



Fiscal Year 2020 DHS Asylum Application, Interview, and Employment Authorization for Applicants Final Rule

8/7/2020

Small Entity Compliance Guide

- **Introduction and Purpose**

The U.S. Department of Homeland Security (DHS) has prepared this document as the small entity compliance guide required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. The guide summarizes and explains rules that DHS adopted, but it is not a substitute for any rule. Only the rule can provide complete and definitive information regarding its requirements.

- **Overview**

On June 26, 2020 DHS issued a final rule at [85 FR 38532](#) that modifies DHS's regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application. The effective date of the final rule is August 25, 2020. This guidance restates some of the information in the final rule, particularly the information related to small entities. However, this guidance does not replace the final regulations; instead, it is a reference for small entities seeking information concerning the impact of the regulations on them.

- **Summary of the Final Rule Provisions**

On November 14, 2019, DHS published a notice of proposed rulemaking (“NPRM”) entitled Asylum Application, Interview, and Employment Authorization for Applicants.¹ Following careful consideration of public comments, DHS made some amendments as well as changes to

¹ *Asylum Application, Interview, and Employment Authorization for Applicants*, 84 FR 62374 (proposed Nov. 14, 2019).

the regulatory text proposed in the NPRM. This final rule implements the proposed rule, with the necessary amendments and technical changes applicable to the (c)(8) employment authorization category. The rule's provisions are briefly summarized here—more detailed and technical information involving each provision can be found in the rule itself:

1. Establishes a 365-day wait period to file for an employment authorization document (EAD) for persons with pending asylum claims;
2. Requires biometrics collection (and related service fee) for aliens seeking initial and renewal (c)(8) EADs;
3. Eliminates recommended approvals for affirmative asylum applications, whereby currently, persons with such recommended approvals could obtain an EAD sooner than others;
4. Eliminates the requirement that applications to renew employment authorization must be received by USCIS 90 days prior to the expiration of the applicant's employment authorization;
5. Applies an illegal entry bar, with limited exceptions, to eligibility for employment authorization to aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry on or after the effective date;
6. Requires aliens who fail to file their asylum applications within 1 year of their last arrival into the United States to wait until an asylum officer or an IJ has determined that the alien meets an exception to the one-year deadline before the alien can seek employment authorization;
7. Adds criminal bars to eligibility for a (c)(8) EAD; and
8. Provides that any delay requested or caused by the applicant that is outstanding or has not been remedied at the time the initial (c)(8) EAD application is *filed* will result in the denial of the EAD application.

- **Entities Subject to the Rule**

As DHS explains in the Final Regulatory Flexibility Analysis (FRFA), only a portion of the impacts that could accrue to the rule could be quantified, due to data constraints. However, the population impacted, of about 290,000 individuals annually, is complete because it covers the entire (c)(8) EAD renewal and initial filing population, regardless of whether their asylum case was filed affirmatively with DHS or defensively at Executive Office for Immigration Review (EOIR), and regardless of the outcome of their asylum claim and EAD filing.

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.² The transfers would

² Transfer payments are monetary payments from one group to another that do not affect total resources available to society.

fall on the asylum applicants who would be delayed in entering the U.S. labor force or who would leave the labor force earlier than under current regulations. The transfers would be in the form of lost compensation (wages and benefits). A portion of this lost compensation might be transferred from asylum applicants to others who are currently in the U.S. labor force or eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the effects of this rule would also be borne by companies that would have hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These companies will incur a cost, as they will be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided and by having to pay workers to work overtime hours. DHS does not know what this next best alternative may be for those companies. As a result, DHS does not know the portion of overall effects of this rule that are transfers or costs but estimates the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies can easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will bear little or no costs. Conversely, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then there would be no transfers, and because the jobs would go unfilled there would be a real resource cost impact as well as a loss of taxes.

This rule directly regulates pending asylum applicants, or individuals, applying for employment authorization. However, DHS prepared the FRFA as the rule may indirectly impact small entities who incur opportunity costs by having to choose the next best alternative to immediately filling the job the asylum applicant would have filled. In addition, some employers, potentially including small entities, might face labor turnover costs earlier than they otherwise would under the rule's provision to end some EADs before their validity date expires, such as when an EAD is revoked or terminated. DHS cannot reliably estimate how many small entities may be indirectly impacted as a result of this rule because DHS does not have employment information for asylum applicants who are issued EADs, but DHS believes the number of small entities directly regulated by this rule is zero.

- **Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities that Are Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record**

This rule would not directly impose any reporting, recordkeeping, or other compliance requirements on small entities. Additionally, this rule would not require any additional professional skills.

A submitted public comment claimed that the rule would generate human resource and logistical costs germane to some workers having EADs eliminated, and therefore that DHS could not make the determination that there will be no “direct costs on small entities.” The commenter said the agency should be required to justify all the costs and logistical difficulties created by the rule for employers. DHS considered the commenter’s concerns regarding logistical burdens to employers due to the provision to end some EADs early through termination or revocation. However, this rulemaking is not imposing new obligations or conditions on employers, so DHS disagrees that this rule directly impacts small entities. Additionally, DHS notes that fewer than 30 percent of asylum seekers are found eligible for asylum, so employers who choose to employ asylum seekers already have to account for the eventual termination of most of these workers when the alien’s asylum claim is denied.

- **Resources to Support Compliance Among Small Entities**

DHS is not aware of any alternatives to the rule that accomplish the stated objectives and that would minimize the economic impact of the rule on small entities as this rule imposes no direct costs on small entities. Resources for small entities are available at <https://www.uscis.gov/legal-resources/small-business-regulatory-enforcement-fairness-act-sbrefa>. USCIS can help small entities with questions about the final rule. Please refer to the above website for information on directing questions to the help desk via phone and other inquiries and resources.