



QUICK GUIDE: EAD ELIGIBILITY FOR ASYLUM APPLICANTS

By Aruna Sury

I. Introduction

In the summer of 2020, the Department of Homeland Security (DHS) published two regulatory rules relating to eligibility for employment authorization documents (EADs) for individuals with pending asylum applications (under the (c)(8)¹ or “asylum-pending” category). Both rules went into effect in August 2020. This advisory provides a summary of the rules and the preliminary injunction currently in effect for certain organizational members with respect to some of the provisions. The end of this advisory contains a helpful chart for quick reference, outlining current eligibility requirements for employment authorization based on a pending asylum application and which provisions are temporarily enjoined from application to certain organizational members by the case *Casa de Maryland v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020).²

II. The Two Rules

A. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” Published June 19, 2020³

Effective date: August 21, 2020 - Rule only applies to initial applications for work authorization received by USCIS on or after August 21, 2020.

Current Status of Rule: Processing time provision enjoined by preliminary injunction in *Casa de Maryland v. Wolf*, for members of Casa de Maryland (CASA) and Asylum Seeker Advocacy Project (ASAP). The rule applies fully to individuals who are not members of one of these organizations.

- *Unlimited Processing Time:* United States Citizenship and Immigration Services (USCIS) is no longer required to process an initial employment authorization application within thirty

days of the filing of Form I-765, Application for Employment Authorization. There is now no time limit on how long USCIS can take to adjudicate an I-765. Asylum seekers who filed their initial work authorization applications on or after August 21, 2020 will no longer be guaranteed that USCIS will process their application within a specific timeframe.⁴

B. “Asylum Application, Interview, and Employment Authorization for Applicants,” Published June 26, 2020⁵

Effective Date: August 25, 2020 - Rule only applies to work permit applications postmarked or electronically filed on or after August 25, 2020. Some provisions apply to EAD applications filed as of the effective date.

Current Status of Rule: Preliminary injunction in effect for CASA and ASAP members but only with respect to certain key provisions, as outlined immediately below.

1. Provisions Preliminarily Enjoined for CASA and ASAP Members

- *Deemed-complete rule:* Requires EAD applicants to wait an unspecified time to receive agency notice that the underlying asylum application is complete.⁶
- *365-day waiting period after filing asylum application:* From the date their asylum applications are received by USCIS or the Immigration Court, applicants must wait 365 days, instead of the 180-day waiting period previously required, before they can be granted work authorization.⁷
- *Discretionary review:* Allows USCIS to deny EAD applications as a matter of discretion.⁸
- *Effect of late-filed asylum application:* An EAD will be denied to anyone, except unaccompanied minors, who has not filed for asylum within one year of entering the United States, unless and until an asylum officer or immigration judge finds applicable one of the statutory exceptions to the one-year filing bar (applies only to asylum applications filed more than one year after entry, if filed after August 25, 2020).⁹
- *Biometrics Requirement:* Requires applicants to submit biometric information—including fingerprints, photographs, and signatures—at a scheduled biometric services appointment. This is separate from the biometrics requirement that applicants must comply with as part of their asylum application. Applicants will also be required to pay a fee of \$85 for this service (in addition to a new \$85 fee for the asylum application).¹⁰

2. Provisions Not Currently Enjoined

- *Illegal entry or attempted entry*: Bars asylum seekers who entered, or attempted to enter, the United States unlawfully from obtaining a (c)(8) category EAD, unless they: (1) presented themselves to DHS within forty-eight hours of entry or attempted entry; (2) indicated to a DHS officer their intent to apply for asylum or expressed a fear of persecution or torture; and (3) had good cause for the illegal entry or attempted entry (not for convenience, evasion, or circumvention of the asylum process).¹¹
- *Recommended approvals*: Stops USCIS from issuing ‘recommended approvals’ for asylum, and therefore EADs previously issued based on recommended approvals.¹²
- *Applicant-caused delays*: Any applicant with unresolved, applicant-caused delays in the underlying asylum application will be denied an EAD. This provision replaces the “asylum clock,” in that there is no longer a “clock” that will start and stop upon applicant-caused delays. Instead, the applicant must prove that any delay is no longer “unresolved.” Applicant-caused delays include the applicant requesting to amend or supplement the pending asylum application; failing to appear to receive and acknowledge receipt of the asylum decision; requesting an extension of time to submit additional evidence; submitting additional documentary evidence fewer than fourteen days before the asylum interview or at the interview; failing to provide a competent interpreter for the interview; requesting a change in location for processing an asylum application, even if based on the applicant’s new address; failing to comply with any other request to determine asylum eligibility; or requesting re-scheduling of the asylum interview. It also allows the agency to deem either a failure to appear for an asylum interview or a biometric services appointment, an applicant-caused delay that would form a basis for denying an EAD application.¹³
- *Aggravated felony convictions, particularly serious crimes, serious nonpolitical crimes, and other crimes*: Excludes asylum seekers convicted of an aggravated felony and those who “have committed certain lesser criminal offenses on or after the effective date” of August 25, 2020 from receiving employment authorization. These lesser criminal offenses include being convicted of a felony in the United States, a particularly serious crime, or a serious non-political crime outside the United States, or being convicted, in the United States, of certain public safety offenses involving domestic violence or assault; child abuse or neglect; possession or distribution of controlled substances; or driving under the influence (DUI).¹⁴ Any applicant who fails to establish that they are not subject to a mandatory criminal bar to asylum, will be denied an EAD.¹⁵
- *Extension and automatic termination of EAD*: If an asylum application is denied, any employment authorization associated with a pending asylum application will be terminated

