January 13, 2020

Ms. Samantha Deshommes  
Chief, Regulatory Coordination Division, Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Ave., NW  
Washington, DC 20529


Dear Chief Deshommes:


The ABA is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. The ABA’s Commission on Immigration provides continuing education to the legal community, judges, and the public and develops and assists in the operation of pro bono legal representation and information programs.

The ABA has long supported the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. Therefore, we have concerns about the Proposed Rule, which places unduly restrictive and inflexible limitations on those individuals seeking asylum, as well as barriers to self-sufficiency for those who exercise their legal right to seek protection.

As an initial matter, the ABA is troubled by the purposes the Department of Homeland Security (“DHS”) has articulated for proposing these regulatory changes. According to DHS, the purposes of the Proposed Rule are to “reduc[e] incentives for [non-citizens] to file frivolous, fraudulent, or otherwise non-meritorious asylum applications” and “disincentiviz[e] illegal entry into the United States.”1 DHS claims to have made an assessment that “many asylum applications appear to be coming from aliens escaping general criminal violence and poor economic situations in their home countries, rather than the five protected grounds for asylum

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1 84 Fed. Reg. at 62383.
or torture[.]" However, DHS has not provided the public with access to any of the evidence it claims supports this statement. The Immigration and Nationality Act ("INA") and its implementing regulations already deter the filing of frivolous asylum applications, and there is no evidence that additional measures are necessary. Nor has DHS presented any evidence that the measures it proposes will address such concerns. In justifying the Proposed Rule, DHS also conflates frivolous or fraudulent asylum applications with applications that ultimately may be determined to be non-meritorious. The language of 8 C.F.R. § 208.20 makes clear that they are not same thing. The American Bar Association respectfully submits it is not proper for DHS to attempt to use its regulatory authority to reduce incentives for non-citizens to exercise their legal right to present bona fide applications for asylum, even if not all such applications are successful.

The ABA also is concerned about several specific provisions of the Proposed Rule, as discussed below.

**Applicants Must Wait for USCIS to Deem an I-589 Form Complete and Properly Filed**

First, the ABA has concerns about DHS’ proposal to remove the language in 8 C.F.R. § 208.3 providing that a Form I-589 Application for Asylum and for Withholding of Removal will be deemed complete and properly filed if U.S. Citizenship and Immigration Services ("USCIS") fails to return the form to the applicant within 30 days. Because the ABA supports policies and practices that ensure broad access to legal protection for asylum seekers and torture victims, we believe that DHS should not adopt unduly restrictive or inflexible standards for accepting an I-589 form as complete and properly filed. The current language in section 208.3 strikes the right balance by creating a presumption of completeness that is appropriate given that asylum is a form of humanitarian relief. Moreover, asylum seekers and torture victims are particularly vulnerable and already face many barriers to presenting successful claims, including lingering effects of trauma, language barriers, and lack of knowledge regarding the complexities of immigration law. The ABA is concerned that requiring USCIS to confirm that an I-589 has been properly filed will result in the rejection of more I-589 forms for relatively minor reasons, as well as additional delays in adjudicating claims for relief.

The ABA also is concerned that the proposed revisions to section 208.3 may cause asylum seekers and torture victims to miss the one-year deadline for filing the Form I-589, as provided in section 208(a)(2)(D) of the INA. Under the new proposed regulations, applicants may submit their I-589 Forms before the one-year deadline, and then receive a notice months later (and after the one-year deadline) saying that their application has been rejected. If an asylum seeker or torture victim is unable to re-submit her application in time to comply with the one-year deadline, or the one-year deadline has already passed, will USCIS determine that the applicant has not complied with the deadline? The ABA has long opposed the one-year filing deadline precisely because it places unduly inflexible limitations on vulnerable asylum seekers, and is not an effective means to control any alleged “abuse” of the asylum system. The

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2 *Id.* at 62388.
3 *Id.* at 62388 n.66.
proposed revisions to section 208.3 create additional risks that asylum seekers and torture victims will not be able to comply with the restrictive, one-year deadline. For this reason, the ABA requests that DHS abandon this aspect of the Proposed Rule.

