



ASYLUM SEEKER ADVOCACY PROJECT

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DHS Docket No. USCIS-2019-0011
84 F.R. 62374

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To Whom It May Concern:

The Asylum Seeker Advocacy Project (ASAP) respectfully submits the following comments to the 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.

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 4,000 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). During 2019, ASAP assisted in the preparation and filing of asylum applications for over 80 individuals and EADs for over 50 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 Asylum Application, Interview, and Employment Authorization for Applicants, DHS Docket No. DHS-2019-0011, in the Federal Registry at 84 F.R. 62374.

DHS proposes to make a number of significant, substantive changes to asylum applicants’ eligibility to apply for an employment authorization document (EAD). Under the current law, a person may apply for an EAD 180 days after they apply for asylum if their asylum case is still pending,¹ and U.S. Citizenship and Immigration Services (USCIS) must grant or deny their initial application for work authorization within 30 days.² DHS proposes to extend the waiting period for which asylum applicants may apply for and receive an EAD to 365 calendar days from the date their asylum applications are received by either USCIS or the Department of Justice’s Executive Office for Immigration Review (EOIR).³ DHS also indicates that USCIS will deny any asylum applicant an EAD if there are any “applicant caused delays on the date of the EAD adjudication.”⁴

DHS also proposes the exclusion of many asylum applicants from eligibility for an EAD based on new criteria.⁵ Under the proposed rule, DHS will automatically deny the EAD application of asylum applicants who “absent good cause, entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry,”⁶ as well as the EAD applications of those who have “failed to file for asylum within one year of their last entry.”⁷ DHS also proposes to exclude asylum applicants for EAD eligibility on the basis of specific past criminal convictions.⁸ In addition to criminal

¹ See 8 CFR § 274a.12(c)(8).

² 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).

³ See Notice at 62375.

⁴ *Id.*

⁵ See *id.* at 62375.

⁶ *Id.* at 62375.

⁷ *Id.* The Notice clarifies that there is an exception to this exclusion if “an asylum officer or Immigration Judge (IJ) determines that an exception to the statutory requirement to file for asylum within one year applies.” *Id.* Because the one-year filing deadline does not apply to unaccompanied non-citizen children, the Notice acknowledged that the EAD eligibility of unaccompanied non-citizen children would also be unaffected by this exclusion. See *id.*

⁸ See *id.* at 62375 (“DHS further proposes to exclude from eligibility for employment authorization aliens who have: (1) been convicted of any aggravated felony as defined under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony in the United

convictions, DHS indicates that when an asylum applicant has “unresolved domestic arrests or pending charges involving domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol,” USCIS will exercise its discretion as to whether to deny an otherwise eligible applicant’s employment authorization based on “the totality of the circumstances.”⁹ DHS states that it is unable to assess how many individuals will be impacted by the elimination of work authorization for those who entered without inspection and those who have past criminal bars.¹⁰ The Notice also clarifies that only applicants for asylum who are located within the United States may apply for employment authorization¹¹ — presumably with the intention of excluding asylum applicants subject to the Trump administration’s “Remain in Mexico” program from eligibility.¹²

Moreover, DHS proposes to make adjudications of asylum applicant EADs “discretionary to align with the discretionary authority Congress conferred in INA 208(d)(2), 8 U.S.C. § 1158(d)(2).”¹³ DHS also proposes to make the validity period of EAD authorization “discretionary” for both initial applications and renewals, and to permit USCIS to “set shorter validity periods for initial and renewal [EADs].”¹⁴

The proposed rule would also make a number of changes to the process via which USCIS adjudicates asylum applicant EADs. For instance, the Notice indicates that USCIS will eliminate the current requirement that it “return an incomplete application within 30 days or have it deemed complete for adjudication purposes.”¹⁵ Additionally, the proposed rule would also create new biometric collection requirements as part of the process of obtaining an asylum applicant EAD.¹⁶

States or serious non-political crime outside the United States or (3) been convicted of certain public safety offenses in the United States.”).

⁹ *Id.* at 62375.

¹⁰ *See id.* at 62395.

¹¹ *See id.* at 62375.

¹² *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].

¹³ Notice at 62375.

¹⁴ *Id.* at 62376.

¹⁵ *Id.* at 62375-6.

¹⁶ *See id.* at 62376.

DHS's purported justification for these changes is that they will "simplify the adjudication process" for affirmative asylum and work authorization and improve the current asylum case backlog by deterring noncitizens from filing "frivolous, fraudulent, or otherwise non-meritorious applications" and "intentionally delaying" their asylum cases in order to obtain and extend work authorization.¹⁷

Summary of Arguments

First, DHS fails to adequately examine the impact and cost of the proposed rule. The Notice fails entirely to estimate how many asylum applicants will be impacted by the elimination of EAD eligibility for those who entered without inspection and those with certain criminal histories.¹⁸ Without an assessment of the proposed rule's impact on these populations, all of DHS's cost-benefit analysis is inadequate and likely to radically underestimate the true impact of the rule. The rule cannot be implemented until DHS has considered its likely impact and provided estimates for the number of asylum applicants it will ban from working legally.

Second, DHS fails to consider the additional substantial collateral consequences that asylum applicants will suffer without work authorization. In many asylum applicants' cases, the proposed rule will function as an outright ban. The proposed rule will also substantially delay the time it takes for all asylum applicants to receive work authorization and will effectively bar many asylum seekers from legally working during the pendency of their asylum cases. Work authorization allows asylum seekers to successfully integrate into local communities, provide for basic life necessities like housing and healthcare, and secure immigration counsel. The Notice also fails entirely to recognize the most likely outcome that the vast majority of asylum applicants will be forced to engage in unauthorized work, under precarious and exploitative conditions, simply in order to afford basic necessities while their claims are pending.

Third, the proposed rule will also impose significant burdens on local communities, businesses, and legal service providers. Local communities and legal service providers will face substantially greater burdens in trying to provide support for asylum applicants, which will place strain on already limited resources. Businesses that employ asylum seekers will also suffer significant losses in profits beyond DHS's own estimates.

Fourth, the Notice fails to consider how the proposed rule will create substantial burdens for other agencies. For instance, by forcing more asylum applicants into the shadow economy, the new rule 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 the inevitable increases in unauthorized work will likely create additional investigatory work for the IRS. The increase in unauthorized work will also likely result in

¹⁷ *Id.* at 62375.

¹⁸ *See id.* at 62395.

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 new rule violates Article 31(1) of the 1951 Convention relating to the Status of Refugees by instituting an unlawful “penalty” for seeking asylum by denying work authorization to those who seek asylum outside of ports of entry.

Sixth, DHS’s elimination of work authorization for individuals with certain criminal histories is in tension with the overarching statutory scheme for asylum. The criminal bars to work authorization would reach more broadly than the current bars to asylum eligibility. Additionally, the Notice fails to consider the additional agency burdens these bars would impose, by forcing USCIS adjudicators to engage in complicated legal analysis beyond the expertise of line-officers.

