

## **Frequently Asked Questions: Employment Authorization for Asylum Applicants**

*The information in this FAQ is subject to change. Much of this FAQ relates to new regulations that became effective on August 25, 2020 or will become effective on October 2, 2020. As NIJC gains additional insight and clarity regarding how USCIS will implement and utilize the new regulations, NIJC will update this FAQ.*

*Attorneys should consult [www.uscis.gov](http://www.uscis.gov) for the current filing instructions, location, and fee prior to preparing any immigration applications.*

*\*\*On September 11, 2020, a district court judge issued a [preliminary injunction](#) in *CASA v. Wolf*, preventing the government from enforcing certain parts of the August 21, 2020 and August 25, 2020 employment authorization regulations on members of two of the organizational plaintiffs, the Asylum Seeker Advocacy Project (ASAP) and Casa de Maryland. Attorneys representing clients subject to the new regulations may want to consider having their clients become members of ASAP in order to try to benefit from the injunction. However, it is important clients understand what this membership means and that USCIS may still reject employment authorization applications filed by ASAP members who didn't gain membership until after the district court decision. Please contact your NIJC point-of-contact if you think your NIJC asylum client may benefit from obtaining ASAP membership.* \*\*

### **Employment Authorization Eligibility**

- 1. My asylum client wants to know when she will be able to apply for employment authorization. I heard it depends on an “asylum clock” – is this true?**

Prior to August 25, 2020, an asylum seeker was eligible to apply for employment authorization when the “asylum clock” (an electronic tracking system) showed that her asylum application had been pending for 150 days, minus any delays attributed to the applicant. This changed on August 25, 2020, pursuant to new regulations. *Please note that this change has been impacted by the district court's injunction for ASAP and CASA members.*

Now, there is no longer an “asylum clock.” Asylum seekers are eligible to apply for employment authorization once their asylum applications have been pending for 365 days. 8 C.F.R. § 208.7(a)(1)(ii). There are two exceptions to this rule: one involves a category of asylum seekers who are now prohibited from employment authorization and one involves a category of asylum seekers whose applications will be denied based on USCIS's determination that they caused a delay in the adjudication of their asylum case that is outstanding or has not been remedied. 8 C.F.R. § 208.7(a)(1)(iii)-(iv).

## 2. How can I find out how long my client's asylum application has been pending?

It depends on where your client is in the asylum process.

- If your client's case is pending before the asylum office, you will need to count the number of days that have passed since the date the I-589 was received by USCIS, as noted on the I589 receipt notice.
- If your client is in removal proceedings, you will need to count the number of days from the "lodged" or "filed" date stamped onto the I-589.

## 3. Who is included in the category of asylum seekers who are prohibited from employment authorization?

8 C.F.R. § 208.7(a)(1)(iii) prohibits many different asylum seekers from EADs:

Crime and security-based prohibitions:	Bars from EAD eligibility asylum seekers who: <ul style="list-style-type: none"><li>• Have been convicted at any time of an aggravated felony;</li><li>• On or after August 25, 2020, were convicted of a particularly serious crime; or</li><li>• For whom there are serious reasons for believing that, on or after August 25, 2020, they committed a serious non-political crime outside the United States</li></ul>
Asylum bar-based prohibitions	Bars from EAD eligibility asylum seekers who have failed to establish they are not subject to a mandatory asylum bar under 8 C.F.R. § 208.13(c). This regulatory provision includes: <ul style="list-style-type: none"><li>• The crime and security-based bars listed above</li><li>• The terrorism and persecutor bars</li><li>• The one-year deadline bar</li><li>• The firm resettlement bar</li><li>• The safe third country bar</li></ul>
Denial-before-EAD-eligible prohibition	Bars from EAD eligibility asylum seekers who have received a denial* from an asylum officer or an immigration judge before the asylum application has been pending for 365 days or before USCIS has adjudicated the asylum seeker's initial EAD application.  *An asylum officer denial is different from a referral to the immigration court. The asylum office "denies" applications when it declines to grant asylum and the applicant is in lawful status. <i>(Please note that this change has been impacted by the district court's injunction for ASAP and CASA members.)</i>
One-year deadline prohibition	Bars from EAD eligibility asylum seekers who filed for asylum on or after August 25, 2020, when the asylum applications were filed past the one-year deadline for asylum, unless the asylum office or immigration judge determines the asylum seekers meets an exception to the deadline.*

	<p>*This prohibition does not apply to applicants who met the definition of an unaccompanied immigrant child on the date they filed their asylum application.  <i>(Please note that this change has been impacted by the district court's injunction for ASAP and CASA members.)</i></p>
Entered without inspection (EWI) prohibition	<p>Bars from EAD eligibility asylum seekers who entered the United States without inspection (EWI) on or after August 25, 2020.*</p> <p>*Asylum seekers are exempt from this prohibition if they (1) presented themselves to DHS officers no later than 48 hours after their entry or attempted entry; (2) indicated an intention to apply for asylum or expressed a fear of persecution or torture; and (3) have "good cause" for the entry without inspection, not including the evasion of immigration officers, convenience, or to circumvent asylum processing at a port-of-entry.</p>

#### 4. How do I know if my client has caused a delay in the adjudication of her asylum application that remains outstanding?