If USCIS proceeds with this amendment, it should put protections in place to ensure that asylum seekers and torture victims do not miss the one-year deadline as a result. One possibility would be to create a tolling period such that any applicant who receives a notice of rejection will have 90 days from the date on the notice, or the amount of time it took USCIS to review the application for completeness and proper filing, whichever period is longer, to re-submit the application. This would give asylum seekers and torture victims enough time after receiving a notice of rejection to submit a complete, properly filed application that would be considered timely for purposes of the one-year deadline.

**Restrictions on Access to Employment Authorization**

The ABA also has concerns regarding several provisions of the Proposed Rule that limit eligibility for or access to employment authorization for I-589 applicants. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the 1951 Convention Relating to the Status of Refugees. Articles 17-19 of the 1951 Convention address Gainful Employment. Article 17 requires contracting states to “accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment” and Article 18 requires contracting states to “accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in” various forms of self-employment.6

The United Nations High Commissioner for Refugees (UNHCR) has recognized that the ability to engage in “decent work,” for refugees and asylum seekers in particular, “can be crucial to their survival and self-sufficiency”.7 UNHCR interprets a phrase such as “lawfully in” in Article 18 of the Convention to cover both recognized refugees and “asylum seekers admitted into national asylum procedures.”8 And UNHCR has taken the position that, while asylum seekers’ right to self-employment may be delayed “for a limited period of time, for example, to prevent fraud or to ensure the genuineness of an applicant’s asylum claim, it cannot be deprived over the long-term because of government delays in the asylum procedures.”9 UNHCR also observes that asylum seekers who are unable to work lawfully “are likely to be forced to seek employment in unregulated, dangerous, degrading and exploitative conditions.”10

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8 *Id.* at 4.
9 *Id.*
10 *Id.*
Many of the changes in the Proposed Rule with respect to employment authorization eligibility are inconsistent with the principles expressed by UNHCR in terms of access to employment for asylum seekers. They also unduly restrict the ability of asylum seekers and torture victims to be self-sufficient while they wait for their applications to be processed. For these reasons, the ABA encourages DHS to rescind the proposed provisions discussed below.

- **Employment Authorization for I-589 Applicants Would Now Be Discretionary**

  First, the ABA is concerned about DHS’ proposal to add new regulatory language making the decision whether to grant employment authorization to asylum applicants discretionary.\(^{11}\) While section 208(d)(2) of the INA does not entitle an asylum applicant to employment authorization, given the principles discussed above, under section 208(d)(2), the USCIS should exercise its discretion in favor of granting employment authorization to I-589 applicants, except for in very limited circumstances. Any use of such discretion to deny employment authorization to asylum applicants without substantial justification would be of great concern. The ABA encourages DHS to make clear in regulatory language that employment authorization applications from asylum seekers will be granted on a routine basis unless the applicant does not comply with regulatory requirements.

- **Asylum Seekers Would Need to Wait Longer for Initial Employment Authorization**

  The Proposed Rule also would extend the time period an asylum applicant must wait before she is eligible for employment authorization from 180 to 365 calendar days. According to DHS this time period “was based on an average of the current processing times for asylum applications.”\(^{12}\) However, as discussed above, UNHCR has explicitly found that asylum seekers cannot be unduly deprived of employment authorization because of government delays. Moreover, this deprivation will be longer than 365 days from the filing of an I-589 application, because of the proposed revisions to section 208.3 discussed above. The 365-day clock would not start running until an application is accepted by USCIS,\(^{13}\) and the Proposed Rule does not provide for a time frame within which USCIS must review a submitted application to determine whether it is complete and properly filed. Therefore, the Proposed Rule is likely to lead to long-term deprivation of employment authorization for asylum seekers and torture victims due to processing times determined by USCIS.

If, as DHS notes, one of the animating purposes behind the Proposed Rule is to “ease some of the administrative burdens” in accepting and adjudicating applications for asylum and requests for employment authorization from asylum applicants, as well as to “improve the current

\(^{11}\) See 84 Fed. Reg. 62375, 62378; id. at 62424 (proposed 8 C.F.R. § 274a.13(a)(1)).

\(^{12}\) Id. at 62377.

