

# IMMIGRATION JUSTICE CAMPAIGN

---



## **Employment Authorization for People Formerly in MPP:**

### **Practice Advisory**<sup>1</sup>

#### **I. What it Means to have an EAD**

Certain asylum applicants may be eligible to apply for an employment authorization document (“EAD”). EADs, commonly referred to as work permits, are official U.S. government documents issued by U.S. Citizenship and Immigration Services (USCIS) that provide temporary employment authorization to noncitizens in the United States. To request an EAD, qualifying asylum applicants may file Form I-765, Application for Employment Authorization, along with required supporting documents, with USCIS.

This practice advisory will discuss when asylum seekers now in the U.S., who were formerly subjected to the Migrant Protection Protocols (“MPP”), popularly known as the “remain in Mexico” policy, are eligible to seek employment authorization, as well as details on how to file.<sup>2</sup>

#### **II. Eligibility**

EAD eligibility rules are found in the regulations at 8 CFR § 274a.12. There are two main categories for EAD eligibility for asylum seekers formerly in MPP. These two categories are found at 8 CFR §274a.12(c)(8), which is for certain people with asylum applications pending, and 8 CFR § 274a.12(c)(11), for certain people who have been allowed into the U.S. in a status known as “parole.” In this Practice Advisory, we will lay out the eligibility requirements, and the filing and documentation requirements for both of these categories, as well as practice pointers and filing considerations.

---

<sup>1</sup> The Justice Campaign is grateful to Kids In Need of Defense, the Immigrant Justice Corp, Immigrant Advocates Response Collaborative, and Taylor Levy Law for their important contributions to this Practice Advisory.

<sup>2</sup> This advisory is written for attorneys working with asylum applicants who postmark their I-765s on or after 8/25/2020. If you are working with a client who postmarked their I-765 before 8/25/20, do not rely on this advisory unless you do additional research.

## A. *Asylum Pending—Category (c)(8)*

### 1. General Eligibility Rule

Asylum applicants may be eligible to file for employment authorization under category (c)(8) on the I-765, Application for Employment Authorization form. Prior to August 25, 2020, asylum applicants were permitted to file I-765s with USCIS 150 days after their asylum applications were deemed “pending,” minus any delays attributed to the asylum applicants. USCIS was required to adjudicate the initial work permit applications within 30 days of receiving them. Thus, asylum applicants could receive employment authorization documents (“EADs”) 180 days after their I-589s were pending. The Trump administration changed these rules by promulgating new, much harsher regulations. These Trump-era work permit regulations remain in place as of the date this practice advisory was published but have been enjoined in part by federal litigation as detailed below.

Under the current regulations, asylum applicants are eligible to apply for employment authorization only after their I-589 applications have been pending for 365 days. 8 C.F.R. § 208.7(a)(1)(ii). If your client’s case is before the immigration court, their application is considered “pending” beginning on the date that the I-589 was filed with the immigration court.

However, even if an asylum applicant’s I-589 has been pending for 365 or more days, they may not be eligible to obtain a work permit if USCIS determines that there is an outstanding, unresolved “applicant-caused delay” at the time the I-765 was filed.<sup>3</sup> If there is such a delay, the work permit application will be denied. The following are examples of “applicant-caused delay” in immigration court:

- Requesting to amend or supplement an asylum application that causes a delay in proceedings;
- Failure to appear for scheduled biometrics collection on the asylum application; and
- Failures to comply with any other request needed to determine asylum eligibility.
- Requesting a continuance to find an attorney;
- Declining an expedited hearing in immigration court;
- Requesting a change of venue.

In addition to changing the timing for asylum applicants to submit I-765s, the Trump administration also eliminated the requirement that USCIS process initial work permit applications for asylum applicants within 30-days.

### 2. Membership in CASA and ASAP and Eligibility to File I-765 after 150 Days

The Asylum Seeker Advocacy Project (ASAP), CASA de Maryland, and several additional organizations filed a [lawsuit](#) challenging the new work permit regulations in federal court. The case, *CASA v. Wolf*, is currently pending in the Southern District of Maryland. On September 11, 2020, Judge Paula Xinis issued a [preliminary injunction](#) in the *CASA* case, barring the

---

<sup>3</sup> This new process replaces the former “asylum work clock” tracking system.

government from enforcing parts of the new work restrictions on members of the plaintiff organizations, including ASAP and CASA. Critically, members of ASAP and CASA may apply for a work permit 150 days after filing an I-589, *even if they join ASAP or CASA after the September 11, 2020 injunction*, so long as their membership is current at the time the I-765 is filed. They are eligible for a work permit 180 days after their I-589s are filed.<sup>4</sup>

❖ **Practice Pointer:** If your client is not eligible for a work permit as a parolee (see section II.B below) and has not yet reached the 365-day mark to file their I-765 under category (c)(8), joining CASA or ASAP will enable your client to benefit from the preliminary injunction.

### **How to Join ASAP and CASA:**

**ASAP** is a non-profit organization that welcomes new members who: (1) have sought or are seeking asylum in the United States, (2) are 14 years old or older, and (3) believe in ASAP's mission. ASAP does not currently charge a membership fee. For additional information about ASAP and instructions on how to become a member of ASAP, please click [here](#).