as well. If, however, it is referred to an immigration judge the EAD will be extended until the judge makes a decision. If that decision is successfully appealed, the EAD will be extended again. An EAD cannot be granted while the case is before a federal court, however, or after the Board of Immigration Appeals (BIA) denies the asylum claim.¹⁶

- *Two-year increments*: Allows USCIS to set EAD validity periods at its discretion and clarifies that any EAD validity period cannot exceed increments of two years.¹⁷

III. Summary of Preliminary Injunction in *Casa de Maryland v. Wolf*

On September 11, 2020, the District Court for the District of Maryland, issued a preliminary injunction in the case *Casa de Maryland v. Wolf*. The preliminary injunction prevents the government from enforcing certain parts of the August 21, 2020 and August 25, 2020 EAD regulations on members of two of the organizational plaintiffs, CASA and ASAP.

The court found that the plaintiffs were likely to succeed on the merits of their claim that Chad Wolf, the former Acting Secretary of DHS, was not properly appointed to that position when he promulgated the regulations. The court also found that the plaintiffs were likely to prevail on their arguments that DHS should have been able to predict a timeframe for adjudication of initial EADs, and to address important comments regarding the interaction between the rules and a series of procedural and financial barriers under the new rules that would render nearly impossible pre-asylum work authorization. The court was especially concerned that denial of EADs to many “bona fide asylees will inevitably affect their ability to afford the costs of seeking asylum, including hiring legal counsel.”

The court further concluded that the plaintiffs would suffer irreparable harm absent an injunction and that the equities tipped in favor of the plaintiffs. As such, the court preliminarily enjoined six main provisions among the two rules. As of this writing, the preliminary injunction remains in effect for CASA and ASAP members. To benefit from the injunction, EAD applicants must submit proof of their CASA or ASAP membership along with their application.

A. Becoming a CASA or ASAP Member

1. CASA

Casa de Maryland is a Maryland-based organization that is currently accepting members nationally. Membership costs approximately \$40 per year. New members are able to benefit from the EAD regulations enjoined by the Maryland District Court.¹⁸ It is currently taking a few

weeks to become a member of CASA. Minors who are under 17 years old cannot independently become members of CASA. Instead, they must submit proof of a parent's CASA membership. Anyone who is under 21 years old can choose to use their parent's CASA membership to qualify for an EAD.

2. ASAP

The Asylum Seeker Advocacy Project is a national organization and it is free to join.¹⁹ New members are able to benefit from the EAD regulations enjoined by the Maryland District Court and currently, membership is taking approximately 3-4 weeks to obtain. Minors who are 14 years old and above can independently qualify for ASAP membership or use their parent's membership to qualify for an EAD. Minors who are under 14 years old can only qualify for an EAD based on a parent's ASAP membership. Anyone who is under 21 years old can choose to use their parent's ASAP membership to qualify for an EAD.

Quick Reference Chart

Rule	Effective Date	Enjoined by Preliminary Injunction for CASA and ASAP Members?
No limit on processing time for initial EAD applications	August 21, 2020. EAD applications filed before this date must have been processed within 30 days	Yes, for members of these organizations, initial EAD applications must be processed within 30 days
Must wait 365 days from the time of filing asylum application before applying for initial EAD	Applies only in cases where complete <i>asylum</i> application was filed on or after August 25, 2020	Yes
Must wait to receive USCIS notice that the underlying asylum application is complete, before 365-day wait period for filing EAD application starts	Applies only in cases where complete <i>asylum</i> application was filed on or after August 25, 2020	Yes
Stops USCIS from issuing “recommended approvals” for asylum, and therefore bars EADs based on recommended approvals	Applies only to EAD applications postmarked on or after August 25, 2020	No
Requires denial of EAD to any applicant with unresolved, “applicant-caused delays” in underlying asylum application	Applies only to EAD applications postmarked on or after August 25, 2020	No

