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Via Federal e-Rulemaking Portal
https://www.regulations.gov

Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: Employment Authorization Reform for Asylum Applicants, 91 Fed. Reg. 8,616 (Feb. 23, 2026)
DHS Docket No. USCIS-2025-0370
RIN 1615-AC97

To Whom It May Concern:

The Center for Gender & Refugee Studies submits this comment in response to the notice of proposed rulemaking DHS Docket No. USCIS-2025-0370, Employment Authorization Reform for Asylum Applicants, 91 Fed. Reg. 8,616 (Feb. 23, 2026) ("NPRM" or "Rule").

The Rule is inconsistent with international law. It would also violate the Administrative Procedure Act because it is arbitrary and capricious and is not in accordance with law. Our comment highlights in particular the devastating impacts the Rule would have on women and LGBTQ+ asylum seekers if implemented. We therefore urge DHS to withdraw the NPRM.

We include the following outline to guide your review.

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I. EXPERTISE OF THE CENTER FOR GENDER & REFUGEE STUDIES

The Center for Gender & Refugee Studies ("CGRS") was founded in 1999 by Professor Karen Musalo[1] following her groundbreaking legal victory in *Matter of Kasinga*[2] to advocate for asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ+ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions.

We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[3] produce an extensive

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[1] Bank of America Foundation Chair in International Law; Professor & Director, Center for Gender & Refugee Studies, University of California College of the Law, San Francisco.

[2] 21 I&N Dec. 357 (BIA 1996).

[3] *See, e.g.,* Al Otro Lado v. EOIR, 138 F.4th 1102 (9th Cir. 2025) (affirming in part and vacating in part district court's ruling that held unlawful metering of asylum seekers at ports of entry), cert. granted sub nom. Mullin v. Al Otro Lado, 2025 WL 3198572 (Nov. 17, 2025); U.T. v. Mullin, 1:20-cv-00116-EGS (D.D.C. amended complaint filed Oct. 15, 2025) (challenging rule providing the structure for asylum cooperative agreements enabling the removal of asylum seekers to designated countries without hearing their claims in the United States); RAICES v. Mullin, No. 25-5243 (D.C. Cir. Apr. 24, 2026) (affirming district court's grant of plaintiffs' motion for summary judgment and class certification and rejecting government's claim that INA § 212(f) proclamation allows president to summarily deport asylum seekers who cross the border without allowing them to seek protection); E.Q. v. DHS, No. 1:25-cv-00791 (D.D.C. filed Mar. 17, 2025) (challenging rule that requires asylum officers conducting initial fear screenings to make complicated determinations about applicability of mandatory bars that would render individuals ineligible for asylum); Las Americas Immigr. Advoc. Ctr. v. DHS, 783 F.Supp.3d 200 (D.D.C. May 2025) (granting in part and denying in part plaintiffs' motion for summary judgment and defendants' motion cross-motion for summary judgment challenging "Securing the Border" rule), appeal docketed, No. 25-5313 (D.C. Cir., Sept. 2, 2025); Al Otro Lado v. Trump, No. 3:25-cv-01501 (S.D. Cal. complaint filed June 11, 2025); Al Otro Lado and Haitian Bridge Alliance v. Mayorkas, No. 3:23-cv-01367-AGS-BLM (S.D. Cal., Sept. 19, 2025) (granting joint motion to dismiss in challenge to turnbacks of arriving asylum seekers without CBP One appointments); East Bay Sanctuary Covenant v. Trump, 683 F. Supp. 3d 1025 (N.D. Cal. July 25, 2023), (granting plaintiffs summary judgment in challenge to "Circumvention of Lawful Pathways" rule), vacated, No. 23-16032 (9th Cir. Apr. 10, 2025) (vacating and remanding to district court for further proceedings); Immigr. Def. Law Ctr. v. Mayorkas, No. CV 20-9893 JGBSHKX, 2023 WL 3149243, 18-19 (C.D. Cal., Mar. 15, 2023) (granting in part and denying in part defendants' motion to dismiss challenge to implementation of MPP 1.0 and granting plaintiffs' motion for class certification), appeal docketed, No. 25-02581 (9th Cir. Apr. 22, 2025); Huisha-Huisha v. Mayorkas, 642 F. Supp. 3d 1 (D.D.C. Nov. 15, 2022) (vacating and setting aside Title 42 policy as arbitrary and capricious), cert. and stay

library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with refugee, immigrant, LGBTQ+, children's, and women's rights networks.[4]