Seventh, the purpose stated in the Notice — deterring “frivolous” asylum claims by “economic migrants” — is not rationally related to the content of the proposed rule. The Notice offers no evidence that the proposed rule will have any such deterrence effect on asylum claims. This is especially concerning given that its most likely effect will be to force asylum seekers — individuals who have fled persecution and risked their lives to come to the United States — into exploitative labor conditions as unauthorized workers. Moreover, the Notice also falsely characterizes individuals fleeing conditions of violence as “economic migrants,” and fails to appreciate the underlying factors driving asylum.

Eighth, the proposed rule is a ban on asylum applicants working legally in the United States, which is motivated by impermissible animus towards Latin American and other asylum seekers. The proposed rule must be viewed as part of the administration’s larger campaign to institute an effective ban on seeking asylum at the Mexico-U.S. border. Indeed, the “deterrence” rationale of the Notice is merely an exercise in cruelty — the administration hopes to make living conditions in the United States unbearable for asylum seekers by denying them the ability to work legally and secure basic necessities such that they are effectively coerced into forgoing their legal right to seek asylum.

Ninth, DHS currently lacks statutory authority to implement 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.”¹⁹

I. DHS Fails to Adequately Estimate the Costs and Impact of the Proposed Rule

DHS’s estimates for the costs associated with the proposed rule are flawed and fail to consider the substantial impact of its two major provisions.

¹⁹ 5 U.S.C. § 3348.

DHS underestimates the number of asylum applicants who would be impacted by the proposed rule change. DHS's calculation fails to estimate (1) the number of initial asylum applicants who will be impacted by elimination of work authorization for asylum applicants who do not arrive at ports of entry, and (2) the number of asylum applicants who would be barred from work authorization on the basis of past criminal convictions.²⁰ DHS must provide estimates of the number of asylum applicants likely to be denied work authorization because they did not arrive at a port of entry as well as the number of asylum applicants likely to be barred from work authorization due to past criminal history before it can implement the rule.

The only projected costs of the proposed rule are based on an underestimation of the number of asylum applicants who would be impacted. The Notice states that the proposed regulation would impact approximately 300,000 asylum seekers annually in total²¹, and would result in about \$269.5 million to \$815.9 million annually in lost wages to asylum seekers and about \$41.3 million to \$125 million in lost contributions to Social Security and Medicare.²² DHS calculated the lost wages to asylum seekers and lost contributions to Social Security and Medicare by analyzing the impact of only about a quarter of EAD holders that the agency determined would be affected.²³ However, a quarter of EAD holders is likely an underestimation of the impacted population.²⁴ Indeed, as part of its quantitative analysis DHS notes that for the provisions of the proposed rule that would potentially [terminate] some EADs early, DHS could estimate only the portion of the costs — those attributable to affirmative cases because DHS has no information available to estimate the number of defensive cases affected."²⁵

DHS further estimates that for the residual population, the lost earnings would be about \$1.2 billion to \$3.6 billion, and the tax transfers would be about \$182 million to \$551 million annually, which is also likely to be a substantial underestimate given the exclusion of the rule's impact on all defensive cases.²⁶ At a minimum, DHS should provide an outer and lower bound of costs — including cost estimates of what lost wages and social security contributions would be for all asylum applicants affected by the proposed rule (including defensive cases) — before implementing the proposed rule.

DHS also fails to estimate how the proposed rule would impact the renewal of work authorization for many asylum applicants who have also previously been granted EADs

²⁰ See Notice at 62397 (Noting that the number of individuals affected by these policies is "unknown" to the agency, but that the associated costs would include "forgone earning, lost taxes," and "tax transfers").

²¹ See *id.* at 62396.

²² See *id.* at 62409-10.

²³ See *id.*

²⁴ See *id.* at 62396.

²⁵ *Id.*

²⁶ See *id.* at 62410.

but would no longer be eligible for an EAD at the moment of renewal. This would potentially impact thousands of asylum applicants who have previously been granted EADs, and in these cases, force them out of their current jobs.²⁷

The failure to estimate the impact of this provision of the rule implicates DHS's overall cost benefit analysis of the proposed rule. As such, the agency must not implement the proposed rule until it can provide an adequate and reasonable assessment of the proposed rule's true impact.

II. The Proposed Rule Will Impose Significant Collateral Consequences on Asylum Seekers Making it Difficult to Successfully Integrate

For many asylum seekers the proposed rule will effectively function as a ban on working legally during the pendency of their asylum cases. The denial of work authorization to asylum applicants who did not arrive at a port of entry in particular, will likely exclude thousands of asylum seekers; this is a particularly egregious exclusion, given that the statute specifically makes individuals eligible for asylum "whether or not" they arrive at a port of entry.²⁸ The proposed rule's restrictions on work authorization on the basis of past criminal history are also potentially far reaching – and, as discussed in detail below, more far reaching than the criminal bars to asylum eligibility.²⁹ Because of backlogs in asylum case processing, these proposed rule changes barring asylum applicants from receiving EADs would mean that many asylum applicants have to wait years before being granted asylum, at which time they would finally become eligible to apply for the ability to work legally.³⁰ Moreover, asylum seekers who have been legally

²⁷ See *id.* at 62397 (Noting that "the proposed rule would impose the conditions in the rule to renewal filers," but failing entirely to estimate the number effected or costs associated with the application of the rule to renewal filings).

²⁸ 8 U.S.C § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section." (emphasis added)).

²⁹ See *infra*, Section VI.

³⁰ See Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at its Breaking Point?* MIGRATION POLICY INSTITUTE (Oct. 3, 2019) [available at: <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>] (noting that "wait times have skyrocketed in recent years, surpassing 700 days on average that a currently open case has been pending" and that "the growing backlog and pushes to expedite decisions, combined with pre-existing disparities in asylum grant rates, could result in insufficient due process for those who need it most.").

working while their cases are pending will also be unable to renew their work authorizations and will likely be forced to leave their jobs.³¹

Asylum seekers will face other issues short of eligibility when attempting to apply for an EAD. For those who will still be eligible for work authorization, there will be significant delays in when they can apply. The proposed rule extends the waiting period to apply for work authorization to 365 days, which will force asylum applicants to find other ways outside of being legally employed to support themselves while their cases are pending.³² Additionally, the proposed rule also seems likely to result in a number of EAD applications being denied on the basis of mere technicalities.³³

In order to provide reasonable justification for the new rule, DHS must provide further analysis of how eliminating or delaying work authorization for asylum applicants will impact (1) the ability of asylum seekers to integrate into local communities; (2) the health, well-being and safety of asylum seekers; (3) the likelihood that asylum seekers are forced into exploitative, unauthorized work; and (4) the ability of asylum seekers to obtain immigration counsel.

