



# The New Asylum EAD Rules: Practice Tips & Litigation Update

September 17, 2020




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## Panelists

- Mariko Hirose, Litigation Director, International Refugee Assistance Project
- Sarah Brenes, Refugee & Immigrant Program Director, The Advocates for Human Rights
- Sayoni Maitra, Staff Attorney, Center for Gender & Refugee Studies
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## Summary of Rule Changes

Rule/Change	Operative Date	Exceptions
30-day processing	Eliminated for <i>initial</i> I-765s filed after 8/21/20	Rule never applied to renewals, but can file more than 90 days before current EAD expires)
365-day waiting period for EAD eligibility	<i>Initial</i> I-765s filed on or after 8/25/20	Rule does not apply to renewal applications.
Denial of EADs based on applicant-caused delays	<i>Initial</i> I-765s filed on or after 8/25/20 with unresolved delays.	Rule does not apply to renewal applications.
1-year deadline bar	Ineligible for EAD if I-589 was filed after the 1-year-deadline and asylum claim was filed on or after 8/25/20	<ul style="list-style-type: none"> <li>• UACs</li> <li>• Determination from Asylum Officer or Immigration Judge that an exception applies.</li> <li>• Applications lodged with the immigration court before 8/25/20 (maybe)</li> </ul>




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## Summary of Rule Changes

Rule/Change	Operative Date	Exceptions
Illegal Entry Bar	Entry or attempted entry other than port of entry on or after 8/25/20.	Present to DHS official within 48 hours, claim a fear of persecution or torture, and establish "good cause" for entering between ports of entry.
Criminal Bars	<ul style="list-style-type: none"> <li>Convicted of aggravated felony at any time</li> </ul> On/After 8/25/20: <ul style="list-style-type: none"> <li>Convicted of particular serious crime;</li> <li>Committed serious non-political crime outside the U.S.</li> </ul>	N/A
EAD Termination	AO and IJ decisions on/after 8/25/20. Automatic termination if asylum is denied by AO, denied by IJ and no BIA appeal is filed, or upon BIA denial.	UACs "denied" by AO but referred back to the IJ.

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## Gray Area: Applicant-Caused Delays

Type of Delay	Points of Uncertainty
A request to amend or supplement a pending asylum application that causes a delay in adjudication or proceedings;	How would an applicant know whether the amendment or supplement caused a delay? At what point would the delay be considered resolved?
Failure to appear in person to receive and acknowledge an asylum office decision (if required);	How frequently does this occur? When is the delay resolved? When applicant makes contact and acknowledges they missed the appointment? What if the decision is a grant?
A request for an extension to submit additional evidence supporting an asylum application fewer than 14 days prior to the asylum office interview;	What if the evidence is submitted without a request? Does this apply to any amount/type of evidence? What if little more than 14 days notice is provided before the interview? What if several years have passed between the filing and interview? When would the delay be "resolved"?
Failure to appear for a scheduled biometrics services appointment (unless excused under 8 C.F.R. § 103.2(b)(13)(ii)), or an asylum office interview (unless excused due to exceptional circumstances);	Resolved when excused? How will asylum office communicate to USCIS on these issues?




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## Gray Area: Applicant-Caused Delays

Type of Delay	Points of Uncertainty
A request to reschedule an asylum office interview;	Does the same apply to a motion to continue before EOIR? What if the Asylum Office double books the attorney?
A request to transfer case to another asylum office;	Does the same apply to a motion to change venue before EOIR?
A request to provide additional evidence after interview;	What if the Asylum Office request specific additional information? When is the delay resolved? When the evidence is submitted?
Failure to provide a competent interpreter at an interview;	At what point would this be "resolved"? After another interview is scheduled? When the applicant asserts they have identified a competent interpreter?
Failure to comply with any other request needed to determine asylum eligibility.	Whether any of the above restrictions apply to claims before EOIR?




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## Gray Area: 1-year-deadline

- Determination from Asylum Officer or Immigration Judge that an exception applies.

Unclear: Can an applicant obtain a narrow determination on the 1-year deadline issue prior to full adjudication of the asylum claim?

*Mendez-Rojas*: Argue inconsistent to consider timely on merits, but not on EADs.




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## Gray Area: Illegal Entry Bar

- Present to DHS official within 48 hours, claim a fear of persecution or torture, and establish "good cause" for entering between ports of entry.

Unclear: Can an asylum seeker "present" to a DHS official after being apprehended when crossing the border outside a port-of-entry?




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## Are the rules retroactive?

- 30-day processing timeline in place for initial I-765s filed before 8/21/20
- Changes/restrictions in 6/26/20 rule do not apply to initial or renewal I-765s postmarked before 8/25/20
- Individuals with valid EADs as of 8/25/20 will remain employment authorized until expiration




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## Are the rules retroactive?

- Individuals who file initial I-765s on or after 8/25/20 subject to new 365-day waiting period even if asylum application filed beforehand
- Individuals who file initial or renewal I-765s on or after 8/25/20 will not be barred if:
  - Asylum application with one-year bar issue was filed before 8/25/20
  - Entry without inspection occurred before 8/25/20
  - Conviction of particularly serious crime occurred before 8/25/20 (unless aggravated felony)
  - Alleged commission of serious non-political crime outside US occurred before 8/25/20




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## Elena's Case: Waiting Period

Elena filed her asylum application on March 27, 2020. Her initial EAD application was postmarked on August 24, 2020 (150 days later). Can USCIS approve her EAD application?

If Elena mails her initial EAD application on September 18, 2020 (175 days later) instead, can USCIS approve it?