Since our founding, we have engaged in international human rights fact-finding and analysis with a strong emphasis on El Salvador, Guatemala, Haiti, Honduras, and Mexico, to address the underlying causes of forced migration that produce refugees, including climate change and environmental disasters.[5]

We have assisted many clients applying for asylum with their employment authorization document ("EAD") applications, including both initial and renewal applications, and have conducted trainings on EAD issues for attorneys representing asylum seekers. In addition, we successfully challenged two previous rules restricting asylum seekers' access to work authorization.[6]

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate protection claims of those fleeing persecution and torture. Our goal is to ensure that the U.S. framework of law and policy respects the rights of refugees and aligns with international law.

It is in furtherance of our mission that we submit this comment urging that the Rule be withdrawn.

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granted sub nom. Arizona v. Mayorkas, 143 S. Ct. 478, 214 L. Ed. 2d 312 (2022), and vacated, No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023); Pangea Legal Servs. v. DHS, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (preliminarily enjoining the "Global Asylum" rule); and Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020) (affirming in part and vacating in part the district court's injunction against the use of Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) (Matter of A-B- I), and guidance implementing Matter of A-B- in credible fear proceedings).

[4] *See, e.g.*, the Welcome With Dignity and No Turning Back campaigns.

[5] *See, e.g.*, CGRS, The IACtHR's Advisory Opinion on the Climate Emergency: An Important Step for the Protection of Climate-Displaced Individuals (2025); The Chile Declaration and Plan of Action 2024-2034: A Blueprint for Addressing Climate and Disaster-Related Displacement in the Americas (2025); Precluding Protection: Findings from Interviews with Haitian Asylum Seekers in Central and Southern Mexico (2024); "Manifesting" Fear at the Border: Lessons from Title 42 Expulsions (2024).

[6] AsylumWorks v. Mayorkas, 590 F.Supp.3d 11 (D.D.C. 2022) (granting plaintiffs' motion for summary judgement and vacating DHS final rules *Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants*, 85 Fed. Reg. 37,502 (June 22, 2020) and *Asylum Application, Interview, and Employment Authorization for Applicants* , 85 Fed. Reg. 38,532, (June 26, 2020)).

II. THE RULE IS INCONSISTENT WITH INTERNATIONAL LAW

The Rule is inconsistent with the relevant international legal obligations of the United States. These are found in the 1967 Protocol Relating to the Status of Refugees ("Protocol").[7] The United States acceded to the Protocol in 1968 with no relevant declarations or reservations. By doing so, the United States undertook to apply all substantive articles of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[8] *See* Rule at 8,661. These treaties have been implemented in domestic law in the Refugee Act of 1980, other subsequent legislation, and accompanying regulations.

A. A General Policy of Treating Asylum Seekers Less Favorably Than Other Foreign Nationals in the Same Circumstances Violates the Refugee Convention and Protocol

Article 17 of the Refugee Convention relates to the right to engage in wage-earning employment. It provides that refugees lawfully in the territory of the host State (which would include not only asylees and resettled refugees, but all individuals pursuing asylum claims),[9] shall be the accorded the "most favorable treatment accorded to nationals of a foreign country in the same circumstances."

Under current law and regulations, resettled refugees and asylees are employment-authorized incident to status.[10] That means they are legally permitted to work in the United States due to their status as people admitted as refugees or granted asylum and only need to request EADs as evidence of that permission, not to receive the permission itself.

However, the granting of employment authorization to refugees who are still seeking to have their status recognized through the asylum process is discretionary.[11] Thus, even without the implementation of the Rule, the U.S. statutory and regulatory scheme already provides some refugees less favorable treatment than other foreign nationals in the same circumstances. The Rule would

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[7] 606 U.N.T.S. 267 (entry into force 4 Oct. 1967).

[8] 189 U.N.T.S. 137 (entry into force 22 April 1954).

[9] *See* United Nations High Commissioner for Refugees ("UNHCR"), Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV. 4, April 2019 ("UNHCR Handbook"), para. 28 ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.").

