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June 6, 2022

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

Re: Comment in Response to the DHS/USCIS Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Employment Authorization; DHS Docket No. USCIS-2005-0035; OMB Control Number 1615-0040

Dear Chief Deshommès,

The Immigrant Legal Resource Center (ILRC) submits the following comment in response to the Department of Homeland Security's (DHS) Agency Information Collection; Extension Without Change, of a Currently Approved Collection: Application for Employment Authorization, published on April 5, 2022.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates, and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

Through our extensive networks with service providers, immigration practitioners and immigration benefits applicants, we have developed a profound understanding of the barriers faced by low-income immigrants of color seeking to obtain immigration benefits. As such, we welcome the opportunity to provide comments on the Form I-765, Application for Employment Authorization. The recommendations that follow are gleaned from the experiences of many low-income immigrants who we and our partners serve.

- I. USCIS should remove questions that are unnecessary to establish eligibility for employment authorization from the I-765.

Generally, we encourage U.S. Citizenship and Immigration Services (USCIS) to revert to a one-page form that asks only questions legally necessary to determine eligibility for employment authorization and basic contact information. Long forms pose a barrier to all applicants and practitioners, but particularly to pro se applicants who may not feel comfortable completing

forms on their own. Longer forms may discourage pro se applicants from completing the forms themselves or may drive them to notarios charging exorbitant fees to complete the application. Moreover, the more questions that are included on a form – particularly those that have no relevance to eligibility for the specific benefit sought – the greater the need to obtain a full legal assessment and record review in order fill out a basic form. The I-765 is meant to provide work authorization while a substantive application is on file with DHS or sister agencies. USCIS should revise Form I-765 to include only those questions that are statutorily necessary and reduce the length of the form.

Additionally, a shorter form would not only be less daunting for applicants but would also help increase efficiency in adjudications. The current backlogs and long processing times for I-765 adjudications delay the lawful authorization for employment for applicants who are statutorily eligible to work, depriving applicants of the ability to provide financially for themselves and their families. While USCIS has made strides in addressing backlogs and in extending employment authorization for renewal applicants, wait times for adjudications remain excessive and vary greatly by location. Moreover, extensions do not offer relief for initial employment authorization requests. In many instances, processing times for I-765 for pending applications are as long as or longer than the processing times for the application to which the I-765 is incident.¹ The longer the form, the longer it takes to adjudicate. The proper place to address collateral issues and discretionary factors is in the adjudication of the principal application, rather than assessing these issues when adjudicating the work permit and then again when adjudicating the substantive application for relief. This duplicative evaluation wastes the resources of an overstretched agency. By reverting to a version of the I-765 that only assesses the eligibility for employment authorization pursuant to 8 C.F.R. § 274a.12, an adjudicator would not be required to assess unnecessary factors and information; this should lead to more expeditious case completions.

Specifically, we urge USCIS to eliminate or modify the following questions on Form I-765:

1. Part 2, Questions 6-7: USCIS should eliminate the requirement for a physical address and require only the mailing address for the applicant. An applicant's physical address is not relevant to his or her eligibility for work authorization, though the mailing address is necessary to correspond with the applicant. The requirement to list a physical address in addition to a mailing address raises concerns that this question is intended to ensure that an applicant's physical location is recorded for enforcement purposes. As such, questions 6 and 7 should be eliminated.
2. Part 2, Questions 21-24 and all sub-questions: These questions request information about travel document numbers and an individual's last arrival to the United States. These questions are irrelevant to the status that is currently held by the individual which enables them to apply for employment authorization. In comparison, Question 25 asks for an individual's current immigration status, which is relevant to the applicant's eligibility for employment authorization. Applicants – particularly pro se applicants – could be subject to enforcement for incorrectly answering questions 21-24 – which asks applicants to remember exact dates and details – if those answers are compared with other applications, even if discrepancies are minor. These questions do not appear to be required by statute or regulation and appear to serve only as mechanism of the agency's extreme vetting that pervades in other USCIS practice and policy. As such, these questions should be eliminated.

¹ For example, an I-765 filed at the California Service Center based on a pending I-485 adjustment application in category (c)(9) has a processing time of 20 months while an I-485 at the San Francisco Field Office has a processing time of 29.5 months. For applicants in these categories and geographical spaces, the wait time for work authorization is unacceptably long and USCIS in this situation is essentially granting employment authorization for less than one year, which is an inefficient use of agency resources. Information accessed May 23, 2022, at <https://egov.uscis.gov/processing-times/>.