Additionally, ASAP has created a new website to provide updates and information to people formerly in MPP, [ayudainfo.org](http://ayudainfo.org). Migrants entering the U.S. as former MPP enrollees are being given a postcard with information about this website. The website encourages users to join ASAP to receive updates and information.<sup>5</sup> Your client may have already joined. You can check their ASAP membership status [here](#).

**CASA de Maryland** is an advocacy organization for immigrants. Members are currently charged a \$35.00 annual fee. For additional information on CASA and instructions on how to become a member, please click [here](#).

In addition to having the right to apply for a work permit 150 days after filing an asylum application and becoming eligible after 180 days, ASAP and CASA members have these additional rights under the *CASA v. Wolf* preliminary injunction:

- Their I-765 applications should be processed within 30 days;
- They may apply for an EAD even if they have filed an asylum application more than a year after arriving in the United States;
- They do not need to pay the \$85 biometrics fee other asylum applicants are required to pay with their Form I-765;
- They will not be subject to a discretionary denial of their I-765 application.

***\*Please note that ASAP and CASA members are still subject to the restrictions discussed below with regard to asylum applicants who entered without inspection and those with certain criminal histories. However, ASAP and CASA members are not subject to the one-year filing deadline EAD bar.***

---

<sup>4</sup> EAD applications for CASA and ASAP members will still be automatically denied if an unresolved “applicant caused delay” exists at the time that the I-765 is filed or occurs before the 180 day eligibility date is reached. However, they too are not subject to the former “asylum work clock” system.

<sup>5</sup> Your client may already be a member of ASAP. To check their membership status with ASAP, click [here](#).

### 3. Asylum Seekers Excluded from Obtaining Work Permits

The August 2020 work permit regulations bar certain categories of asylum applicants from obtaining work permits based on their pending I-589 applications. These groups include the following asylum seekers:

- *Asylum Seekers Who Entered Without Inspection (EWI)*
  - Asylum seekers who enter or attempt to enter the US without inspection on or after August 25, 2020 are barred from eligibility for work permits under category (c)(8). This rule does not apply if an asylum seeker can demonstrate they (1) presented themselves without delay to DHS no later than 48 hours after the entry or attempted entry; (2) indicated to DHS an intention to apply for asylum or expressed a fear of persecution or torture; and (3) otherwise had “good cause” for having entered, or having attempted to enter, without inspection. The rule does not define what constitutes good cause.<sup>6</sup>
- *Asylum Seekers Past the One-Year Filing Deadline (except ASAP and CASA members)*
  - Asylum applicants are generally required to file their asylum application within one year of their last entry into the U.S. 8 CFR 208.4(a)(2). The regulations provide a number of exceptions to the one-year filing deadline, and until these new EAD regulations, the one year filing deadline had no bearing on asylum-pending EADs. Now, however, applicants who postmark or file their I-589s on or after August 25, 2020 and past the one-year filing deadline are ineligible for a work permit unless and until the Immigration Judge determines that they meet an exception for late filing OR the applicant was an unaccompanied child on the date the I-589 was first filed. In effect this means that the majority of applicants who file past the one-year filing deadline will not receive an asylum pending (c)(8) EAD, because the Immigration Judge will not rule on the filing deadline question until the applicant’s individual hearing on the merits of the asylum claim.
- *Asylum Applicants with Certain Criminal Histories*
  - Applicants convicted of an “aggravated felony” in the US or abroad are ineligible
  - Applicants convicted on or after August 25, 2020 of a “particularly serious crime” are ineligible
  - If there are serious reasons to believe the applicant committed a serious, non-political crime outside of the US on or after August 25, 2020, they will be barred.

“Aggravated felony” is an immigration law term that describes a wide category of criminal convictions under state and federal law. It is very important to be aware that crimes that may not be classified as an “aggravated felony” under state or federal law (and may in fact be classified as misdemeanors under the applicable law) fall under the immigration law heading of

---

<sup>6</sup> Please note that asylum applicants who were placed in MPP proceedings may have tried to enter without inspection afterwards to flee dangerous conditions in Mexico. It will be important for these individuals to consider ASAP or CASA membership in order to avoid the EAD bar against entering EWI.

“aggravated felony.” If your client was convicted of a crime, it will be extremely important to obtain your client’s criminal records and analyze any convictions to see if they are classified under immigration law as an “aggravated felony.” If you are not experienced with criminal immigration issues, it will be important to consult an experienced mentor.

“Particularly serious crime” similarly has a specific definition in immigration law, and the same analysis will be needed for any convictions.

## ***B. 212(d)(5) Parole, Category (c)(11)***

### ***1. Eligibility***

Not all those who enter through the MPP program will be immediately eligible for an asylum-pending EAD, either because they have not yet filed an asylum application, or because their asylum application has not been pending for long enough. Others may be barred from an asylum pending EAD because of criminal convictions, or one or more of the other bars outlined above. For those who are not eligible (or not yet eligible) in for an EAD in the asylum pending category, there is another EAD category under which they may apply: parole.