It will be difficult to know whether USCIS considers an asylum seeker to have caused an unresolved delay in the adjudication of their asylum application. The new regulations provide a non-exhaustive list of delays, most of which relate to situations at the asylum office, but the regulations do not clarify when USCIS will consider one of these delays to be resolved. The listed delays listed in the regulations include:

- A request to amend or supplement an asylum application that causes a delay, or a request to provide additional evidence for an interview, or for an extension to submit additional evidence less than 14 days prior to an asylum interview
- A failure to appear at an asylum interview, to appear to receive an asylum office decision, or to appear for a biometrics appointment
- A request to reschedule an asylum interview or a transfer to a new asylum office based on an address change
- A failure to provide a competent interpreter at an asylum office interview; and
- A "[f]ailure to comply with any other request needed to determine asylum eligibility."

8 C.F.R. § 208.7(a)(1)(iv)

#### Responding to the One-Year Deadline and EWI Prohibitions

#### 5. My client didn't file for asylum until after her one-year deadline, but she filed her asylum application before August 25, 2020. Is she prohibited from applying for an EAD?

No. The one-year deadline prohibition only applies to asylum seekers who filed for asylum past their one-year deadline and filed the application on or after August 25, 2020. 8 C.F.R. § 208.7(a)(1)(iii)(F).

**6. My client filed for asylum on September 1, 2020 and was past her one-year deadline. I understand she may be prohibited from asylum, but I think she may be eligible for an exception to the deadline. What do I need to do to convince the asylum office or immigration judge to find that she meets an exception so that she can apply for an EAD?**

Generally, NIJC believes that could be very harmful to the broader asylum claim if an attorney attempts to obtain a finding from an asylum officer or immigration judge that a client meets an exception to the one-year deadline outside the context of an asylum interview or merits hearing where the officer or judge would have the benefit of all of the client's evidence. NIJC strongly encourages pro bono attorneys with clients in this situation to consult with their NIJC point-of-contact before attempting to obtain an asylum officer or immigration judge finding regarding the one-year deadline.

*(Please note that this change has been impacted by the district court's injunction for ASAP and CASA members.)*

**7. My client entered the United States without inspection after August 25, 2020, but I think she may be able to establish that she qualifies for the exception to the EAD prohibition. What kind of evidence should I submit with her EAD application to demonstrate that she meets the exception?**

In the coming months, NIJC will have a better understanding of the type of evidence USCIS finds persuasive to establish an exception to the EWI prohibition to EAD eligibility. In the meantime, NIJC expects that generally, asylum seekers will need to establish their eligibility through affidavits and immigration documents related to the asylum seekers' apprehension by immigration at the border.

Attorneys will likely need to file a Freedom of Information Act (FOIA) request to obtain immigration documents from the border and should plan to file a USCIS FOIA as soon as possible after representation begins. More information about the FOIA process can be found in [NIJC's asylum manual](#).

Pro bono attorneys should be aware that any affidavits submitted as part of the EAD application will become part of the asylum seeker's immigration file. Any inconsistencies between the EAD affidavit and other affidavits submitted as part of the asylum filing can be used to make an adverse credibility determination in the asylum seeker's case.

NIJC therefore recommends that attorneys narrowly tailor their EAD affidavits, avoid including unnecessary details and specifics that the client may not remember at the time of the merits hearing, and limit any discussion of the underlying asylum claim. NIJC is

available to review EAD affidavits and encourages pro bono attorneys to forward the affidavits to their NIJC point-of-contact before filing.

### **Responding to Potential Delays Caused by the Asylum Seeker**

**8. I am representing an asylum seeker at the asylum office. I filed a skeletal application and am waiting to receive an interview notice. I don't want USCIS to find that my client caused a delay because I submitted the supporting evidence too late. When should I submit the supporting evidence to the asylum office to avoid this issue?**

This is a complicated situation without a simple answer. Historically, the Chicago Asylum Office has advised that attorneys only submit a skeletal asylum application to USCIS and then supplement that filing with all supporting documents one week prior to the interview. In addition, the asylum office generally does not provide more than about two to three weeks' notice of the asylum interview. Finally, nowadays, many asylum interviews are not scheduled for months to years after the application was initially filed, which makes it difficult to know when to file supporting documentation that will remain current and relevant by the time the interview occurs.

For these reasons, NIJC currently does not recommend that attorneys dramatically change the timeline of their supporting documentation filing based on the new EAD rule, although NIJC may change this guidance if interview timelines speed up. For now, NIJC recommends that attorneys file their supporting documents as soon as possible after they receive an interview notice. However, NIJC strongly recommends that attorneys not include any language in their filing that could be read as requesting permission to amend or supplement a filing or for an extension to submit more evidence.

NIJC will continue to update this guidance as we gain more insight into how USCIS is responding to this issue in their adjudications of EAD applications.