3. Part 2, Question 30 and all sub-questions: These questions first appeared several years ago and were expanded in the 2020 version of the form. In the federal class action lawsuit *Asylumworks v. Mayorkas*,² plaintiffs sued after the Trump Administration imposed bars to employment authorization for asylum seekers to restrict their ability to work during the pendency of their asylum cases. On February 7, 2022, a federal judge vacated these rules, which the Biden Administration did not appeal, and the *Asylumworks* decision is now final. However, questions that speak to the bars that the Trump Administration tried to impose still exist on Form I-765 and there is no indication on the form or in the instructions that answering these questions is no longer required. These questions waste the time of applicants, legal workers, and adjudicators. Moreover, their continued inclusion poses a risk to all applicants, but particularly pro se applicants as the information disclosed could be compared to other applications filed and discrepancies could be exploited. USCIS should eliminate these questions in their entirety on the form and in the instructions to remain in compliance with the *Asylumworks* decision.
 4. Part 3: We urge USCIS to revise the information collected in Part 3 of the form. Specifically, we request that USCIS eliminate the request for the applicant's phone number and email address as this information is not necessary to assess eligibility but is also not necessary to contact the applicant. Part 2 of the form requires the applicant's mailing address and for paper applications, USCIS communicates via mail. For forms filed online, USCIS collects an email address as part of the creation of an USCIS Online Account and communicates with the applicant via email to that address. These additional forms of contact – which were not required on previous versions of the form – are unnecessary to the adjudication and administration of the form and should be eliminated.
 5. Parts 4 and 5: The current version of the I-765 requests attestations from both a preparer and an interpreter as well as personal information for both including mailing addresses, phone numbers, and email addresses. If the preparer or interpreter is not the applicant's representative with a valid Form G-28, Notice of Entry of Appearance, on file with USCIS, the question is raised as to why USCIS needs this information at all. The I-765 instructions do not indicate why this information is necessary and notes specifically for the preparer that a G-28 must be filled out if the preparer is the applicant's representative. USCIS does not notify the preparer or interpreter when there is a decision made in the case, as it does with a representative whose appearance has been entered. Furthermore, the I-765 is ancillary to a substantive benefits application for which this information is required, rendering the collection of this information again for the I-765 redundant and unnecessary. It does not appear that the collection of this information is required by law or regulation and USCIS has not established a clear policy for collecting it and should revise the I-765 to eliminate these questions.
- II. USCIS should include clarifying information in Form I-765 and Form I-765 Instructions on the distinction between initial, replacement and renewal applications.

We recommend that USCIS alter Form I-765 and the accompanying instructions to clarify the differences between applications for initial employment authorization, replacement of an Employment Authorization Document (EAD), and a renewal of employment authorization in the same category. Part 1 on the current I-765 asks the applicant to select a reason for applying and gives the options of an initial, replacement, or renewal application. The instructions for this section simply mirror the information on the form and do not provide any further guidance for this question. The lack of clearer guidance often leads applicants to check the incorrect box in Part 1, which can lead to rejections, processing delays, and prolong or initiate periods of unemployment. USCIS should provide clearer guidance to the public on the distinction between these choices.

² *Asylumworks v. Mayorkas*, Civil Action 20-cv-3815 (BAH) (D.D.C. Feb. 7, 2022).

An older version of the USCIS Customer Service Guide, which is available in the FOIA reading room, provides a blueprint for clarity.³ At the very least, the I-765 instructions should direct applicants that an initial application is needed whenever the category of eligibility changes and that a renewal application is only for those seeking to renew in the same category for which their current EAD is issued. On the form itself, USCIS should update the options in Part 1 in accordance with this version of the customer service guide and include the following options or something similar:

- Initial EAD (this is your first application under a specific category)
- A Renewal EAD (an extension of previously granted employment authorization)
- A Replacement EAD (to replace a lost, mutilated, or destroyed EAD, or to update information, such as a name change on the EAD)

By having these distinctions clear on both the form and the instructions, applicants will be more likely to choose the correct category, and USCIS officers will not have to try to discern what the correct category is if the form is filled out incorrectly. This will save time and resources for USCIS and will keep applicants from enduring unnecessary delays that threaten their livelihood.

III. USCIS should amend Form I-765 Instructions to clarify which applicants are eligible for a fee waiver.

The instructions for Form I-765 provide a list of applicant categories for which a filing fee is not required.⁴ However, there is no such list for those categories for which an applicant may file a fee waiver. Given the length and amount of information included in the instructions, the lack of clarity in this space disadvantages low-income, pro se applicants who may not know that they are eligible to file a fee waiver with their I-765. As such, USCIS should amend the I-765 instructions to include a similar list for all categories for which a fee waiver is available.