[10] INA § 208(c)(1)(B), 8 U.S.C. § 1158(c)(1)(B); 8 CFR 274a.12(a)(3) *and* (5).

[11] INA § 208(d)(2), 8 U.S.C. § 1158(d)(2).

further exacerbate these disparities by imposing significant new barriers to asylum applicants seeking initial or renewal EADs.

DHS proposes denying EADs to asylum applicants who entered irregularly, with limited exceptions. Rule at 8,661. DHS further proposes to "pause" its acceptance of *all* initial EAD applications from asylum applicants until USCIS sustains – over a period of 90 days – an average processing time to adjudicate affirmative asylum applications of 180 days or less. Rule at 8,650. It estimates this pause could last from 14 to 173 years, or longer. *Id*.

The Rule would also more than double the waiting period before asylum seekers are eligible for EADs from 180 days to 365 days after receipt of the asylum application. Rule at 8,653. The latter two provisions contain no exceptions at all.

None of these barriers applies to other refugees in the same circumstances seeking to work lawfully in the United States. If implemented, the Rule would thus dramatically exacerbate the existing, impermissible disparities in treatment of asylum seekers and other foreign nationals in the same circumstances. It is therefore issued in violation of Art. 17 of the Refugee Convention.

B. A General Policy of Barring Employment Authorization to Asylum Seekers Who Enter Irregularly Violates the Refugee Convention and Protocol

1. Any limitations on employment authorization must be consistent with the Refugee Convention and Protocol

DHS proposes to entirely exclude asylum seekers from receiving EADs if they entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry. Rule at 8,618. The Rule provides only limited exceptions where the applicant 1) without delay (within 48 hours) indicated to an immigration officer an intent to apply for asylum or expressed a fear of persecution or torture; 2) has "good cause" for the irregular entry or attempted entry; or 3) is or was determined to be an unaccompanied alien child ("UAC").

DHS attempts to justify this proposed bar, in part, on an erroneous interpretation of U.S. obligations under the Protocol. Specifically, "DHS does not believe this change could be considered a 'penalty' within the meaning of Article 31(1) of the 1951 Convention…because it is consistent with U.S. obligations under the 1967 Protocol." Rule at 8,661. This interpretation is incorrect as it is based on a misreading of the Refugee Convention.

The Refugee Convention, whose provisions are binding on the United States through our ratification of the Protocol, specifically prohibits States from imposing penalties on refugees "on account of their illegal entry or presence."[12] It is clear that Art. 31(1) applies to people seeking asylum as well as to those recognized as refugees.[13] It is equally clear that "restrictions on economic or social rights, such as … employment" are penalties within the meaning of Art. 31(1).[14]

Therefore, any limitations on employment authorization would have to be consistent with Art. 31(1).

It is correct that the Convention limits this protection from penalization to refugees who present themselves without delay to the authorities and show good cause for their irregular entry or presence. However, the Rule's limited exceptions to the bar on employment authorization go far beyond the Refugee Convention, and as likely to be applied, will certainly result in the United States violating the Convention.

2. The Rule's provision regarding "delay" is inconsistent with the Refugee Convention and Protocol

The Rule's first limited exception states that asylum seekers must "without delay" (no later than 48 hours after entry or attempted entry) affirmatively indicate to the authorities their intention to apply for asylum or express a fear of persecution or torture. Rule at 8,618. This latter requirement does not appear in the Refugee Convention, which lists only the need to present oneself without delay and show good cause. Furthermore, the Convention's exemption from penalties for refugees who present to the authorities "without delay" must not be interpreted as imposing a strict temporal requirement.[15]

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[12] Refugee Convention, Art. 31(1). https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx. *See also Introductory note* by UNHCR to the Text of the 1951 Convention Relating to the Status of Refugees Text of the 1967 Protocol Relating to the Status of Refugees Resolution 2198 (XXI) adopted by the United Nations General Assembly, available at https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html.

[13] UNHCR, Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees ("UNHCR Guidelines No. 14"), HCR/GIP/24/14, para. 10, 23 Sept. 2024, https://www.refworld.org/policy/legalguidance/unhcr/2024/148632 (last visited Apr. 20, 2026).

[14] *Ibid*., para. 28.

[15] *Ibid.,* paras. 22-23.

