

CURRENT DEVELOPMENTS

THE ONE-TWO PUNCH TO ASYLUM SEEKERS: HOW THE TRUMP ADMINISTRATION WOULD CHANGE ASYLUM AS WE KNOW IT

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During a recent interview on National Public Radio announcing changes to the Public Charge Rule,¹ Acting Director of U.S. Citizenship and Immigration Services (USCIS), Ken Cuccinelli, shared his own version of the Statue of Liberty's famous epitaph.² He changed "Give me your tired, your poor/Your huddled masses yearning to breathe free"³ to "Give me your tired and your poor who can stand on their own two feet and who will not become a public charge."⁴ Although the Public Charge Rule does not affect those seeking asylum, those who have gained asylum, or those seeking to become lawful permanent residents based on their asylum status,⁵ Acting Director Cuccinelli's version of the historic poem reflects the Trump administration's shift in U.S. immigration policy concerning asylum-seekers.

The Trump Administration's USCIS has announced regulations that would make it financially challenging for asylum seekers to support

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1. See generally *Public Charge Provisions of Immigration Law: A Brief Historical Background*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Aug. 14, 2019), <https://www.uscis.gov/history-and-genealogy/our-history/public-charge-provisions-immigration-law-a-brief-historical-background>.

2. Sasha Ingber & Rachel Martin, *Immigration Chief: 'Give Me Your Tired, Your Poor Who Can Stand On Their Own 2 Feet'*, NPR (Aug. 13, 2019, 10:38 AM), <https://www.npr.org/2019/08/13/750726795/immigration-chief-give-me-your-tired-your-poor-who-can-stand-on-their-own-2-feet>.

3. Jacki Lyden, *Emma Lazarus, Poet of the Huddled Masses*, NPR (Oct. 21, 2006, 12:16 PM), <https://www.npr.org/templates/story/story.php?storyId=6359435>.

4. Ingber & Martin, *supra* note 2.

5. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,324 (Aug. 14, 2019) (to be codified at 8 C.F.R. 103).

themselves.⁶ These regulations would increase sevenfold the time before asylum-seekers can obtain employment authorization, after having already waited 150 days.⁷ If passed, these regulations would also make the United States one of only four countries in the world to charge asylum applicants a fee, \$50, for applying.⁸ These proposed regulations would deliver a one-two punch to asylum seekers that would make it harder for them to support themselves.

WHAT CHANGES HAS THE TRUMP ADMINISTRATION PROPOSED?

In addition to expanding the criteria for when an immigrant may be considered a “public charge,” the Trump Administration would prolong the period of time taken to resolve an asylum applicant’s employment status.⁹ The Department of Homeland Security (DHS) has proposed to rescind the guarantee to asylum applicants that decisions on employment authorization come within thirty days.¹⁰ DHS also proposed to extend the waiting period before eligibility for employment authorization from 150 days to 365, more than doubling the wait time for asylum applicants.¹¹ That length of time would mean asylum applicants would wait longer to work, putting them at a higher risk of not being able to support themselves.¹²

DHS promulgated both rules purportedly to give USCIS more time to screen applicants for employment authorization and prevent fraud.¹³ But it is unclear that so long of an extension is necessary – the asylum employment authorization process already takes 180 days, informally known as the “180 Day Employment Authorization Document (EAD) Clock.”¹⁴ The proposed

6. See, e.g., Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47,148 (Sept. 9, 2019) (to be codified at 8 C.F.R. 208); Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62,374 (Nov. 14, 2019) (to be codified at 8 C.F.R. pt. 208).

7. See Florence Immigrant & Refugee Rights Project, Comment Letter on Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications (Sept. 24, 2019), <https://www.regulations.gov/document?D=USCIS-2018-0001-0026>; Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. at 47,160; Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. at 62,385, 62,388.

8. See Zolan Kanno-Youngs & Miriam Jordan, *New Trump Administration Proposal Would Charge Asylum Seekers an Application Fee*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/08/us/politics/immigration-fees-trump.html>.