A. Integration of Asylum Seekers into Local Communities

The Notice fails to consider how work authorization is essential for asylum applicants to successfully integrate into local communities.³⁴ The inability of asylum seekers to legally work in the United States will destabilize the lives of individuals and families

³¹ See *id.*

³² 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>]; Nicole Narea, *A New Trump Administration Proposal Could Put Asylum Seekers Out of a Job*, VOX (Sept. 11, 2019) [available at: <https://vox.com/policy-and-politics/2019/9/11/20853362/trump-work-permit-asylum>].

³³ For instance, consider that under the current regulatory scheme, DHS has 30 days to inform an asylum applicant that her application is incomplete, or that the application has been deemed complete for adjudication purposes and retains that filing date. See 8 CFR § 274a.12(c)(8). DHS proposes to remove this regulation – and fails to propose any new deadline for USCIS to inform applicants as to whether their asylum applications are incomplete before denying the I-589 application. See Notice at 62388. The effect is that many applicants will learn that their application is incomplete many months after filing, at which time the one-year filing deadline will likely preclude them from receiving asylum — regardless of the merits of their claim. This problem is compounded by the fact that DHS has been increasingly deeming applications “incomplete,” based on minor, hyper-technical “problems,” such as writing “na” instead of “n/a” to indicate that a question does not apply.

³⁴ See Human Rights Watch, *At Least Let Them Work*, 12–16 (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 Report”].

already traumatized by the threats and persecution that led them to seek asylum. The story of ASAP's client, Adriana,³⁵ featured below 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 been able to later secure her EAD or been forced to wait a year before submitting her application, 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, work authorization 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 like

³⁵ The name Adriana is a pseudonym used to protect the identity of ASAP's client.

Adriana the ability to apply for work authorization, with serious consequences for asylum applicants and their families. DHS must assess the different ways in which lack of employment authorization will make integration more difficult for asylum seekers.

B. Impact on Health, Safety and Well-Being of Asylum Seekers

The proposed rule would also create a substantial financial difficulty for asylum seekers, beyond the impact of lost wages. 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.³⁶ Indeed, according to DHS's own estimates, some asylum seekers spend nearly \$10,000 in attempting to reach the United States, which for many asylum seekers exceeds the entirety of their life savings.³⁷ 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.³⁸ For asylum applicants with limited resources, the ability to work is necessary to provide for medical care and to feed their families.

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 above and those of many others.³⁹ Without work authorization and the associated access to employment, asylum seekers will have difficulty obtaining a driver's license in many states, as well as trouble obtaining banking services, adequate housing, and healthcare due to lack of identification.⁴⁰ However, DHS does not attempt to estimate these collateral consequences by considering the impact on health insurance coverage or other relevant collateral costs.

³⁶ See Human Rights Watch Report, 10-16.

³⁷ 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/>].

³⁸ 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].

³⁹ See Human Rights Watch Report 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.”).

⁴⁰ See *id.* at 15 (noting that until an asylum seeker is either granted asylum or work authorization, they are eligible for few, if any, social service benefits in the United States).

DHS must consider and provide analysis regarding the extent to which these additional burdens will be placed on asylum seekers, as well as the cost to their family members.

C. 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.⁴¹ 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.⁴² 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

⁴¹ See *id.* at 33–34.

⁴² 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.”⁴³

The ability to work makes it easier for asylum seekers to extricate themselves from dangerous living situations and exploitative working conditions.⁴⁴ The Notice fails to consider how EAD exclusion and the extended waiting period will force many asylum applicants to engage in unauthorized work and subject them to other dangerous environments. The government must therefore address and estimate to what extent the proposed rule will result in higher levels of unauthorized and exploitative labor before implementing it.

D. 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. Given that asylum seekers do not currently have a right government-funded counsel like criminal defendants,⁴⁵ their ability to work and hire private counsel to represent them is essential. For many of the asylum seekers ASAP works with, obtaining work authorization allows them to save sufficient funds to hire private immigration counsel.

Noncitizens who are represented are significantly more likely than their unrepresented counterparts to obtain immigration relief, such as asylum.⁴⁶ 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.⁴⁷

⁴³ *Id.* at 33-34.

⁴⁴ *See id.* at 34-35.

⁴⁵ *See* 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).

⁴⁶ *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).

⁴⁷ *See* Transactional Records Access Clearinghouse (TRAC), *Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, (Nov. 12, 2017) [available at: <https://trac.syr.edu/immigration/reports/491/>].

Under the proposed rule, asylum seekers who cannot legally work will be significantly less likely to be able to afford legal counsel, and therefore significantly less likely to prevail in their asylum cases. The government must address the proposed rule's impact on asylum seekers' ability to obtain immigration counsel before implementation.

III. The Proposed Rule Does Not Consider its Negative Impact on Local Communities, Businesses, Legal Service Providers

A. Impact on Local Communities

The impact of the proposed rule will also be felt across communities: it is likely that rates of homelessness will increase, and that the resources of community service providers will consequently be stretched thin. Asylum applicants, barred from employment authorization, or forced to wait for authorization for 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.

Losing eligibility for work authorization or delays in obtaining it will also 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.

DHS must consider the additional impact of the rule on local communities and factor the cost to those communities into its analysis of the proposed rule.

B. Impact on Local Businesses and Economies

By ensuring many asylum applicants cannot legally work, the proposed rule will have negative consequences for domestic businesses and local economies beyond the agency's estimates.

DHS acknowledges that this proposed rule may impact companies that hire or currently employ asylum seekers because businesses would have to find replacement labor, incur opportunity costs by having to choose the next best alternative to immediate labor, and potentially lose money in the form of lost productivity and potential profits.⁴⁸

⁴⁸See Notice at 62380. USCIS uses its estimates of lost wages to asylum seekers as a proxy for estimating costs to employers, which is inadequate. DHS must separately assess any costs to employers as a result of the proposed rule.

Indeed, many business sectors rely heavily on the labor of immigrants, including asylum seekers with work authorization while their cases are pending before an immigration judge or an asylum officer.⁴⁹

However, DHS's analysis fails to consider that companies that have already hired asylum applicants may lose their employees who are unable to renew their existing work authorization, with the attendant loss of skills, knowledge, and experience.⁵⁰ Importantly, asylum seekers often fill positions that businesses in the United States cannot fill otherwise.⁵¹ For example, asylum seekers may come with credentials that are in short supply in the U.S. workforce, or in a specific community, which benefits from the arrival of workers with specialized skills or experiences making them uniquely qualified to perform certain work.⁵² To the extent that asylum seekers bring skills or training that are otherwise absent from the workforce, companies that would have hired them will bear significant costs in trying to fill positions, or, alternatively, the costs of being unable to

⁴⁹ See, e.g., Stacey Vanek Smith and Cardiff Garcia, *Worker Shortage Hurts California's Agriculture Industry*, NPR (May 3, 2018) [available at: <https://npr.org/2018/05/03/607996811/worker-shortage-hurts-californias-agriculture-industry>]; Alfred Corchado, *Companies squeezed by labor shortage welcome immigrants*, Seattle Times (May 22, 2018) [available at: <https://seattletimes.com/business/companies-squeezed-by-labor-shortage-welcome-immigrants/>]; Shelly Hagan, *Immigrants Help to Alleviate U.S. Health Care Staffing Shortage*, Bloomberg (June 3, 2019) [available at: <https://www.bloomberg.com/news/articles/2019-06-03/immigrants-help-to-alleviate-u-s-health-care-staffing-shortage>].