### **EAD Eligibility for Asylum Seekers in Immigration Court**

**9. My client is in immigration court proceedings. Is there anything we could do at this point that USCIS would consider a delay that would result in the denial of my client's EAD application?**

It is difficult to know for sure what immigration court actions could be considered an unresolved delay that would result in the denial of an EAD application. The non-exhaustive list in the regulations does not specifically reference immigration court activity. However, until NIJC has an opportunity to observe USCIS's treatment of EAD applications filed by asylum seekers in immigration court proceedings, NIJC advises attorneys to be careful about taking the following actions, which could be considered an asylum seeker-caused delay:

- Filing a motion to change venue

- Declining an expedited hearing date
- Filing a motion to continue
- Requesting more time for attorney preparations

**10. The judge denied my client's applications for asylum. I am appealing the immigration judge's decision to the BIA. Is my client still eligible for employment authorization?**

If your client's asylum application was pending for at least than 365 at the time the judge denied asylum, your client will remain eligible for an EAD during the pendency of the appeal, as long as she isn't otherwise prohibited from an EAD and hasn't caused an unresolved delay in the adjudication of the case. *(Please note that this change has been impacted by the district court's injunction for ASAP and CASA members.)*

**Filing and Fees**

**11. My client's asylum application has been pending for more than 365 days and I don't believe she is prohibited from an EAD or subject to the delay provision. How do I apply for an EAD for her?**

To obtain employment authorization, you must file Form I-765, Application for Employment Authorization, and supporting documents with USCIS. This form is available on the USCIS website, [www.uscis.gov](http://www.uscis.gov). For more information on filing Form I-765, please see [NIJC's asylum manual](#).

Please note that pro bono attorneys should file the employment authorization application on behalf of their clients and include a new G-28 appearance form with each filing; represented individuals should not file this form on their own.

**12. How do I renew my client's EAD?**

You can renew your client's EAD so long as your client's asylum application remains pending before the asylum office, the immigration court, or the BIA. The renewal should not be filed more than 180 days before the previously issued EAD expires, but you should plan to file right at the 180-day point to avoid any gaps in employment authorization. To renew the EAD, you must file form I-765, the filing fee, and supporting documents, with USCIS.

At present, so long as the EAD renewal is filed before the expiration of the prior EAD, the client will receive a notice from USCIS, automatically extending the EAD for up to 180 days while the renewal is pending.

For more information, please see [NIJC's asylum manual](#) and [www.uscis.gov](http://www.uscis.gov).

### 13. How much does it cost to apply for employment authorization?

*On September 29, 2020, a district court [enjoined the implementation and the effective date](#) of the final rule changing the USCIS fee structure, including fee increases and the elimination of fee waivers for various applications. Since it is impossible to know how long the injunction will remain in effect, NIJC strongly encourages attorneys with eligible clients to file their applications for employment authorization as soon as they are able, to avoid being subject to the increased fees. Please contact your NIJC point-of-contact with any questions.*

The fees depend on whether or not the EAD application is filed before October 2, 2020, when a new fee structure goes into effect. Please note that the fee structure for EAD applications filed on or after August 25, 2020 is different than it was for applications filed before August 25, 2020.

Type of Application and Date of Filing	Fee	Fee Waiver Eligibility
Initial applicants filing between 8/25/20 and 10/1/2020	\$85 (biometrics fee)	Yes
Renewal applicants filing between 8/25/20 and 10/1/20	\$495 (\$410 fee + \$85 biometrics fee)	Yes
Initial applicants filing on or after 10/2/2020	\$580 (\$550 + \$30 biometrics fee)	No
Renewal applicants filing on or after 10/2/2020	\$580 (\$550 + \$30 biometrics fee)	No

### 14. If my client cannot pay the EAD fee, can I request a fee waiver?

Presently, asylum-based EAD applicants are eligible to apply for a fee waiver, but this change on October 2, 2020. On that date, these applicants will no longer be eligible to apply for a waiver. *Please note that this change has been impacted by the district court's injunction.*

To request a waiver of the filing fee for your client's I-765 application, use form I-912. You may also want to include an affidavit from your client with additional details regarding her inability to pay the filing fee.

### 15. I just filed the employment authorization application for my client. How long will it take my client to receive her EAD?

It generally takes a little over 90 days from the filing date for an applicant to receive her EAD.

### 16. My client already obtained employment authorization based on her asylum application. For how long is her EAD valid?



At present, an asylum application-based EAD is valid for two years.

**More information on EADs**

**17. Where can I find the law and regulations on obtaining an EAD?**

The laws and regulations regarding employment authorization for asylum applicants can be found in INA § 208(d)(2) and 8 C.F.R. §§ 208.7 and 274a.12(c)(8).

**If you have any additional questions, please contact Anna Sears at 312-660-1307 or [ansears@heartlandalliance.org](mailto:ansears@heartlandalliance.org).**

**For more information, read NIJC's Asylum Procedural Manual, available at [immigrantjustice.org/attorney-resources](https://immigrantjustice.org/attorney-resources).**