9. See Hamed Aleaziz, *Trump Officials Are Seeking To Double The Time Asylum-Seekers Must Wait To Legally Work*, BUZZFEED NEWS (Apr. 10, 2019, 6:48 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/uscis-asylum-work-permit-delay-trump>.

10. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. at 47,148.

11. Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. at 62,375.

12. See Florence Immigrant & Refugee Rights Project, *supra* note 7.

13. See Asylum Application, Interview, and Employment Authorization for Applicants, *supra* note 6, at 62,375.

14. An asylum applicant files an I-589 form to begin the process of seeking asylum under adjudication by USCIS. *The ABT Settlement Agreement*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (June 14, 2019), <https://www.uscis.gov/asylum/ABT>. The applicant then waits 150 days, after which the applicant files a I-765 form and waits thirty days for employment authorization. *Id.* The now defunct Immigration

rule would extend the current 180-day clock to a minimum of 365 days.¹⁵ Although the DHS correctly recognizes that the total number of asylee employment applications has increased threefold from 2013 to 2017,¹⁶ DHS would increase the minimum wait time after the 150 days before employment authorization by over seven times as much – from thirty days to 215 days.¹⁷ It is odd that DHS proposed such a disproportionate increase simply due to screening concerns. Moreover, the Department’s concerns over applicants filing fraudulent asylum applications seems dubious: the regulation used legislative findings from the passage of the Violent Crime Control and Law Enforcement Act of 1994, over twenty-five years ago, to justify the presence of fraud.¹⁸

WHAT IS THE IMPACT OF A 365-DAY CLOCK?

The Florence Immigration & Refugee Rights Project (FIRRP), which works with thousands of detained immigrants in Arizona, explained that work permits help asylum applicants support themselves while their status is being adjudicated.¹⁹ FIRRP added that the time it takes to adjudicate a claim after an asylum applicant has waited 150 days to apply varies widely: immigration courts can take as little as six weeks or as long as five years to adjudicate asylum claims.²⁰ Additionally, most refugees strive to avoid being on public benefits: the Migration Policy Institute found that, from 2009 to 2011, around two-thirds of refugee men were employed, as compared to around sixty percent of men born in the United States.²¹

Depriving asylum applicants of a thirty-day employment authorization application period increases the likelihood that they will need public benefits.²² With time, refugees commonly achieve incomes roughly equivalent to

Naturalization Service established the thirty-day employment authorization deadline in 1995. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, *supra* note 6, at 47,160.

15. Aleaziz, *supra* note 9.

16. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, *supra* note 6, at 47,160.

17. Aleaziz, *supra* note 9.

18. Asylum Application, Interview, and Employment Authorization for Applicants, *supra* note 6, at 62,375 n.31, 33, 74.

19. See Florence Immigrant & Refugee Rights Project, *supra* note 6; see also American Immigration Council, Comments Opposing Removal of 30-Day Processing Provision of Asylum Application-Related Form I-765 Employment Authorization Applications (Nov. 12, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/comments_opposing_removal_of_30-day_processing_provision_of_asylum_application-related_form_i-765_employment_authorization_applications.pdf; Daniel Costa, *EPI comments on removal of 30-day processing provision for employment authorization for asylum applicants*, ECONOMIC POLICY INST. (Nov. 8, 2019), <https://www.epi.org/publication/epi-comment-on-removal-of-30-day-processing-provision-for-asylum-applicant-related-form-i-765-employment-authorizations/>.

20. See Florence Immigrant & Refugee Rights Project, *supra* note 7.

21. See Randy Capps & Michael Fix, *Ten Facts About U.S. Refugee Resettlement*, MIGRATION POLICY INST., (Oct. 2015), https://www.migrationpolicy.org/research/ten-facts-about-us-refugee-resettlement?gclid=CjwKCAiAhJTYBRAvEiwAln2qB2k9Wd4fwKS1BMy1xkJdxtzQjZ2k7O69EvM3JsCsIakgeVVthMjpOxoCr6EQAvD_BwE.