IV. USCIS should withdraw the existing discretionary factors used to adjudicate Form I-765.

The USCIS Policy Manual states that applications for categories found at 8 C.F.R. § 274a.12(c) – those individuals who must apply for employment authorization as opposed to those whose eligibility for employment authorization is incident to status – will only be approved for an EAD subject to a favorable exercise of discretion.⁵ However, the Trump Administration introduced sweeping changes in the USCIS Policy Manual to the definition of discretion, including adding more than two dozen new factors for applicants to document and adjudicators to consider that fundamentally altered applicants' ability to qualify for a benefit, including work authorization.⁶ We urge USCIS to reconsider and withdraw the discretion sections of the USCIS Policy Manual generally and return to previous guidance from the Adjudicators Field Manual (AFM) which was succinct and clear and prioritized consistency,

³ See USCIS Customer Service Guide, page 17, available at https://www.uscis.gov/sites/default/files/document/foia/Employment_Authorization.pdf

⁴ Instructions for Application for Employment Authorization, pages 26-7.

⁵ 10 USCIS-PM A.4.

⁶ Volume 1 of the Policy Manual contains a chart of applications subject to discretionary analysis. The chart includes employment authorization, I-765, annotated as "with some exceptions," but without further explanation. 1 USCIS-PM E.8(A). That section goes on to name a non-exhaustive list of 22 factors that adjudicators should apply in all discretionary adjudications, including employment authorization. We are grateful that the chapter on discretion within Volume 10 on employment authorization has been removed; however, the fact that the discretionary analysis in Volume 1 remains, and that employment authorization is a discretionary determination, means that these factors can still be seen to apply. In fact, in Volume 10 on employment authorization, footnote 8 specifically states that the categories of employment authorizations under 8 CFR 274a.12(c) (which lists 36 categories of employment authorization) are discretionary. 10 USCIS-PM A.4.

fairness, following pertinent case law, and consulting with supervisors and peers in difficult cases in adjudications. This guidance should be re-instated immediately to prevent further harm to employment authorization applicants.⁷

Furthermore, employment authorization is and should be viewed by USCIS as an administrative benefit, not a merits-based application for immigration relief requiring an extensive discretionary analysis. Employment authorization is not an immigration status, and it cannot be granted without an approved or pending application for another immigration benefit for which a favorable exercise of discretion is required. Requiring full discretionary analysis of an I-765 in addition to a discretionary analysis of a merits-based application is redundant and wastes agency resources.

By relying on factors promulgated by the previous administration to make a discretionary determination, USCIS has turned I-765 into another opportunity for extreme vetting and enforcement. By requiring such information under the guise of discretion and in direct contradiction to a federal court ruling,⁸ USCIS is engaging in a fishing expedition for inconsistent or negative information in an applicant's background, which could result in a denial of benefits, or even a referral to Immigration and Customs Enforcement to initiate removal proceedings. The pall of the previous administration's anti-immigrant sentiment still lingers with the public and USCIS cannot hope to rebuild trust⁹ with immigrant communities when vestiges such as these persist.

We urge USCIS to reconsider this practice and revise the I-765 to reflect the administrative nature of employment authorization.

V. Conclusion

We urge USCIS to consider these suggestions to revise and simplify Form I-765. Returning the form to a simpler version will benefit all applicants and practitioners but will also benefit USCIS by streamlining the process for adjudication and will aid in addressing the current and future backlogs. We also ask USCIS to use this opportunity to further clarify Form I-765 Instructions and USCIS Policy Manual regarding discretionary determinations to increase access to lawful employment authorization for all immigrants who are eligible.

Please reach out to Elizabeth Taufa, etaufa@ilrc.org, if there are any questions.

Sincerely,



Elizabeth Taufa
Policy Attorney and Strategist

⁷ ILRC submitted suggested USCIS Policy Manual language to address this issue on September 2, 2022, https://www.ilrc.org/sites/default/files/resources/ilrc_uscis_pm_suggestions.pdf, and April 13, 2022: https://www.ilrc.org/sites/default/files/resources/ilrc_uscis_pm_priorities.pdf.

⁸ *Asylumworks v. Mayorkas*, Civil Action 20-cv-3815 (BAH) (D.D.C. Feb. 7, 2022)

⁹ Executive Order 14012, Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/>