The Rule's requirement of immediately and affirmatively expressing an intention to apply for asylum in order to access employment authorization later is also contrary to the longstanding procedure established to implement Congressional requirements for expedited removal. During an expedited removal interview, the immigration officer is required to ask each person four fear-related questions, a requirement that continues to apply under a court order.[16] Asylum seekers are not required to affirmatively volunteer that they have a fear of return or intention to seek asylum; it is the responsibility of immigration officers to elicit such information.

Therefore, if the Rule goes into effect, it is foreseeable that DHS will take the position it can deny EADs to everyone who entered irregularly and whose intention to apply for asylum or fear of persecution or torture was discovered, *as it is designed to be*, in response to mandatory questioning by the immigration officer, rather than by means of an unprompted affirmative manifestation of such intention or fear. This "limited exception" will therefore prove to be illusory, and the provision as applied will result in most, if not all, irregular entrants being found ineligible for EADs.

3. The Rule's "good cause" provision is inconsistent with the Refugee Convention and Protocol

The second exception applies if the asylum seeker had "good cause" for the irregular entry or attempted entry. This exception has two major defects. First, the Rule does not define "good cause," opting instead to provide limited examples in the preamble that do not appear in the proposed regulatory text. Rule at 8,611. DHS states that it has "purposely kept those [examples] broad to allow for discretion" in considering the asylum seeker's circumstances that led to the irregular entry. This discretionary approach directly contravenes UNHCR guidance on the interpretation of Art. 31(1)'s good cause provision, which states that whether good cause has been shown is a question of fact.[17] Instead, any proposal to apply penalties to refugees for irregular entry consistent with Art. 31(1) should define

[16] RAICES v. Mullin, No. 25-5243 (D.C. Cir. Aug. 2025) (order granting in part and denying in part motion for stay).
[17] UNHCR Guidelines No. 14, para. 27.

"good cause" consistent with UNHCR guidance and apply objective standards, rather than leave such determinations to officer discretion.[18]

The second defect of this limited exception is the highly restrictive examples given for what constitutes "good cause" for irregular entry. The examples listed are: requiring immediate medical attention, fleeing imminent serious harm, or being a victim of a severe form of trafficking in persons. Rule at 8,661. Here again, these examples fall far short of being consistent with Art. 31(1). The Refugee Convention does not require that a person be in a life-or-death situation or a trafficking victim in order to justify their irregular entry. UNCHR guidance provides that refugees may establish good cause even where access to legal entry is available and lists a number of examples, including fear of rejection or expulsion at the border, acting under the instruction of a third party, or being traumatized.[19]

Good cause should therefore be interpreted to include attempts to reach safety in the United States where entering irregularly is often the only possible option in the face of U.S. violations of international and domestic law. These include suspensions of entry; travel bans; and the asylum cooperative agreements established with Belize, Capo Verde, Ecuador, Guatemala, Honduras, Paraguay, and Uganda, as well as any additional countries in the future.[20] Given the generally dangerous conditions and lack of social services including food, shelter, and medical care in northern Mexico, which are exacerbated by U.S. policies designed to deter asylum seekers, there should be a presumption that any asylum seeker entering irregularly has in fact established good cause.

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[18] *See id* ("Some form of compulsion, need or reasonable belief on the part of the refugee that resorting to irregular, rather than regular, means of entry or presence is necessary to secure entry or to remain in the asylum country in order to seek international protection, would generally constitute 'good cause' within the meaning of Article 31(1).").

[19] UNHCR Guidelines No. 14, para. 27 ("Article 31(1) does not require that the irregular entry or presence is necessary to be able to seek international protection…Even where genuine and effective access to means of legal entry are available, a refugee may still show good cause for irregular entry within the meaning of Article 31(1). 'Good cause' may be satisfied by a number of factors, such as a fear of being rejected or pushed back at the border; being unable to physically enter at an established port of entry; lacking information or knowledge about relevant procedures for claiming asylum upon entry; acting under instruction of a third party, such as a smuggler; or being traumatized or otherwise lacking capacity to identify or use lawful means to enter.").

[20] *See id* ("In practice, refugees will generally have good cause, given that many face significant factual and legal barriers to regular entry or stay in a host country, which consequently compel them to resort to irregular means.").