22. See Florence Immigrant & Refugee Rights Project, *supra* note 7.

those born in the United States: median household income for refugees arriving from 2010–2015 was forty-two percent of the U.S.-born median household income, while the median household income for refugees who had arrived ten to twenty years before 2015 was eighty-seven percent of the U.S.-born median household income.²³ A longer application period would likely interfere with this process and decrease the likelihood that refugees would boost their incomes and be able to contribute to the U.S. economy.²⁴ Thus, it seems very likely that the thirty-day authorization period change would work against the Trump Administration’s goal of making immigrants financially self-sufficient.²⁵

OTHER UNPRECEDENTED CHANGES

DHS has proposed another regulation that could undermine refugees’ economic well-being: asylum seekers would now need to pay an unprecedented \$50 to USCIS to apply.²⁶ This fee increase would make the United States one of four countries to charge asylum applicants fees.²⁷

USCIS is supposed to conduct biennial reviews of non-statutory fees under the Chief Financial Officers (CFO) Act of 1990.²⁸ The purpose, according to the regulation, is to determine whether current fees are generating enough revenue for USCIS to adjudicate asylum cases.²⁹ But USCIS has also equivocated that the \$50 fee is designed to “alleviate the pressure” of asylum applications for USCIS.³⁰ The statement that the \$50 fee exists to “alleviate the pressure” seems like a subtle admission that the \$50 increase exists just as much to provide a disincentive to asylum applicants as the increase is designed to help USCIS meet budget shortfalls.

But the fee regulation would additionally undermine asylum seekers’ economic security, making it more difficult for asylum seekers to support themselves. Although \$50 may not be a large amount of money for Americans earning a median-income salary, asylum seekers tend to arrive in the United States with significantly fewer assets than the median American household’s

23. Randy Capps & Michael Fix, *supra* note 21, at 2.

24. See Dany Bahar, *Why accepting refugees is a win-win-win formula*, BROOKINGS INST. (June 19, 2018), <https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/>.

25. See Ingber & Martin, *supra* note 2.

26. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,328 (Nov. 14, 2019) (to be codified at 8 C.F.R. 103).

27. *Marriage Green Card and Citizenship Application Fees to Increase Under New Proposal*, BOUNDLESS (Nov. 10, 2019), <https://www.boundless.com/blog/fee-hikes-citizenship-immigration-forms/>.

28. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. at 62,282.

29. *Id.*

30. Priscilla Alvarez, *Trump administration proposes charging for asylum applications, joining only 3 other countries*, CNN (Nov. 8, 2019, 6:23 PM), <https://www.cnn.com/2019/11/08/politics/asylum-fee-uscis/index.html>.

net worth, which is around \$97,300.³¹ The \$50 fee would thus help prevent asylum seekers from achieving economic security.

THE WAY FORWARD

Reforming the U.S. asylum system's application processes requires methods different from fee changes or extending the time within which employment authorization can be granted. Such proposals are mostly punitive and seem to incorporate only the sticks of diplomacy's proverbial "carrots and sticks."³² Furthermore, these proposals would not solve the fundamental and unfortunate problem of there being more people who want to seek asylum in the United States than the country can take.³³

The ultimate effect of the Trump Administration's proposals would likely make asylum seekers less economically self-sufficient, even as the Trump Administration maintains that economic self-sufficiency of immigrants is its goal. A longer application period would likely hurt asylum seekers' efforts to support themselves, given that applicants need a USCIS decision on whether they can receive work permits during asylum adjudication. Moreover, charging asylum seekers application fees would further hurt asylum seekers' attempts to gain economic security. The Trump Administration thus seems to have two goals here – one stated, one implied. The United States will find out whether its asylum system can sustain both.

31. See Randy Capps & Michael Fix, *supra* note 21, at 2; Kathleen Elkins, *Here's the net worth of the average American family*, CNBC (May 15, 2019, 8:35 AM), <https://www.cnbc.com/2019/05/14/the-net-worth-of-the-average-american-family.html>.

32. The 90-day extension for filing renewal of employment authorization, the exception to these punitive measures, is unhelpful to refugees who cannot gain employment authorization to begin with. See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. at 47,148.

33. See Florence Immigrant & Refugee Rights Project, *supra* note 7.