⁵⁰ See Notice at 62380-82. While a reduction in employment tax transfers is included in DHS's current cost summary, this is only calculated for those with affirmative cases. Furthermore, this calculation includes only Medicare and Social Security taxes, and not income taxes paid by either asylum applicants or the employer. This is flawed analysis, however, because reduced employment for asylum applicants is likely to represent net losses rather than transfers. Moreover, the Notice seemingly ignores costs associated with reduced firm productivity.

⁵¹ See Upwardly Global, *Upwardly Global's Public Comment on Work Authorization for Asylum Seekers* (Oct. 10, 2019) [available at: <https://upwardlyglobal.org/all-news/upwardly-globals-public-comment-work-authorization-asylum-seekers/>].

⁵² See, e.g., Maine Business Immigration Coalition, *Public Comment, Re: USCIS 2018-0001: Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications* (Oct. 30, 2019) [available at: <https://regulations.gov/document?D=USCIS-2018-0001-0078>] (discussing the unique contributions of asylum seekers to local businesses and the state economy); see also, Sarah Matusek, *Among Those Helping Maine's New Arrivals: Other Immigrants*, CHRISTIAN SCIENCE MONITOR (Aug. 13, 2019) [available at: <https://www.csmonitor.com/USA/Society/2019/0813/Among-those-helping-Maine-s-new-arrivals-Other-immigrants>].

fill positions.⁵³ The net result will likely be substantial lost profits and productivity for local businesses.

Additionally, DHS's analysis fails to consider the larger economic impact that the rule will have on 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.⁵⁴ The proposed rule would unnecessarily deny businesses and organizations the economic advantages provided by asylum seekers' who will lose eligibility for EADs. 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.⁵⁵ Accordingly, restricting asylum applicants from the labor market because might actually lead to adverse impacts on native worker prospects,⁵⁶ which is not contemplated at all as a potential consequence of the proposed rule.

DHS must consider the impact of the proposed rule on the local businesses, and reevaluate its economic cost benefit analysis to provide a more complete picture of the proposed rule's impact on the economy and private sector. Given the substantial additional costs and losses outlined above, DHS should consider whether it would be better to withdraw the proposed regulation in light of this additional impact.

C. Impact on Legal Service Providers

The proposed rule will also create significant burdens and hardships for some legal service providers. Public defender organizations and criminal defense attorneys will face

⁵³ See, e.g., Stacey Vanek Smith and Cardiff Garcia, *Worker Shortage Hurts California's Agriculture Industry*, NPR (May 3, 2018) [available at: <https://npr.org/2018/05/03/607996811/worker-shortage-hurts-californias-agriculture-industry>]; Alfred Corchado, *Companies Squeezed by Labor Shortage Welcome Immigrants*, SEATTLE TIMES (May 22, 2018) [available at: <https://seattletimes.com/business/companies-squeezed-by-labor-shortage-welcome-immigrants/>]; Shelly Hagan, *Immigrants Help to Alleviate U.S. Health Care Staffing Shortage*, BLOOMBERG (June 3, 2019) [available at: <https://www.bloomberg.com/news/articles/2019-06-03/immigrants-help-to-alleviate-u-s-health-care-staffing-shortage>].

⁵⁴ 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/>].

⁵⁵ See, e.g., Jongkwan Lee, Giovanni Peri, Vasil Yasenov, *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>].

⁵⁶ See G. I. P. Ottaviano & G. Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 152 (2012).

additional burdens in advising clients. In order to be comprehensive and accurate in advising asylum seekers about the collateral consequences of criminal convictions (and open criminal cases more generally), criminal attorneys must advise their clients about the consequences of accepting plea deals in their criminal cases.⁵⁷ This proposed rule would thus require them to become familiar with the results of case-by-case USCIS adjudications, given that part of the final rule proposes increasing the exercise of discretion with respect to pending criminal cases.

The government should consider and estimate the impact of the proposed rule on legal service providers, including public defender offices funded by state and local governments, before promulgating this proposed rule.

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. In order to promulgate the rule, DHS must adequately assess its cost on EOIR, the IRS, and the DOL.

A. *Increased Backlogs in Immigration Court*

The rule could inadvertently increase the backlogs in immigration court. The changes to EAD eligibility and extended delay in waiting time will result in a higher number of asylum applicants being 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 in defensive proceedings 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.⁵⁸

⁵⁷ See *Padilla v. Kentucky*, 559 U.S. 356 (2010).

⁵⁸ 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).

Defensive asylum applicants are also currently dissuaded from seeking continuances, because if they do so, they become ineligible for an EAD.⁵⁹ The proposed rule, however, will render many asylum seekers in defensive proceedings ineligible for work authorization, therefore removing this disincentive to ask for continuances, and as such, possibly increasing delays in immigration proceedings. 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 — a result that would be directly counterproductive to the Notice’s stated goals of unburdening the immigration system.⁶⁰

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

B. 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.

C. Higher Levels of Unauthorized Work and Additional Investigatory Burdens for DOL

The rule could also create additional burdens for the DOL by forcing it to investigate higher incidents of wage theft, and other unsafe working conditions monitored by its

⁵⁹ 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].

⁶⁰ See Notice at 62389.

sub-agency, the Occupational Health and Safety Administration (OSHA).⁶¹

DHS does not acknowledge the impact of unauthorized work on the DOL. As discussed above, the elimination of work authorization eligibility and extension of the waiting period will force many asylum applicants 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.⁶² 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.⁶³

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.⁶⁴ As such, the proposed rule restrictions on work authorization are 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.

⁶¹ 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>].

⁶² 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.”).

⁶³ 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>].

⁶⁴ 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) (noting that “[c]ontemporary courts...have continued to conclude that” FLSA’s definition of employee extends to unauthorized immigrant workers) (collecting cases); 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.”).

Additionally, individuals 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.⁶⁵ 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 cost of the proposed rule on the DOL before the rule can be implemented.

V. The Rule Conflicts with U.S. Treaty Commitments and International Norms

The proposed 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.

Most notably, the elimination of work authorization eligibility for individuals who do not enter at a port of entry conflicts with the United States' treaty obligations under Article 31(1) of the 1951 Convention relating to the Status of Refugees.⁶⁶ Article 31 states that:

"Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."⁶⁷

The exclusion from work authorization clearly constitutes a "penalty," because it denies a certain sub-set of asylum seekers a benefit on the basis of their "illegal entry." Indeed, DHS's own stated purpose of "deterring" asylum seekers from coming to the United

⁶⁵ See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 677 & n. 51 (2003).

⁶⁶ See 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]. By acceding to its 1967 Protocol, the United States has bound itself to these provisions of the Refugee Convention.