4. Restrictions on EADs may not be used to deter people from seeking asylum

The number of people seeking protection in the United States does not justify the Rule's massive barriers to employment authorization for asylum applicants. The United States, as a member of UNHCR's Executive Committee, has joined an international consensus in agreeing that even in situations of large-scale influx, asylum seekers "should not be penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is considered unlawful."[21] Barring an asylum applicant from work authorization based on their irregular entry – even providing for limited exceptions, which are insufficient for the reasons outlined above – would be such a penalty.

Nor is it permissible to differentiate between asylum seekers who approach a port of entry and those who enter irregularly. In accordance with our international treaty obligations, Congress for over 45 years has clearly supported the right to claim asylum *anywhere* on the U.S. border or at a land, sea, or air port of entry. In the Refugee Act of 1980, Congress authorized asylum claims by any foreign national "physically present in the United States *or* **at a land border** or port of entry".[22] Later, Congress expressly reaffirmed the eligibility for asylum of "any" foreign national "who is physically present in the United States or who arrives in the United States ***(whether or not at a designated port of arrival)***".[23] This inclusive provision reflected Congress's ongoing intent to comply with international law, as well as its recognition that allowing an applicant for recognition as a refugee to assert a claim for asylum at any point along a land border is a necessary component of essential refugee protections, because asylum seekers often flee for their lives and cannot pick and choose where they will ask for protection.[24]

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[21] Protection of Asylum-Seekers in Situations of Large-Scale Influx, No. 22 (XXXII) II.B.2(a) – 1981 Executive Committee 32nd session. Contained in United Nations General Assembly Document No. 12A (A/36/12/Add.1). Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees. https://www.unhcr.org/en-us/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html.

[22] Pub. L. No. 96-212, § 208(a), 94 Stat. 102 (1980).

[23] INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

[24] *See* Human Rights First, *Why do some asylum seekers cross the U.S. southern border between ports of entry?* (Nov. 2018), https://humanrightsfirst.org/wp-content/uploads/2022/10/US-Southern-Border-Fact-Sheet.pdf.

Because the Rule would violate Arts. 17 and 31(1) of the Refugee Convention, it should be withdrawn as inconsistent with the binding obligations of the United States under international law.

III. THE RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT BECAUSE IT IS ARBITRARY AND CAPRICIOUS AND BECAUSE IT IS NOT IN ACCORDANCE WITH LAW.

If implemented, the Rule would be unlawful because it is arbitrary and capricious under the Administrative Procedure Act ("APA").[25] An agency rule is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[26]

In addition, a rule is also arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[27] Furthermore, an agency enacting a policy change must acknowledge the change; must demonstrate the change is permissible under the relevant statute and that there are good reasons for it; and, when the prior policy has engendered serious reliance interests that must be taken into account, must provide a more detailed justification for the change than what would suffice for a new policy.[28]

The Rule must be withdrawn under the APA as arbitrary and capricious because DHS failed to consider important aspects of the problem and ignored serious reliance interests. In particular, it has failed to consider impacts of the Rule on asylum seekers who are women or members of the LGBTQ+ community and ignored the reliance interests of asylum seekers in being able to access work authorization without the barriers the Rule would impose. It has also failed to provide a sufficiently detailed justification for the Rule's changes to existing policies.

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[25] 5 U.S.C. 706(2)(A).

[26] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). *See also* Texas v. United States Environmental Protection Agency, 132 F.4th 808 (5th Cir. 2025) (internal citations omitted) ("State Farm").

[27] *See* State Farm at 43.

[28] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

An agency action is also unlawful under the APA if is not in accordance with law.[29] The Rule would require adjudicators of EAD requests to perform functions that by statute must be performed by asylum officers. It must therefore also be withdrawn under the APA as not in accordance with law.

A. The Rule is Arbitrary and Capricious Because DHS Failed to Consider Important Aspects of the Problem

1. DHS failed to consider that barring EADs to asylum applicants who fail to meet the one-year filing deadline would increase harm to women and LGBTQ+ asylum seekers

DHS has proposed to make asylum seekers whose asylum applications are received more than a year after their most recent entry to the United States ineligible for EADs, with limited exceptions for unaccompanied children and those who meet an exception under applicable law and regulation. Rule at 8,658. The first stated justification for this change is to prevent foreign nationals seeking to apply for cancellation of removal, who are not in removal proceedings, from filing an asylum claim in order to trigger a removal hearing and provide an avenue to present their application for cancellation of removal. Rule at 8,658-59.