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## Oscar's Case: Waiting Period

Oscar filed his asylum application on March 30, 2020. His initial EAD application was postmarked on August 24, 2020 (147 days later). Can USCIS approve his EAD application?

If Oscar mails his initial EAD application on September 18, 2020 (172 days later) instead, can USCIS approve it?




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## Aisha's Case: One-Year Filing Bar

Aisha entered the US on January 1, 2019. She filed her asylum application on May 1, 2020. Could she be eligible for an initial EAD in the future?

If Aisha files her asylum application on September 18, 2020 instead, could she be eligible for an initial EAD in the future?



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## Raul's Case: One-Year Filing Bar

Raul entered the US on January 1, 2017 and filed his asylum application on June 1, 2018. He applied for and received an EAD valid from December 1, 2018 to December 1, 2020. Raul's renewal EAD application was postmarked on August 24, 2020. Can USCIS approve his renewal application?

If Raul mails his renewal application on September 18, 2020 instead, could USCIS approve it?



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## Henri's Case: EWI Bar

Henri entered the US without inspection on January 1, 2020 and did not present himself to a DHS agent. He is planning to apply for asylum affirmatively. Would he be eligible for an initial EAD in the future?

If Henri entered the US without inspection under the same circumstances on September 1, 2020 instead, would he be eligible for an initial EAD in the future?



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## Sam's Case: EWI Bar

Sam entered the US without inspection on March 1, 2018 and filed for asylum on May 1, 2018. They applied for and received an EAD valid from November 1, 2018 to November 1, 2020. Sam's renewal application was postmarked on August 24, 2020. Can USCIS approve their renewal application?

If Sam mails their renewal application on September 18, 2020 instead, can USCIS approve it?



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## Maria's Case: Criminal Bars

Maria filed for asylum on July 1, 2018. She later applied for and received an EAD valid from January 1, 2019 to January 1, 2021. In March 2020, she was convicted of an aggravated felony. Can she renew her EAD?

Can Maria renew her EAD if she was convicted of a particularly serious crime, but not an aggravated felony?



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## CASA v. Wolf (D. Md July 21)

- Plaintiffs:
  - CASA de Maryland
  - ASAP
  - Centro Legal de la Raza
  - Oasis Legal Services
  - Pangea Legal Services
- Arguments:
  - Federal Vacancies Reform Act
  - Homeland Security Act
  - APA rulemaking & reasoned decisionmaking



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## Order (Sept. 11, 2020)

- Standing:
  - Limited to CASA and ASAP members
  - Limited to certain rule changes
- Likelihood of success:
  - APA
    - Failure to consider alternatives to 30-day timeline
    - Staggered rulemaking
    - Failure to consider impact on asylum applicants
  - HSA
- Remedy:
  - PI v. 705 relief v. summary judgment




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## Preliminary injunction

Members of CASA and ASAP will no longer be subject to the following provisions of these new rules:

- **The new 365-day waiting period** for asylum applicants to file work authorization applications. Instead, members of ASAP and CASA members will be able to request work authorization 150 days after filing for asylum (as before).
- **The repeal of 30-day processing** of work authorization applications. ASAP and CASA members will have work authorization applications adjudicated within 30 days.
- **The "deemed complete" provision**, which previously meant that if an asylum application was pending with U.S. Citizenship and Immigration Services (USCIS) for more than 30 days without agency action, it would be deemed complete. ASAP and CASA members whose applications have been pending with USCIS for more than 30 days will be deemed complete, ensuring that they can request employment authorization 150 days after submitting their asylum application (as before).




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## Preliminary Injunction

- **The one-year filing rule**, which makes asylum applicants ineligible for work authorization if they filed their asylum application more than a year after arriving in the United States (unless an immigration judge finds they qualify). ASAP and CASA members will be eligible for work authorization regardless of whether they filed for asylum after more than a year of arriving in the United States.
- **A provision stating that work authorization for asylum applicants is discretionary.** ASAP and CASA members who are eligible for work authorization must receive that authorization.
- **A new biometric information requirement** (including fingerprints), which imposes a biometrics requirement and an \$85 fee on asylum applicants applying for work authorization in addition to the biometrics requirement for filing an asylum application. ASAP and CASA members will not be required to submit additional biometric information if they have already done so for their asylum application, nor will they be required to pay \$85 for fulfilling the new biometrics requirement.




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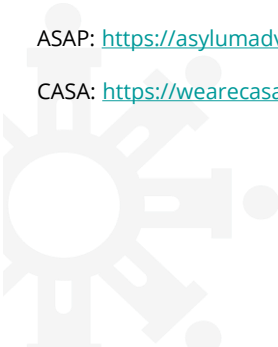
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## Joining ASAP and CASA

ASAP: <https://asylumadvocacy.org/members/>

CASA: <https://wearecasa.org/membership/>



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## Next steps

- Ensuring compliance with injunction
- Moving to summary judgment



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## Strategies



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## Resources

- CGRS "FAQ" request form:  
<https://docs.google.com/forms/d/e/1FAIpQLSdt5qWYuf1q1qPV2wjgHzN66Nm6MX0C1Ah85QoHGW81SytUw/viewform>
- The Advocates for Human Rights summary of the new rules:  
[www.immigrationadvocates.org/nonprofit/alerts/742285.New\\_Regulations\\_for\\_Asylum\\_Work\\_Permits\\_August\\_2020](http://www.immigrationadvocates.org/nonprofit/alerts/742285.New_Regulations_for_Asylum_Work_Permits_August_2020)




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## Questions

# Questions?

(Use the chat box on the right of your screen to ask questions.)




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## Join Us!

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