⁶⁷ 1951 Convention, art. 31(1).

States, indicates that the agency intends for the ban on work authorization to function as a powerful negative consequence for asylum applicants.⁶⁸

DHS's claim that it avoids violating the 1951 Convention and 1967 Protocol relating to the Status of Refugees is flawed. The Notice states that because DHS allows for a "good cause" exception to the work authorization ban on those not presenting at a port of entry.⁶⁹ This argument, however, depends entirely on whether DHS's interpretation of good cause falls within the scope of the 1951 Convention. The Notice provides examples of "good cause":

"Examples of reasonable justifications for illegal entry or attempted entry include, but are not limited to, requiring immediate medical attention or fleeing imminent serious harm, but would not include the evasion of U.S. immigration officers, or entering solely to circumvent the orderly processing of asylum seekers at the U.S. port of entry, or convenience."⁷⁰

This definition, however, notably diverges from the intended meaning of "good cause" by the drafters of Article 31(1); the official negotiating documents for the Convention —the "travaux préparatoires"⁷¹ — include comments by delegates indicating that "fleeing persecution itself was good cause for illegal entry."⁷² Indeed, other interpretations of the good cause requirement seem to suggest that by passing a credible fear interview alone, asylum seekers would have sufficiently demonstrated good cause under Article 31.⁷³

⁶⁸ Notice at 62389.

⁶⁹ *Id.* at 62392.

⁷⁰ *Id.*

⁷¹ Travaux préparatoires are the official negotiating records of a treaty and are often used in assessing the intention and meaning of a treaty. The Vienna Convention on the Law of Treaties also clarifies the role of the travaux in treaty interpretation. See Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

⁷² See comments by The United Kingdom representative, Mr. Hoare, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. p. 13; UN doc. A/CONF.2/SR.14, p. 10-11.

⁷³ See Swiss Federal Court (Bundesgericht, Kasstionshof, Urteil vom 17 März 1999), reported in Asyl 2/99, 21-23 ("A refugee has good cause for illegal entry especially when he has serious reason to fear that, in the event of a regular application for asylum at the Swiss frontier, he would not be permitted to enter Switzerland, because the conditions laid down in Article 13c of the Asylum Law and Article 4 of the Asylum Procedure Law are satisfied. 'Good cause' is thus to be recognized in regard to the alien who, if he is considered as a refugee, enters Switzerland illegally with such well-founded apprehension, in order to be able to make an asylum application inland.") Translated in Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection*, Paper Prepared at the Request of the

Because DHS's interpretation of "good cause" is much narrower than the meaning of good cause within Article 31, the proposed rule's ban on work authorization for those who enter without inspection violates the United States' international legal obligations.

The proposed rule is also out of sync with the commitments and policies of our peer nations in the international community. Articles 17 and 18 of the 1951 Convention recognizes that asylum seekers have a right to access employment opportunities that is at least as favorable as the access enjoyed by "nationals of a foreign country in the same circumstances."⁷⁴ The United States has historically maintained policies that mirrored the requirements of the Convention.⁷⁵ 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 the system outlined in this proposed rule.⁷⁶ Concretely, Canada allows eligible asylum seekers (and their families) to access work permits. Canada's commitment 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).⁷⁷ Furthermore at least nine nations in Latin America allow for immediate work authorization upon filing of asylum application.⁷⁸ The proposed 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.

DHS should fully consider the ramifications of a regulatory change that diverges from international norms before implementing the proposed rule; and where conflict exists, DHS should make revisions to avoid violating the United States' international legal obligations.

Department of International Protection for the UNHCR Global Consultations, 1, 17 (2001) [available at: <https://www.unhcr.org/3bcfdf164.pdf>].

⁷⁴1951 Convention, art. 17, 18; see also, James C. Hathaway, *The Rights of Refugees Under International Law*, (New York: Cambridge University Press, 2005).

⁷⁵ 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>].

⁷⁶See 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].

⁷⁷UNHCR, *A guide to international refugee protection and binding state asylum systems* at 102, [available at: <https://www.unhcr.org/3d4aba564.pdf>].

⁷⁸ *Id.* at 102; see also Directive 2013/33/EU, [available at: <https://www.refworld.org/docid/51d29db54.html>].

VI. *The Criminal Bars in the Proposed Rule Conflict with the Overarching Statutory Scheme Governing Asylum and Face Serious Implementation Barriers*

The proposed rule would create substantial eligibility barriers to work authorization on the basis of past criminal history.⁷⁹ The effect of the proposed rule will effectively be

⁷⁹ Specifically, DHS proposes modifying the existing regulation 8 CFR § 208.7 in relevant part to read as follows:

“(a) Application and decision

(1) . . .

(iii) *Asylum applicants who are ineligible for employment authorization.* An applicant for asylum is not eligible for employment authorization if:

(A) The applicant was convicted in the United States or abroad of any aggravated felony as described in section 101(a)(43) of the Act;

(B) The applicant was convicted in the United States of any felony as defined in 18 U.S.C. 3156(a)(3);

(C) The applicant was convicted of any serious non-political crime outside the United States. USCIS will consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses, warrant a favorable exercise of discretion for a grant of employment authorization;

(D) The applicant was convicted in the United States of a public safety offense involving:

(1) Domestic violence, domestic assault, or any other domestic or spousal battery-type offense unless the applicant has been subjected to extreme cruelty, is not and was not the primary perpetrator of the violence in the relationship, and is not otherwise ineligible. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(2) Child abuse, child neglect, or any other offense against a child, regardless of an element of sexual or inappropriate touching. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

to categorically bar asylum-seekers with nearly any conviction from receiving employment authorization, even where the conviction is not an aggravated felony and is extremely unlikely to be deemed a particularly serious crime that would render the person ineligible for asylum.⁸⁰ In other words, some asylum seekers who will ultimately win their asylum cases would be rendered categorically ineligible for work authorization while their asylum applications are pending due to minor infractions. For example, under the proposed rule, an asylum seeker who was convicted of a marijuana possession violation⁸¹ in New York State would be categorically ineligible for employment authorization while their asylum application is pending — despite the fact that these offenses are not crimes under New York law.⁸² Distressingly, DHS says it seeks public comment “on whether . . . additional crimes should be included as bars to employment authorization,”⁸³ suggesting that the final rule may make even more criminal convictions subject to a categorical bar to employment authorization, regardless of whether these offenses actually render asylum seekers ineligible for asylum.

DHS also proposes that any asylum seeker with *pending or unresolved*⁸⁴ criminal charges be granted employment authorization at USCIS’s discretion only after it considers “the totality of the circumstances.”⁸⁵ And DHS’s placement of this proposed change — in a section entitled “Asylum applicants who are ineligible for employment authorization”⁸⁶— implies that the agency’s default would be to deny employment

(3) Controlled substances, including possession, possession with intent to distribute, or delivery. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(4) Driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the arresting, charging, or convicting jurisdiction classifies the offense. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

⁸⁰ By statute, individuals convicted of a “particularly serious crime” — which includes all aggravated felonies — are categorically ineligible for asylum. 8 U.S.C. §§ 1158(b)(2)(A)(ii) & (b)(2)(B)(i).