CGRS is sympathetic to the effect that the practice of seeking cancellation of removal through the asylum system has had on the asylum case backlog. However, promulgating a Rule that will harm asylum seekers with legitimate claims and reasons for their delay in filing is not a reasonable solution. Women and members of the LBGTQ+ community, who fled or fear gender-based persecution in their home countries—such as female genital mutilation/cutting, domestic violence, rape (including as a weapon of war), human trafficking, "honor" crimes, and forced marriage—must be able to seek safe haven in the United States and utilize all measures, such as work authorization, to create the durable solution that they require.

Women and others escaping gender-based harms may fail to file within one year of arrival for many legitimate reasons, such as suffering from Post-Traumatic Stress Disorder (PTSD) caused by their past persecution, or out of fear of being stigmatized even within their own diaspora community. While regulatory exceptions to the one-year filing deadline contemplate PTSD and other extraordinary reasons for delay, some adjudicators narrowly construe the exceptions and refuse to waive the deadline in such cases.

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[29] 5 U.S.C. § 706(2)(A).

In addition, the regulatory exceptions to the one-year filing deadline do not expressly reference the many compelling but "ordinary" circumstances that can reasonably prevent a woman fleeing persecution from filing for asylum within her first year—or within any rigid time period—after arriving. She may be consumed by the challenges of surviving in a new country; not know that she can ask for asylum at all and specifically from gender-based persecution, let alone that she is "on the clock" to submit a timely application; she may fear bringing herself to the attention of U.S. authorities; and she may resist applying for asylum until she absolutely must, since by taking that drastic step she may be forever severing ties with her family and community, as well as her country. To the extent that many women seeking asylum based on domestic violence come from repressive, patriarchal societies, it may take a very long time for a woman to build up the courage to come forward and request asylum.

While the Rule proposes to allow asylum seekers who meet an exception for filing late to be granted work authorization, it does not allow an asylum seeker the right to work while that exception is being adjudicated by an asylum officer or immigration judge. Given the current years-long asylum backlog, this new Rule would expose vulnerable women and LGBTQ+ individuals to lengthy periods of uncertainty, exploitation, and abuse if they must remain in or move to the shadow economy to survive or rely on others to support them while their EAD is being adjudicated based on a substantive exception.

2. DHS failed to consider that extending the waiting period to apply for initial EADs to 365 days, lengthening the adjudication time for initial EADs to 180 days, and pausing acceptance of all initial EAD requests would increase harm to women and LGBTQ+ asylum seekers

DHS proposes to extend the time period an asylum seeker must wait to be eligible for an EAD based on a pending asylum application from 180 to 365 calendar days from the date their asylum application is received. It also proposes to extend the time USCIS has to adjudicate initial EAD requests from 30 days to 180 days. Rule at 8,618. Even more startlingly, it proposes to "pause" its acceptance of initial EAD applications from asylum seekers altogether until USCIS eliminates the backlog of affirmative asylum cases. For the following reasons, CGRS urges DHS not to increase the wait for asylum seekers to access EADs.

Extending the time before asylum seekers can lawfully work will exacerbate their economically precarious and socially vulnerable situations. Asylum seekers are not entitled to most forms of government assistance or social welfare benefits and can

support themselves only by working. Creating obstacles, such as pausing acceptance of initial EAD applications, extending the time before they can apply, and extending the adjudication time for their applications puts women and members of the LGBTQ+ community in particular at greater risk of hunger, potentially abusive living situations, and homelessness, as well as trafficking and other coercive employment practices.[30] Most asylum seekers have experienced trauma and harm either in their home country and/or on their journey to safety. This is especially true for women and LGBTQ+ asylum seekers.[31] As long as they are unable to work, they remain in a highly vulnerable situation having to rely on others.

The sooner asylum seekers can begin to work, the sooner they can be, and begin to feel, self-reliant. The UNHCR Executive Committee has recognized that asylum seekers are capable of attaining self-reliance if provided with an opportunity to do so.[32] Providing asylum seekers with an early and financially accessible opportunity to work legally also recognizes the lack of social services and assistance provided by the U.S. government to asylum seekers. Moreover, once employed, an asylum seeker can be a contributing member of U.S. society, and can take pride in providing for herself and her family. This sense of empowerment is particularly important for women and LGBTQ+ refugees: it allows them to begin to heal from their traumatic experiences and regain their confidence.