\(^{13}\) Id. at 62421 (proposed 8 C.F.R. § 208.3(c)(3)) (“Receipt of a properly-filed asylum application will commence the 365-day period after which the applicant may file an application for employment authorization in accordance with § 208.7 and 8 CFR 274a.12 and 274a.13.”).
asylum backlog,” the ABA suggests that a more prudent course would be to equip USCIS (as well as immigration courts) with the resources necessary to adjudicate asylum and employment authorization application decisions in a timely manner. Extending the time period for initial employment authorization to 365 days also is not justified “to prevent fraud or to ensure the genuineness of an applicant’s asylum claim.” The INA and its implementing regulations already contain sufficient deterrents to the filing of frivolous and fraudulent claims, and there is no evidence that increasing the waiting time from 180 days to more than 365 days will act as an additional deterrent. And the Proposed Rule conflates concerns about frivolous and fraudulent asylum filings with applications that are not granted. These are not the same things, and it is not proper for DHS to erect barriers to asylum seekers’ self-sufficiency to deter bona fide applications that are ultimately not successful. Therefore, the ABA urges DHS to return to the prior regulatory language providing that asylum applicants are eligible for employment authorization 180 days after submitting an I-589 Form.

- **Asylum Seekers Who Enter Other Than at a Legal Port of Entry Would Be Ineligible for Employment Authorization**

Under the Proposed Rule, an asylum applicant would not be eligible for employment authorization if she entered or attempted to enter the United States other than at a lawful port of entry, with certain limited exceptions. This aspect of the Proposed Rule is meant to discourage unlawful entry; however, section 208(1) of the INA clearly states that any non-citizen who is physically present in the United States, or arrives in the United States (whether or not at a designated port of arrival) may apply for asylum, irrespective of such person’s status. This clear statutory language recognizes the reality for many asylum seekers fleeing persecution: they frequently cannot obtain documentation that enables them to enter the protection country lawfully, precisely because they fear persecution from the very actor that would need to issue them travel documents, the government of the country from which they

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14 Id. at 62383.
15 See, e.g., Migration Policy Institute, *From Control to Crisis: Changing Trends and Policies Reshaping U.S.-Mexico Border Enforcement* 2 (2019), https://www.migrationpolicy.org/research/changing-trends-policies-reshaping-us-mexico-border-enforcement (“Rather than narrowing eligibility and access to asylum processing, new strategies and investment of resources that enable the asylum system to handle its escalating caseload represent the first-order need.”).
16 Expert Opinion of UNHCR at 4.
17 See 84 Fed. Reg. at 62422 (proposed 8 C.F.R. § 208.7(a)(1)(iii)(G)).
18 Id. at 62383.
19 Numerous courts recognized this clear statutory command when vacating or enjoining a November 8, 2018 interim final rule jointly issued by DHS and the Department of Justice (DOJ) that purported to ban migrants from receiving asylum if they were subject to a Presidential Proclamation that suspended the entry of individuals crossing into the United States from Mexico, except at designated ports of entry. O.A. v. Trump, Civil Action No. 18-2718 (RDM), Civil Action No. 18-2838 (RDM), 404 F.Supp.3d 109 (D.D.C. 2019); East Bay Sanctuary Covenant, et al. v. Trump, et al., 354 F.Supp.3d 1094 (N.D. Cal. 2018). On December 21, 2018, the Supreme Court denied the government’s request for a stay pending appeal of the district court’s earlier November 19, 2018 order granting a temporary restraining order in East Bay Sanctuary. See Trump v. East Bay Sanctuary Covenant, 139 S.Ct. 782 (2018).
have fled. Given this reality, it is unduly punitive to for DHS to restrict asylum seekers’ eligibility for employment authorization based on their manner of entry to the country.

This aspect of the Proposed Rule also is unduly restrictive given that DHS currently employs a “metering” policy at the Southern Border, whereby Customs and Border Protection (“CBP”) limits the number of individuals who can seek to be inspected and apply for asylum at a port of entry during a given time period. This practice has turned away many asylum seekers from the Southern Border and forced thousands of individuals to wait months in Mexico for their opportunity to present claims for protection. DHS’ own Office of Inspector General found that “metering” likely has led more non-citizens who would otherwise seek to enter the Southern Border legally to cross unlawfully between ports of entry.