⁸¹ DHS proposes that all individuals convicted of a “controlled substance” offense be categorically ineligible for employment authorization and refers to section 102 of the Controlled Substances Act, which includes marijuana. 21 U.S.C. § 812(c) Schedule I(c)(10).

⁸² See V.T.L. § 1192(1); P.L. § 221.05.

⁸³ Notice at 62375.

⁸⁴ DHS does not define “unresolved” or explain the distinction between “pending” and “unresolved” criminal cases.

⁸⁵ Notice at 62375.

⁸⁶ *Id.* at 62390.

authorization in such cases absent reasons to positively exercise discretion (as described below). In New York State, for example, DHS's proposal could mean that even asylum seekers with an open Adjourment in Contemplation of Dismissal ("ACD") — which would eventually result in all charges being sealed without a guilty plea — would likely be denied employment authorization.

DHS implies, but does not explicitly state,⁸⁷ that its proposed categorical exclusions based on criminal convictions are necessary to limit work authorization to only those asylum seekers with potentially meritorious claims (and by extension, to discourage individuals who are barred from asylum based on criminal convictions from filing non-meritorious asylum claims simply in order to qualify for work authorization).⁸⁸ Even taking this argument at face value, however, DHS fails to explain why it proposes to categorically eliminate work authorization for many asylum seekers whose convictions are extremely unlikely to have any impact on their asylum claims.

DHS states that its proposed rule would "bar any alien who has been convicted of or charged with a serious crime from eligibility" for work authorization,⁸⁹ which represents a much broader group of people than those ineligible for asylum on the basis of a conviction for a particularly serious crime.⁹⁰ In practice, applying these criminal bars may undermine the overarching statutory scheme governing asylum by discouraging asylum claims from potentially meritorious applicants with minor criminal convictions. Asylum seekers may have perfectly valid claims, but be unable to support themselves, hire counsel, or otherwise provide for necessities without access to work authorization. By so greatly expanding the criminal bars to work authorization, the proposed rule threatens to create additional *de facto* bars to asylum that undermine the existing regulatory and statutory scheme.

Applying these criminal bar provisions in practice, would also require USCIS adjudicators of EAD applications to make complex determinations about whether particular offenses are subject to the categorical bar. By default, USCIS apparently would only receive basic information about the conviction such as the code violation, date, and jurisdiction and DHS does not propose any mechanism for EAD applicants to provide

⁸⁷ DHS notes that under current law some individuals who are statutorily ineligible for asylum are ineligible for work authorization while their asylum applicants are pending. See Notice at 62387. Current regulations do, however, categorically bar asylum seekers convicted of aggravated felonies from receiving employment authorization. See 8 C.F.R. § 208.7(a)(1).

⁸⁸ By statute, an individual is ineligible for asylum if she has been convicted of a "particularly serious crime," if "there are serious reasons for believing that . . . [she] has committed a serious nonpolitical crime outside the United States," or if there are "reasonable grounds for regarding the alien as a danger to the security of the United States," among other grounds. 8 U.S.C. § 1158(b)(2)(ii), (iii) & (iv).

⁸⁹ Notice at 62404 (emphasis added).

⁹⁰ See 8 U.S.C. § 1158(b)(2)(A)(ii).

mitigating information about convictions.⁹¹ Indeed, it would be preferable not to institute criminal bars to work authorization at all, and instead leave the process to the individualized assessment of the asylum process itself — where, IJs and USCIS asylum officers are better trained and equipped to make the necessary individualized assessments for determining whether past criminal conduct should serve as a bar to asylum eligibility.

The agency should reconsider the broad reaching effects of its proposed ban on work authorization eligibility for individuals with criminal histories. Because the agency does not even estimate how many applicants will be impacted by this exclusion it is impossible to analyze the real effects of the rule. DHS must both estimate the actual number of individuals would will be excluded from work authorization on the basis of past criminal history and should revise the proposed rule to avoid conflict with the existing regulatory and statutory scheme governing asylum.

Moreover, the proposed changes to the criminal bars to work authorization eligibility will create major conflicts and confusion in light of the additional proposed rule DHS has published regarding criminal bars to asylum.⁹² As such, DHS should consider removing this language from the proposed rule altogether.

VII. The Stated Purpose in the Notice is not Rationally Related to the Proposed Rule

The Notice offers virtually no evidence or support for its claim that the regulatory changes will promote its stated goals. According to the Notice, the purposes of the rule change are to (1) reduce “incentives to file frivolous, fraudulent, or otherwise non-meritorious applications intended primarily to obtain employment authorization...and remain for years in the United States due to the backlog of asylum cases;” and (2) disincentive “illegal entry into the United States by proposing that any alien who entered or attempted to enter the United States at a place and time other than lawful entry through a U.S. port of entry may be ineligible to receive [an EAD].”⁹³

DHS therefore believes that making work authorization unavailable to certain categories of asylum applicants will have a sufficiently negative impact on their cases to *discourage them from applying for asylum in the first place*. As an initial matter it is important to note that federal courts have previously held those policies — like

⁹¹ DHS simply proposes requiring that all applicants for employment authorization complete a biometrics check.

⁹² See Notice of Proposed Rulemaking on Procedures for Asylum and Bars to Asylum Eligibility, EOIR Docket No. 18-0002, A.G. Order No. 4592-2019, in the Federal Register at 84 FR 69640, issued Dec. 12, 2019. This seems especially pertinent given DHS’s purported goal in the Notice of “simplifying the adjudication process” for work authorization applications. See Notice at 62375.

⁹³ Notice at 62383.

immigration detention — may not legally be implemented for the purpose of deterring asylum claims.⁹⁴

Crucially, the Notice also provides no evidence to suggest that the rule will likely achieve its purpose, nor that it is rationally related to its stated goals. While the Notice states that “this rule stands alone as an important disincentive for individuals [to] use asylum as a path to seek employment in the United States,”⁹⁵ DHS offers no empirical evidence or even anecdotal support to prove that depriving asylum seekers of work authorization eligibility will deter them from seeking asylum in the United States. To the contrary, as discussed above, it seems likely that asylum seekers will continue to pursue asylum in the United States, even if barred from authorized employment, and instead be forced to either rely on community support or work under exploitative working conditions in the shadow economy in order to survive. The Notice offers no evidence that the proposed rule will actually deter asylum claims, rather than simply result in increased practices of unauthorized work.⁹⁶

Moreover, the Notice fails entirely to provide evidence for its central claim that the asylum seekers it seeks to deter are coming to the United States primarily to pursue “economic opportunity.”⁹⁷ The Notice presents no documentation or citations to

⁹⁴ See *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015). In *R.I.L.-R.*, the court flatly rejected the U.S. government’s deterrence argument that “one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.” *R.I.L.-R.*, 80 F. Supp. 3d at 188-89. The court concluded that such an argument is “out of line with analogous Supreme Court decisions” that ruled, in the context of “civil commitment more broadly,” that “such ‘general deterrence’ justifications [are] impermissible.” *Id.* at 189. The court found that, even if, for the sake of argument, deterrence was a legitimate rationale, “a general deterrence rationale seems less applicable where . . . neither those being detained nor those being deterred are certain wrongdoers, but rather individuals who may have legitimate claims to asylum in this country.” *Id.*

⁹⁵ Notice at 62386.