B. The Rule is Arbitrary and Capricious Because DHS Ignored Serious Reliance Interests

The Rule ignores serious reliance interests of all refugees seeking recognition through the asylum process in having access to work authorization. It briefly acknowledges some of these interests and the negative impact the Rule would have on them. Rule at 8,629; 8,644; and 8,657. However, it ignores many others. In particular, DHS ignores the reliance interests of women and LGTBQ+ asylum

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[30] Human Rights Watch, At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States (Nov. 2013), https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united.

[31] UNHCR, *Women on the Run: First-hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, 26 October 2015, available at https://www.refworld.org/docid/56307e2a4.html.

[32] Executive Committee Conclusion No. 93 - 2002: Conclusion on reception of asylum-seekers in the context of individual asylum systems
No. 93 (LIII) – 2002 (Oct. 8, 2022). Contained in United Nations General Assembly document no. 12A (A/57/12/Add.1), https://www.unhcr.org/publications/executive-committee-conclusion-no-93-2002-conclusion-reception-asylum-seekers-context.

seekers in avoiding the Rule's extremely deleterious impacts to their safety and wellbeing, as explained in detail *supra*. DHS should therefore withdraw the NPRM as arbitrary and capricious.

C. The Rule is Arbitrary and Capricious Because DHS Failed to Provide a Sufficiently Detailed Justification for Changes to Existing Policy

DHS states that an overarching goal of the sweeping changes the Rule proposes is "reducing the incentive for aliens to file…meritless asylum applications as a means to obtain employment authorization." Rule at 8,617. "Meritless" is a wholly new term in U.S. asylum law and appears to have been invented for this Rule. The Rule's discussion of "meritless" asylum cases is insufficiently detailed in two major ways: First, it provides vague and contradictory definitions of "meritless." Second, it fails to provide available data or a sufficiently detailed explanation in support of the Rule's premise that "meritless" asylum claims make up a substantial portion of the current backlog and incoming filings.

DHS initially defines "meritless" asylum cases as those "that have no value, or, possibly, that do not meet the substantive requirements of asylum. …[M]eritless cases, by their definition, cannot be approved." Rule at 8,638. This vague and confusing verbiage could allow DHS to deem asylum applications that could be denied on *any* basis to be "meritless."

Defining a key term in contradictory ways in the same Rule shows DHS failed to engage in reasoned analysis to justify the Rule's proposals, a hallmark of arbitrary and capricious rulemaking. Throughout the Rule, DHS uses the phrase, "frivolous, fraudulent, or otherwise meritless" to describe the types of asylum filings that it is proposing the Rule to deter.[33] While this phrasing is helpful in illuminating DHS's understanding that "meritless" asylum applications include those that are frivolous or fraudulent – terms with existing definitions in statute and regulation – it does not sufficiently explain the category of "otherwise meritless" claims that are non-frivolous and non-fraudulent.

Later in the Rule's preamble, DHS states that the effects of the 1994 reforms implied that "ineligible aliens (regardless of the basis for ineligibility or whether the filing was frivolous, fraudulent, or otherwise meritless) stopped filing and the result de-clogged the asylum system." Rule at 8,695. Here, DHS's use of the disjunctive "or"

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[33] *See, e.g.,* Rule at 8,674 "The purpose of this proposed rulemaking is for DHS to be able to balance its overall adjudication burdens with available resources by ensuring that initial (c)(8) EAD filings are not creating incentives for aliens to file frivolous, fraudulent, or otherwise meritless asylum applications."

between "basis for eligibility" and "whether the filing was…otherwise meritless" indicates it considers these to be separate categories of asylum applications. That is, DHS is distinguishing between applications denied simply because they do not meet all eligibility requirements for asylum and those it considers "otherwise meritless." But this explanation contradicts DHS's earlier statement in the Rule that meritless claims could possibly include those "that do not meet the substantive requirements of asylum."