Finally, while this aspect of the Proposed Rule does contain an exception for “good cause,” the circumstances that qualify as good cause are incredibly limited. They do not include, for example, being turned away at the border under the government’s metering policy. Moreover, under the Proposed Rule, the official adjudicating the employment authorization application would determine whether the applicant has demonstrated “good cause” on a “case-by-case basis.” Not only does this have the potential to further delay the processing of employment authorization applications, DHS does not set forth how a non-citizen would establish “good cause” for unlawful entry. For example, how can a non-citizen prove, to the satisfaction of a USCIS adjudicator that she was “fleeing imminent serious harm” at the time of her unlawful entry?

Given that any non-citizen in the United States has the legal right to apply for asylum regardless of her manner of entry, there is no proper basis for denying employment authorization to asylum seekers who entered the United States based on their manner of entry. DHS should rescind this portion of the Proposed Rule.

- **Asylum Seekers Would Be Ineligible Based on Failure to Comply with One-Year Deadline**

As discussed above, the ABA has long opposed the one-year filing deadline for the filing of an asylum application because it places unduly inflexible limitations on vulnerable asylum seekers, and is not an effective means to control any alleged “abuse” of the asylum system. Therefore, the ABA opposes DHS’ effort, in the Proposed Rule, to restrict eligibility for employment authorization based on failure to file an asylum application within one-year of an individual’s latest arrival in the United States. Bona fide asylum seekers often have legitimate reasons for failing to file an application for asylum soon after their arrival, including: lingering trauma, lack of an existing support structure, a language barrier, cultural adjustment,

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20 The ABA has expressed its opposition to policies, such as the Migrant Protection Protocols and “metering” procedures, which present significant, in some cases insurmountable, obstacles to persons seeking asylum in the U.S., see
22 84 Fed. Reg. at 62392.
23 Id.
24 84 Fed. Reg. at 62389-90; id. at 62422 (proposed 8 C.F.R. § 208.7(a)(1)(iii)(F)).
and difficulty finding affordable legal representation. Nor has DHS pointed to any evidence that the imposition of arbitrary time limits such as the one-year deadline deters frivolous or fraudulent claims. In fact, this view is inconsistent with DHS’ position that many individuals file frivolous asylum applications soon after their arrival in the United States to obtain employment authorization. Therefore, DHS should rescind this aspect of the Proposed Rule.

- **Certain Criminal Conduct Would Bar Eligibility for Employment Authorization**

The Proposed Rule also makes asylum applicants ineligible for employment authorization if they have been convicted of a broad array of criminal offenses, including some offenses committed outside of the United States.25 Under existing regulations, only an asylum applicant who is an “aggravated felon” is ineligible for employment authorization based on criminal history.26 While the ABA is mindful of DHS’ legitimate public safety concerns, given our support for broad access to legal protection for asylum seekers and torture victims, we are concerned about the broad range of criminal convictions (some relatively minor) that would render asylum seekers ineligible for employment authorization. Adding these new provisions to the regulations also will further delay the processing of employment authorization applications, as USCIS adjudicators will be required to review conviction records to determine whether they render the applicant ineligible for work authorization.

It also is concerning that the Proposed Rule would apply to convictions prior to the Rule’s eventual effective date.27 The ABA has long opposed retroactivity provisions in immigration laws that impose burdens or reduce benefits available to non-citizens while depriving them of their ability to take such provisions into account when making their decisions or shaping their conduct. Asylum seekers impacted by the Proposed Rule would not have been able to consider the proposed provisions when, for example, deciding whether to plead guilty to a lesser charge in the past that, under the Proposed Rule, would now make them ineligible for work authorization.

Moreover, the ABA is significantly troubled by the fact that the Proposed Rule gives USCIS adjudicators the discretion to deny employment authorization based on unresolved arrests or pending charges for various types of offenses, including non-political foreign criminal offenses, domestic violence offenses, offenses against a child, controlled-substances offenses, and offenses for driving or operating a motor vehicle under the influence of alcohol or drugs.28 The ABA opposes any effort to reduce immigration benefits available to individuals based only on allegations of criminal conduct. It is axiomatic under U.S. law that individuals have the right to defend themselves against criminal charges, and are innocent until proven guilty in criminal court. USCIS adjudicators should not have the ability to deny employment authorization based on allegations that have not been proven in a court of law.