⁹⁶ The government briefly acknowledges that increases in unauthorized work may be a result of the proposed rule, but the Notice offers nothing to address this potential consequence: “while some aliens may disregard the law and work unlawfully in contravention to these reforms, the Department does not avoid establishment of regulatory policies because certain individuals might violate the regulations.” Notice at 62386. In addition to simply ignoring the costs of encouraging unauthorized work, this statement also misconstrues the issue. The question the agency must resolve is whether the proposed regulation will likely achieve its stated goals of discouraging individuals from filing asylum claims. If the likely consequence of the regulation is only that more individuals will be forced into exploitative unauthorized work— and that other federal agencies, like DOL, will be given more work as a result — then the regulation is doomed to fail at achieving its stated purpose. Indeed, the cursory statement on unauthorized work suggests that DHS has not fully vetted the rule or considered its likely consequences, and that the agency must reevaluate the efficaciousness of the rule before implementing it.

⁹⁷ Notice at 62385.

support this empirical claim that economic motivations are driving asylum claims at the southern border.⁹⁸ To the contrary, it is well documented that Latin American asylum seekers at the border are fleeing threats of death, rape, and widespread violence in their home countries.⁹⁹

Disturbingly, the Notice erroneously conflates “feeling poverty” and seeking economic opportunity with feeling what DHS considers “generalized crime in one’s home country.”¹⁰⁰ Specifically, the Notice cites *Hui Zhuang v. Gonzales*¹⁰¹, stating that “[f]ears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.” But DHS incorrectly equates “fears of economic hardship” with fear of death from violence that may or may not meet one of the five protected asylum grounds depending on the jurisdiction or pertinent caselaw.¹⁰² Asylum seekers fleeing fear of imminent death from gang violence are differently motivated than those merely seeking “economic opportunity” — even if their persecution is not ultimately determined by USCIS or EOIR to be on the basis of their membership in one of the five protected asylum categories. As such, it is far from obvious that denying asylum applicants work authorization will dissuade them from fleeing to the United States, when their underlying motivations for seeking asylum is fear for their lives and the lives of their families.¹⁰³

Furthermore, DHS acknowledges that the proposed reforms will also “apply to individual with meritorious asylum claims, and that these applicants may also experience economic hardship as a result of the heightened requirements.”¹⁰⁴ DHS therefore believes that the proposed rule will effectively force at least some asylum applicants with meritorious claims to forgo their cases. This too undermines DHS’s stated purpose for the proposed rule: either the agency knows the rule will be ineffectual, or the agency believes that the rule will not discourage only “frivolous” asylum claims, but asylum claims in general. Indeed, nothing in the text, purpose, or analysis of this proposed rule suggests that it has been tailored in any way to specifically target asylum seekers with “non-meritorious” as opposed to “meritorious” claims — making the rule significantly overbroad in relation to its stated purpose.

⁹⁸ See *id.* at 62386.

⁹⁹ See, e.g., Dara Lind, *New Evidence Suggests Trump’s Border Crackdown isn’t Just Cruel — It is likely Ineffective: Family Separation and Detention Don’t Deter Migrants from Coming*, VOX (Jul. 24, 2018) [available at: <https://www.vox.com/2018/7/24/17606726/border-deterrence-illegal-stop-families>] (discussing how these policies are unlikely to deter migrants fleeing fear of death in their home countries).

¹⁰⁰ Notice at 62385.

¹⁰¹ 471 F.3d 884, 890 (8th Cir. 2006).

¹⁰² Notice at 62385.

¹⁰³ See *supra*, Lind, n. 99 (noting the failures of previous Trump administration policies to deter asylum seekers from coming to the United States).

¹⁰⁴ Notice at 62385.

In short, the Notice offers no reason to conclude that the proposed rule is rationally related to its stated purpose. DHS must supply evidence to support its claim that asylum seekers are motivated primarily by pursuit of economic opportunity, as well as evidence that the rule will function as a deterrent for asylum seekers that are seeking safe haven in the United States. DHS must also consider reasonable alternatives to the proposed rule to show how it can discourage only those asylum claims the agency describes as “frivolous,” rather than those the agency considers “meritorious”; if the agency fails to do so, the proposed rule will remain overly broad and fail at achieving its stated purpose.

VIII. The Proposed Rule Demonstrates Unconstitutional Animus Towards Latin American Asylum Seekers

Congress created a statute to allow for asylum applicants to receive work authorization pending the adjudication of their cases.¹⁰⁵ As discussed above, the proposed rule, however, seeks to either delay asylum seekers from applying for work authorization, or function as an outright ban on work authorization for asylum applicants. The proposed rule must also be understood in the context of two other recently proposed regulatory changes governing asylum seekers’ eligibility for work authorization: the removal of the 30-day processing time for EAD application adjudication,¹⁰⁶ and the unprecedented imposition of a \$490 fee for (c)(8) EAD applicants.¹⁰⁷ Taken together these regulatory changes seek to make it all but impossible for many asylum applicants to receive work authorization and work legally while their claims are pending.

It is also important to understand the rule as one part of the administration’s larger agenda to curtail legitimate asylum claims. The third-country transit bar,¹⁰⁸ Migrant

¹⁰⁵ 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).

¹⁰⁶ See 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, 84 F.R. 47148, issued Sept. 9, 2019.

¹⁰⁷ See Notice of Proposed Rulemaking on U.S. Citizenship and Immigration Services 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 Nov. 14, 2019.

¹⁰⁸ 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>]

Protection Protocols (MPP)¹⁰⁹ and expedited processing for “family unit” asylum cases¹¹⁰ 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.¹¹¹ Indeed, journalists have reported that the administration even considered issuing an outright ban on asylum applicant work authorization.¹¹² Comments from DHS officials suggest that the purpose of such a ban would be to deter asylum seekers from pursuing their immigration cases by subjecting them to greater hardship.¹¹³ The proposed rule changes seek to accomplish precisely this goal without officially naming itself as a ban on allowing asylum applicants to work legally.

The present rule must be understood as part of an egregious and counterproductive extension of the administration’s campaign to deter legal asylum claims¹¹⁴ at the Mexico-U.S. border. The Notice, indeed, states that its goal is to discourage “large-scale migration to the U.S. Southern Border by precluding some

¹⁰⁹ See Human Rights Watch Report, “We Can’t Help You Here”: U.S. Returns Asylum Seekers to Mexico, (2019) [available at: https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf] (“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.”).