Rule	Effective Date	Enjoined by Preliminary Injunction for CASA and ASAP Members?
Requires denial of EAD to anyone, except unaccompanied minors, who has not filed for asylum within one year of entering the United States, unless adjudicator finds a statutory exception to the one-year filing deadline	August 25, 2020 - applies only to <i>asylum</i> applications filed more than one year after entry, if filed on or after this date	Yes
\$85 Biometrics fee and compliance with biometrics requirements	Applies only to EAD applications postmarked on or after August 25, 2020	Yes
Excludes asylum seekers convicted of an aggravated felony and those who “have committed certain lesser criminal offenses” from receiving EAD	Aggravated felony bar applies to EAD applications filed on or after August 25, 2020. Other criminal bars apply only to convictions (or commission of offense) that occurred on or after August 25, 2020	No
Excludes asylum seekers who entered or attempted to enter the U.S. without documentation from EAD eligibility, with some exceptions	Applies only to entries and attempted entries occurring on or after August 25, 2020	No
If an asylum application is denied, any employment authorization associated with a pending asylum application will be terminated as well, once administrative process with USCIS, IJ, and BIA is complete.	Applies only to EAD applications filed on or after August 25, 2020	No

Rule	Effective Date	Enjoined by Preliminary Injunction for CASA and ASAP Members?
Allows USCIS to deny EAD application on discretionary grounds	Applies to EAD applications filed on or after August 25, 2020	Yes
Allows USCIS to set EAD validity periods at its discretion (up to two years)	Applies to EAD applications filed on or after August 25, 2020	No

End Notes

¹ EAD applications filed based on pending asylum applications are filed under the (c)(8) category, which references 8 CFR § 274a.12(c)(8).

² The case is newly named *Casa de Maryland v. Mayorkas* to reflect Alejandro Mayorkas' confirmation as the current Attorney General.

³ DHS proposed the 30-Day EAD Processing Rule on September 9, 2019. See 84 Fed. Reg. 47,148. Although it allowed only a 60-day comment period, DHS received approximately 3,200 comments. See 85 Fed. Reg. at 37,510. The agency published the final rule, without any changes, on June 22, 2020. See *id.* at 37,502.

⁴ 8 CFR § 208.7(a)(1) required USCIS to adjudicate applications for initial employment authorization filed under the (c)(8) category within 30 days, as long as the asylum application was still pending. The final rule has removed this provision. The rule also removed the requirement that renewal EAD applications must be filed 90 days before the previous EAD expires, since in practice, when EAD renewal applications are granted, the validity period is dated back to the expiration of the prior EAD. See 8 CFR § 208.7(d) (repealed).

⁵ DHS proposed the second rule on November 14, 2019, with 17 additional rule changes related to work authorization for asylum applicants. See 84 Fed. Reg. 62,374. Again, DHS allowed only a 60-day comment period, during which it received 1,074 comments. See 85 Fed. Reg. 38,532, 38,553. The agency issued the final rule on June 26, 2020, which was largely identical to the proposed rule, except to clarify that it would apply only to those EAD applications postmarked on or after the effective date of August 25, 2020. See *id.* at 38,536, 38,537.

⁶ 8 CFR §§ 208.3(c)(3); 274a.12(c)(8).

⁷ 8 CFR §§ 208.3(c)(3); 208.7(a)(1)(ii), (a)(1)(iii)(E), (b)(1)(i); 274a.12(c)(8).

⁸ 8 CFR §§ 274a.12(c)(8); 274a.13(a)(1).

⁹ 8 CFR § 208.7(a)(1)(iii)(F).

¹⁰ 8 CFR §§ 208.7(a)(1)(i), (a)(1)(iv)(E); 208.10.

¹¹ 8 CFR §§ 208.7(a)(1)(iii)(G); 274a.12(c)(8).

¹² 8 CFR § 274a.12(c)(8).

¹³ 8 CFR §§ 208.7(a)(1)(iv); 208.9(d)(2), (e); 208.10(a)(2).

¹⁴ 8 CFR § 208.7(a)(1)(iii)(A) – (C).

¹⁵ 8 CFR § 208.7(a)(1)(iii)(D).

¹⁶ 8 CFR §§ 208.7(a)(1)(i), (iii)(E); 208.7(b).

¹⁷ 8 CFR §§ 208.7(b)(1); 274a.12(c)(8).

¹⁸ Instructions on becoming a national member can be found at: <https://wearecasa.org/national-membership/>. Individuals within the state of Maryland can follow separate instructions for in-state membership on the organization’s website, which may have a slightly lower membership rate and more direct services available.

¹⁹ Instructions on becoming a member of ASAP can be found at: <https://asylumadvocacy.org/members/>.



San Francisco

1458 Howard Street
 San Francisco, CA 94103
 t: 415.255.9499
 f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1015 15th Street, NW
 Suite 600
 Washington, DC 20005
 t: 202.777.8999
 f: 202.293.2849

Austin

6633 East Hwy 290
 Suite 102
 Austin, TX 78723
 t: 512.879.1616

San Antonio

500 6th Street
 Suite 204
 San Antonio, TX 78215
 t: 210.760.7368

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