions. The Notice fails to consider how the EAD application fee may force many asylum applicants to engage in unauthorized work and subject them to other dangerous environments. The government must therefore address how the proposed rule will result in higher levels of unauthorized and exploitative labor before implementing it and should consider not requiring the work authorization fee for first-time asylum applicants as a result.

d. The Rule will Create Additional Burdens on Other agencies, in Particular, it will Impact the Work of both the Internal Revenue Service (IRS), and the Department of Labor (DOL)

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 proposed rule would create for the IRS before implementation.

The proposed 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).³⁶ The Notice does not acknowledge the impact of unauthorized work on DOL. With many asylum applicants being unable to pay for work authorization, they 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

³⁴ *Id.* at 33-34.

³⁵ See *id.* at 34–35.

³⁶ 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>].

minimum wage and overtime requirements.³⁷ DOL investigations are also made significantly more difficult as a result of fear among individuals working without 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.³⁸

The DOL is also required to investigate reported instances of wage theft and expend 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.³⁹ As such, an increase in asylum applicants forced into unauthorized work will likely 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 must 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.⁴⁰ 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.

³⁷ 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.”).

³⁸ 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>].

³⁹ 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.”).

⁴⁰ See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 677 & n. 51 (2003).

The agency has failed to consider the meaningful impact of the Rule on the IRS and DOL as it relates to tax collection, wage theft, and work-site safety inspections. DHS must therefore consider the increased investigatory burden and resource cost the Rule will impose on other agencies before instituting the new fee increase.

e. *The Rule is also in Tension with International Legal Standards that Guarantee Asylum Seekers the Right to Work and Support Themselves*

Additionally, the proposed 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.⁴¹ The United States has historically maintained policies that mirrored the requirements of the Convention.⁴² 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 proposed rule.⁴³ Concretely, Canada allows eligible asylum seekers (and their families) who cannot pay for basic needs to access 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 work authorization within 6 months of the filing of their initial application (and several other countries grant work authorization upon filing).⁴⁴ Furthermore at least nine nations in Latin America allow for immediate work authorization upon the filing of an asylum

⁴¹ 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, [available at <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).

⁴² 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>].

⁴³ 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].

⁴⁴ See UNHCR, *A guide to international refugee protection and binding state asylum systems* at 102, [available at <https://www.unhcr.org/3d4aba564.pdf>].

application.⁴⁵ 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.

III. The Proposed Fee Increases in the Notice & the Supplement Exceed DHS’s Statutory Authority

A. *The INA does not Allow USCIS to Transfer Fees Collected for Application Adjudication to Fund ICE Enforcement Actions*

USCIS cannot legally include budget transfers to ICE as part of its cost estimates for immigration benefit application adjudications. DHS does not have the statutory authority under the Immigration and Nationality Act (INA) to increase fees for applications adjudicated by USCIS in order to cover the costs of another sub-agency. INA section 286(m) provides that DHS (“the Attorney General”) may set “fees for providing adjudication and naturalization services...at a level that will ensure recovery of the full costs of providing all such services.”⁴⁶ The “services” provided in this provision are only the adjudication and granting of applications for benefits and naturalization services. The Notice, however, incorrectly claims that “ ‘immigration adjudication and naturalization services’ do not end with a decision to approve or deny a request,” and that USCIS “may fund ICE enforcement and support positions, as well as ancillary costs, to the extent that such positions and costs support immigration adjudication.”⁴⁷

DHS’s clarifications in the Supplement about the ICE activities it proposes to fund with a USCIS funds transfer does not change the fact that such transfers are impermissible. As part of its cost projections, DHS initially included an estimated \$207.6 million transfer of funds from USCIS to ICE in the Notice.⁴⁸ In the Supplement, the agency stated that it had revised the cost estimates from ICE of what it intends to recover and

⁴⁵ See *id.* at 102; see also Directive 2013/33/EU, [available at <https://www.refworld.org/docid/51d29db54.html>].

⁴⁶ 8 U.S.C. § 1356(m) (emphasis added). The Rule acknowledges that the INA may place limits on what fee the Attorney General may charge asylum applicants for work authorization fees, and that under the statute “[s]uch fees shall not exceed the Attorney General’s costs in adjudicating the applications.” INA § 208(d)(3), 8 U.S.C. § 1158(d)(3). However, DHS maintains that the statute also allows it an exemption to charge more than the required processing fee — as is the case under the proposed rule — as long as it follows the general requirements of section 286(m) of the INA. DHS interpretation of the INA, however, and would render section 208(d)(3) superfluous and must be rejected.

⁴⁷ Notice at 62287.

⁴⁸ See *id.* at 62286.

fund via USCIS fee increases; according to the Supplement, USCIS intends to recover \$112.2 million, rather than the \$207.6 million it had indicated it would transfer to ICE in the original Notice.⁴⁹ Regardless of the amount, the statutory and regulatory scheme governing the setting of the USCIS fee schedule does not permit the inclusion of an interagency fund transfer to ICE. Both the underlying purpose and clear meaning of the authorizing statutory scheme assume that USCIS limit its estimates to actual costs it incurs during the adjudication of immigration benefit applications. Additional immigration enforcement performed by ICE, including the potential investigation of fraud, or by other DHS agencies falls beyond the scope of USCIS's work in adjudicating applications, and thus its funding from USCIS fees is not authorized by the statutory scheme.