¹¹⁰ See Jeffery S. Chase, EOIR Creates More Obstacles for Families, (Dec. 13, 2018) [available at: <https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families>] (quoting a former immigration judge on the FAMU docket as an effort in “gaming of the system to deny more asylum claims for [the administration’s] own political motives”).

¹¹¹ 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>].

¹¹² 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>].

¹¹³ *Id.* (noting that “[o]ne of the DHS officials said proponents of the policy [banning work authorization] believe prolonging the period when Mexicans are not allowed to work while they wait for their claim will deter them from coming to the U.S. in the first place.”)

¹¹⁴ See 8 U.S.C § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section.”(emphasis added)).

asylum seekers from entering the United States.”¹¹⁵ If the “some asylum seekers” mentioned in the Notice are asylum seekers who by in large seek asylum at the border, then DHS may be able to meet its stated goal through these proposed rule changes.

The focus on migration at the Mexico-U.S. border is telling, given that the vast majority of asylum seekers arriving at the border are ethnic and racial minorities from Latin America¹¹⁶ — a population white nationalists have been particularly concerned about as potentially transforming the ethnic composition of the United States.¹¹⁷ Moreover, multiple statements by administration officials,¹¹⁸ including the President, have suggested a particular animus motivating immigration policies, directed at specific immigration populations on the basis of their racial and ethnic identities, and countries of origin.¹¹⁹ Recent research by legal scholars has also tied the immigration policies of

¹¹⁵ Notice at 62386.

¹¹⁶ See Maureen Meyer and Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WOLA (Feb. 1, 2018) [available at: <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/>] (discussing how the increase in migration from Central American countries has occurred in recent years, and how the Trump administration’s asylum policies have focused on this population)

¹¹⁷ For example, the El Paso mass shooter manifesto describe his attack as motivated by a fear of a “Hispanic Invasion of Texas,” see Briana Sacks & Adolfo Flores, *The Suspected El Paso Terrorist Said He Was Motivated By A Hatred Of Immigrants*, BUZZFEED (Aug. 4, 2019) [available at <https://www.buzzfeednews.com/article/briannasacks/el-paso-shooting-suspect-immigrants-hate-manifesto>]; for a discussion of how the El Paso shooter and other white nationalists’ view are reflected in President Trump’s rhetoric, see Peter Baker & Michael D. Shear, *El Paso Shooting Suspect’s Manifesto Echoes Trump’s Language*, N.Y. Times (Aug. 4, 2019) [available at: <https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html>].

¹¹⁸ Senior White House official and immigration policy architect Stephen Miller in particular has been accused of holding and promoting white supremacist views. See, e.g., Joel Rose, *Leaked Emails Fuel Calls for Stephen Miller to Leave White House*, NPR (Nov. 26, 2019) (detailing revelations from Miller’s emails while working as reporter at Breitbart News in which he promoted a number sources associated with white nationalist and racism) [available at: <https://www.npr.org/2019/11/26/783047584/leaked-emails-fuel-calls-for-stephen-miller-to-leave-white-house>]; Dennis Carter, *It’s Time to be Honest about Stephen Miller, Whose Radical Vision for U.S. Immigration is Spreading*, REWIRE NEWS (May 14, 2018) [available at: <https://rewire.news/article/2018/03/14/time-honest-stephen-miller-whose-radical-vision-u-s-immigration-spreading/>].

¹¹⁹ See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STANFORD L. REV. 197, 198-204 (2019) [available at: <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf>] (cataloging the President and other administration officials’ statements and explaining how they were justified as part of a white nationalist project); see also Max Greenwood, *Trump on Removing Confederate Statues: “They’re Trying to Take Away Our Culture,”* THE HILL (Aug. 22, 2017).

this administration to nativist ideologies seeking to secure the ethnic composition of the United States as a “white majority” country.¹²⁰

The present rule is part of an insidious agenda of discrimination meant to undermine valid legal claims to asylum as part of the administration’s ethno-nationalist political project.¹²¹ Such a project necessarily runs afoul of the constitutional guarantees of equal protection and due process.¹²² Because the proposed rule is likely animated by unconstitutional prejudice and animus, DHS should withdraw it from the federal registry.

IX. The Acting Director of DHS Lacks Statutory Authority to Promulgate the Rule

The Acting DHS Secretary, 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.”¹²³ 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.¹²⁴ At the time of Secretary Nielsen’s departure, Executive Order 13753 remained in place, which set out the order of succession for DHS.¹²⁵ 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.¹²⁶ 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

¹²⁰ See, e.g., Reva Siegel and Duncan Hosie, *Trump’s Anti-Abortion and Anti-Immigration Policies May Share a Common Goal*, TIME (Dec. 13, 2019) [available at: <https://time.com/5748503/trump-abortion-immigration-replacement-theory/>] (detailing how Trump Administration officials lauded Hungary’s efforts to ensure more white women are procreating in order to ensure the country remains a majority white country); see also Jonathan S. Blake, *How Ethno-Nationalism Explains Trump’s Early Presidency*, VICE (Feb. 26, 2017) [available at: https://www.vice.com/en_us/article/53qnxh/how-etho-nationalism-explains-trumps-early-presidency]; Jayashri Srikantiah & Shirin Sinnar, *supra*, note 119.

¹²¹ See, e.g., Jayashri Srikantiah & Shirin Sinnar, *supra*, note 119 at 200–203.

¹²² See, e.g., Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900-24 (2012) (describing unconstitutional animus in Supreme Court equal protection cases).

¹²³ 5 U.S.C. § 3348.

¹²⁴ 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>].

¹²⁵ See Exec. Order No. 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016).

¹²⁶ See Thompson and Maloney Letter at 2.

under the Federal Vacancies Reform Act (FVRA),¹²⁷ that authority expired after 210 days in office per the terms of that statute.¹²⁸ The changes Mr. McAleenan later made to the order of DHS succession also 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."¹²⁹

The government must articulate the basis of Mr. Wolf's clear statutory authority to promulgate this regulation, and if unable to do so, remove it from the federal registry.

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 that they would be able to integrate and assimilate into our communities expeditiously. The proposed rule diverges from this purpose, and instead, endeavors to deter asylum applicants from even applying to receive work authorization by drastically narrowing its availability.

It is in their interest, and in the interest of the United States that asylum applicants be authorized to participate in society by finding lawful employment. Promulgating arbitrary regulations with the sole purpose of preventing asylum seekers from working legally does absolutely nothing other than force members of our communities into unnecessary reliance on already overtaxed support networks or unauthorized employment. For the reasons listed above, it is in the interest of asylum applicants, and in the interest of the United States that DHS withdraw the proposed rule.

Thank you for your time and consideration.

Sincerely,



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



Zachary Manfredi
Equal Justice Works Fellow
Asylum Seeker Advocacy Project (ASAP)

¹²⁷ 6 U.S.C. § 113(g).

¹²⁸ 5 U.S.C. § 3346(a)(1).

¹²⁹ 5 U.S.C. § 3348.