25 Id. at 62422 (proposed 8 C.F.R. § 208.7(a)(1)(iii)(A)-(D)).
26 8 C.F.R. 208.7(a)(1)).
27 Id. (proposed 8 C.F.R. § 208.7(a)(1)(iv)) (saying that paragraphs (a)(1)(iii)(A)-(D) apply to applications that were filed “prior to and remain pending on [effective date of final rule].”).
28 See id. at 62422 (proposed 8 C.F.R. § 208.7(a)(1)(iii)(C)-(D)).
For the foregoing reasons, DHS should rescind this portion of the Proposed Rule. If DHS does not do so, DHS should amend the Proposed Rule to make clear that asylum seekers’ eligibility for employment authorization will only be limited in cases of criminal convictions of particularly serious offenses that occur after the effective date of the Proposed Rule.  

• **Employment Authorization Would No Longer Be Available During Judicial Review**

The ABA also opposes the Proposed Rule because it would change existing regulations to prohibit eligibility for work authorization during any period of judicial review of the denial of an asylum application.  DHS asserts that this change “is necessary to ensure that [non-citizens] who have failed to establish eligibility for asylum during two or three levels of administrative review do not abuse the appeals processes in order to remain employment authorized.” The ABA has long urged that all non-citizens must be provided with due process of law in the processing of their immigration applications and petitions, as well as their hearings or appeals. Such due process should include meaningful review in the federal courts where removal is at stake. The ABA is therefore opposed to any regulatory provisions that seek in any way to discourage asylum seekers from pursuing their statutory right to seek judicial review of adverse decisions regarding their eligibility for asylum or other humanitarian protection.  

• **Employment Authorization Would No Longer Be Available for Parolees Who Have Established a Credible Fear of Persecution**

Finally, in the Proposed Rule, DHS seeks to codify its policy decision that certain non-citizen arriving aliens who have been paroled into the United States after establishing a credible fear or reasonable fear of persecution or torture are no longer eligible for employment authorization.  This change is both unduly restrictive and unnecessary. Individuals who have established a credible or reasonable fear of persecution or torture are more likely to be able to establish eligibility for asylum and/or relief under the Convention Against Torture than those who have not, and “arriving aliens” are non-citizens who attempt to enter the United States at a port of entry. Therefore, the proposed revision furthers neither of DHS’ two stated main objectives for the Proposed Rule: (1) reducing incentives to file frivolous, fraudulent, or otherwise non-

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29 This would be consistent with UNHCR guidance regarding what constitutes a particularly serious crime under Article 33(2) of the Convention, which provides an exception to the *refoulement* principle. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Related to the States of Refugees* ¶¶ 154-55 (reissued Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcede47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html (saying that a refugee may be expelled or returned to his home country in extreme cases if he is convicted of a particularly serious common crime in the country of refuge and constitutes a danger to the community of the country of refuge); UNHCR, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶¶ 7-11 (July 2010), https://www.unhcr.org/uk/576d237f7.pdf (describing what can constitute a “particularly serious crime”).

30 84 Fed. Reg. at 62391; *id.* at 62422, 62423 (proposed 8 C.F.R. § 208.7(a)(1)(i), (b)(1)).

31 *Id.* at 62391.

32 The ABA also notes that DHS has provided no evidence that asylum seekers or torture victims routinely abuse the appeals processes to remain employment authorized, or that its proposed change will reduce any such abuse.

33 84 Fed. Reg. at 62391-92; *id.* at 62424 (proposed 8 C.F.R. § 208.a.12(c)(11)).
meritorious asylum applications or (2) discouraging illegal entry. Moreover, DHS is already implementing this policy, so codifying it into the regulatory scheme is unnecessary. Doing so would constrain future Administrations from achieving their own policy objectives by requiring an amendment to regulatory language in order to change the current policy. The ABA encourages DHS to reconsider this aspect of the Proposed Rule.

**Conclusion**

The ABA repeatedly has emphasized that our government must address the immigration challenges facing the United States by means that are humane, fair, effective, and uphold the principles of due process that are the bedrock of our Constitution. Inflexible restrictions on access to the asylum system and the ability of asylum seekers to be self-sufficient in the United States do not further these goals. Therefore, we urge DHS to rescind the provisions of the Proposed Rule discussed above.

Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in the ABA Governmental Affairs Office at 202-662-1763 or kristi.gaines@americanbar.org.

Sincerely,

Judy Perry Martinez
President