DHS's interpretation of section 286(m) and 286(n) is also overly broad and would potentially allow for the transfer of a significant amount of funds to cover nearly any ICE costs associated with investigation and enforcement of immigration fraud — even well after USCIS has made an initial determination about the application. To the contrary, the statute clearly indicates that the fees USCIS may collect for immigration benefits applications are only those associated with application adjudication costs, not independent investigations or enforcement actions. At the very least, DHS does not sufficiently justify why the proposed ICE activities to be funded are properly considered as part of the USCIS application adjudication process rather than separate enforcement actions.

B. The Proposed Rule Circumvents the Congressional Appropriations Process

DHS's interpretation also circumvents the requirements of the appropriations process, which legally requires that agencies be funded at the specific level determined by Congress. The Notice acknowledges that "transfers between appropriations are generally prohibited absent statutory authority," but believes that section 286(n) would allow USCIS to transfer any fee collection for expenses in providing "immigration adjudication and naturalization services."⁵⁰ Section 1532 of Title 31 also requires that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law."⁵¹ Additionally, the Government Accountability Office (GAO) has determined that all transfers are prohibited without statutory authority, including "(1) transfers from one agency to another, (2) transfers from one account to another within the same agency, and (3) transfers to an interagency or intra-agency working fund. In each instance statutory

⁴⁹ Supplement at 67244. See also, *supra*, note 1.

⁵⁰ *Id.* at 62287.

⁵¹ 31 U.S.C. § 1532.

authority is required.”⁵² Nothing on the face of section 286(n), however, specifically authorizes intra-agency funds transfers, nor does it suggest that the funds required for application may in any way be used for the purposes of immigration enforcement. The proposed rule would therefore circumvent the appropriations process, by allowing ICE to illegally supplement its designated appropriations funding for investigation and enforcement actions through a different sub-agency’s fee collection process. There are other statutory provisions and regulatory mechanisms to provide for ICE’s budget — Congress already considers the funding needs of ICE for fraud investigation and enforcement when authorizing its appropriations and assumes the funding allocated in that process will be sufficient to cover ICE’s work.

C. Chad Wolf Lacks Legal Authority to Promulgate the Proposed Rule

Chad Wolf does not have a valid legal claim to the office of DHS Secretary, and thus, all actions that he takes in that role — including promulgating this rule — “shall have no force or effect.”⁵³ A November 15, 2019 letter by members of Congress to the Comptroller General of the United States details the succession issues that began when Kevin McAleenan was installed as Secretary of Homeland Security to replace then-Secretary Kirstjen Nielsen.⁵⁴ At the time of Secretary Nielsen’s departure, Executive Order 13753 remained in place, which set out the order of succession for DHS.⁵⁵ Under the Executive Order, Mr. McAleenan was not next in line to head DHS, but rather, at minimum, two Senate confirmed officials should have preceded him.⁵⁶ Accordingly, it appears that Mr. McAleenan had no valid legal claim to the office of the Secretary. And even if Mr. McAleenan could arguably have had authority under the Federal Vacancies Reform Act (FVRA),⁵⁷ that authority expired after 210 days in office per the terms of that statute.⁵⁸ The changes Mr. McAleenan later made to the order of DHS succession also

⁵² U.S. Government Accountability Office (then the U.S. General Accounting Office), *Principles of Federal Appropriations Law*, Third Edition, Volume I, GAO-04-261SP, January 2004, p. 2-24, [available at <http://www.gao.gov/products/GAO-04-261SP>].

⁵³ 5 U.S.C. § 3348.

⁵⁴ See Letter from Bennie G. Thompson, Chairman, Committee on Homeland Security, and Carolyn B. Maloney, Acting Chairwoman, Committee on Oversight and Reform, to Gene Dodaro, Comptroller General of the United States (Nov. 15, 2019), [hereinafter Thompson and Maloney, Letter] [available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf>].

⁵⁵ See Exec. Order No. 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016).

⁵⁶ See Thompson and Maloney Letter at 2.

⁵⁷ 6 U.S.C. § 113(g)

⁵⁸ 5 U.S.C. § 3346(a)(1)

occurred after his 210th day in office, and therefore cannot be legitimate under the FVRA. Mr. Wolf's appointment as Secretary of Homeland Security was a result of those unlawful changes that Mr. McAleenan made to the order of succession. As such, Mr. Wolf has no valid legal claim to the office of the Secretary, and the action he has taken in promulgating the proposed rule "shall have no force or effect."⁵⁹

The government's interpretation of section 286(n) of the INA articulated in the Notice would allow DHS to circumvent the appropriate regulatory and appropriations processes. The proposed rule is therefore contrary to both congressional intent and the text of the statute. The government must remove the transfer to ICE from the proposed rule and revise its cost estimates accordingly. Additionally, DHS should rescind the rule and wait to promulgate any changes to existing regulations until such time as there has been an appointment of a legitimate Secretary with valid rulemaking authority.

Conclusion

For the above reasons, USCIS should rescind the proposed rule, or at a minimum those parts relevant to this analysis. The ability to apply for asylum and for asylum applicants to seek work authorization cannot legally be limited to individuals with the means to pay.

Sincerely,



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⁵⁹ 5 U.S.C. § 3348.