Furthermore, DHS asserts its belief that the current asylum backlog contains "many frivolous, fraudulent, or otherwise meritless asylum application filings that are filed solely for the purposes of obtaining an EAD." Rule at 8,650. Given that a goal of the Rule's draconian proposed restrictions on EADs for asylum applicants is to "allow[] DHS to focus resources on reducing the asylum backlog," Rule at 8,641, DHS must provide a more detailed justification for the Rule's proposed changes than it has.

In addition to providing vague, confusing, and contradictory definitions of "meritless," none of the data or other evidence DHS cites in the Rule support its repeated speculative suggestions throughout that "frivolous, fraudulent, or otherwise meritless" asylum applications make up a substantial portion of the current backlog and incoming filings. Instead, DHS seems to accept this contention as axiomatic, deeming it a "catastrophic" situation that requires the Rule's extreme proposals to "meet the severity of the problem." Rule at 8,650.

Indeed, DHS repeats the word "meritless" 85 times in the Rule. Yet, the level of detail DHS provides to justify the Rule's central premise is completely insufficient. To support its contentions about the prevalence of fraudulent asylum claims, it at least offers what it admits are limited data on the results of FDNS fraud investigations and some anecdotal references to disciplined attorneys. However, it contends that "[q]uantifying 'meritless' cases seems even more difficult" and does not meaningfully attempt to do so. Rule at 8,638. DHS offers no data at all on frivolous applications. Even though only the Department of Justice has the authority to make findings of frivolousness, DHS could have requested data from its sister agency on the number and proportion of affirmative asylum cases referred to the immigration court where an IJ found the application frivolous.[34] DHS should

[34] INA § 208(d)(6), 8 U.S.C. § 1558(d)(6); 8 CFR 208.20 and 1208.20. Note that amendments to these regulations that would have empowered DHS asylum officers to determine an asylum application is frivolous have been enjoined and are not currently in effect. Pangea Legal Services v. DHS, 512 F. Supp. 3d 966 (N.D. Cal. 2021) (order granting preliminary injunction).

therefore withdraw the NPRM due to its inability or unwillingness to provide a sufficiently detailed justification for the Rule's proposed changes.

D. The Rule is Not in Accordance With Law

The Rule would require "EAD adjudicators to consider new eligibility requirements that are analyzed in the asylum interview." Rule at 8,658. Examples include the one-year filing deadline and its exceptions, the particularly serious crime and serious nonpolitical crime bars to asylum, and identification and analysis of potentially derogatory information. Rule at 8, 618. Asylum officers are required by statute to be professionally trained in country conditions, asylum law, and interview techniques and to be supervised by an officer with such training and substantial experience adjudicating asylum applications.[35] USCIS has implemented what it calls "extensive training" requirements for asylum officers in response to this Congressional directive.[36] Included in this training are modules on potentially complex issues in asylum adjudications that the Rule would require EAD adjudicators to consider, such as the one-year filing deadline and its exceptions, the particularly serious crime and serious non-political crime bars to asylum eligibility, UAC determinations, trafficking, identification and analysis of potentially derogatory information, and the exercise of discretion. Nowhere in the Rule does DHS indicate it would assign asylum officers to adjudicate EAD applications or provide EAD adjudicators the training required by law of asylum officers. If implemented, the Rule would be impermissible under the APA because it is not in accordance with law and should therefore be withdrawn.

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[35] INA § 235(b)(1)(E), 8 U.S.C. § 1225(b)(1)(E).

[36] *See* USCIS, *Exploring Asylum Officer Careers* (Feb. 6, 2025), https://www.uscis.gov/exploring-asylum-officer-careers ("All Asylum Officers are required to receive extensive training on U.S. asylum and immigration law. Trainings may last multiple weeks and may be held in-person or virtually. Asylum Officers must achieve a minimum cumulative score of 70% on course exams. Since training is a condition of employment for the Asylum Officer position, not successfully completing the training will be grounds for mandatory removal from the position. In circumstances where someone does not successfully complete the training, this will result in either reassignment to a different position, demotion, or separation from the position by appropriate procedures.").

IV. CONCLUSION

For the foregoing reasons, we urge the DHS to withdraw the NPRM.

We appreciate the opportunity to submit this comment on the Rule. Should you have any questions, please contact Matthew Joseph at josephmatt@uclawsf.edu.

Sincerely,

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/s/
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