“Parole” is a temporary immigration status that DHS can give people either at the border or when ICE releases them from detention. The statutory authority for this type of parole is found at INA 212(d)(5), which says “The Attorney General may...in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.”

People entering the U.S. from the MPP program should be given 212(d)(5) parole when they enter the U.S. Your client’s electronic I-94 record should indicate that your client was paroled into the U.S. under INA Sec. 212(d)(5). You can retrieve a copy of your client’s electronic I-94 [here](#).<sup>7</sup> If your client was paroled into the US, the “class of admission” on the I-94 will be listed as “D-T.”<sup>8</sup> See Appendix 1 for Sample I-94 from an asylum applicant formerly in MPP.

People granted this type of parole are eligible for work authorization under category c (11). The relevant text in the regulations (8 CFR 274a.12(c)(11)) provides that:

“Except as provided in paragraphs (b)(37) and (c)(34) of this section, [8 CFR 212.19\(h\)\(4\)](#), and except for aliens paroled from custody after having established a credible fear or reasonable fear of persecution or torture under [8 CFR 208.30](#), an alien paroled into the [United States](#) temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the [Act](#).”

The first exceptions--paragraphs b(37) and c(34)--relate to immigrant entrepreneurs, and are not relevant in this context. As to the second exception, anyone paroled from ICE custody following

---

<sup>7</sup> Instructions on accessing the I-94 can be found in English [here](#) and in Spanish [here](#).

<sup>8</sup> Several other admissions codes also refer to parole, including “CH.” If you are unsure whether your client was paroled into the United States, please consult a mentor.

a positive credible or reasonable fear interview is not eligible for a parole EAD -- but it is important to note that people enrolled in MPP were NOT given credible or reasonable fear interviews. Therefore, anyone paroled into the U.S. through MPP *should* be eligible for a parole-based EAD.

## 2. Special Considerations

There are several downsides to applying for an EAD in this category. First, applicants must pay a fee of \$495. Second, USCIS is currently taking a long time to process and adjudicate these applications. As section II.A.2. above explains, first-time asylum pending applicants who are CASA or ASAP members should have their EAD applications processed within 30 days. This is not the case for asylum applicants who apply under the parole category. Third, a parole-based EAD is only granted until the date of the parole's expiration, while an asylum-based EAD is granted for two years. While asylum-based EAD's have automatic employment authorization extensions for timely-filed renewals, ICE is usually unwilling to renew parole documents provided at the border. Without an extension of the parole status, an asylum seeker will be not eligible for extensions of a parole-based EAD.

That said, for those not eligible at all for an asylum pending EAD, the parole category will be the only way to obtain an EAD unless and until the applicant is granted long-term immigration relief such as asylum. For applicants who have asylum applications pending, you and your client will want to evaluate whether it is worth applying in the parole category. If for example your client has two months until she is eligible for an asylum-pending EAD, it might make sense to wait for that.

- ❖ **Practice Pointer:** If your client is currently eligible for a work permit under (c)(11) as a parolee but has not reached the 365-day mark to apply under category (c)(8), they may want to apply for an EAD under (c)(11) first. Then, when their (c)(11) permit expires, they can apply under (c)(8).

## III. How to Apply

### A. *Form I-765: Application for Employment Authorization*

To obtain employment authorization, an asylum application must file a signed [Form I-765](#), Application for Employment Authorization, and supporting documents with USCIS. If you are an attorney representing a client in their I-765 application, you must file a [G-28](#) (Notice of Entry of Appearance as an Attorney) along with the I-765.

The [instructions](#) for Form I-765 are lengthy and complicated. We have distilled some of the most important pieces of information below. However, it is crucial that you also consult the I-765 instructions at the time of filing your client's I-765 to ensure you have all of the requisite documentation and proper filing address.

The [USCIS web page on the I-765](#) also contains important information about where to file, how to pay the fees, and more. Make sure to carefully review the information on that page before filing.

**B. Required documents<sup>9</sup>**

1. Asylum Pending, (c)(8)

- a. Proof of ASAP or CASA membership (if applicable)—place immediately behind I-765
- Copy of ASAP or CASA membership card OR
  - A letter from ASAP or CASA certifying the asylum applicant’s membership

*Note: Children under 21 may instead submit proof of their parent’s membership along with evidence establishing the parent-child relationship such as a copy of the child’s birth certificate*

- b. Copy of acknowledgement of receipt of your application from the Immigration Court or other evidence that the asylum applicant’s I-589 was filed.

- Some clients may have a date-stamped copy of the first page of the I-589. If so, you will want to send a copy of that page, along with the hearing notice for their next hearing.
- If your client does not have a date stamped copy of their I-589 your options include (1) calling the immigration court administrator to ask if they can send a copy of the date stamped I-589 to you; (2) mailing the court administrator a request for a date stamped I-589 with a self-addressed, stamped envelope; (3) requesting to review the client’s file (known as the record of proceedings or “ROP”) at the immigration court and making a copy of the date-stamped I-589, or (4) filing a Freedom of Information Act Request with EOIR.<sup>10</sup>

- c. A copy of one of the following identity documents:

- A printout of the asylum applicant’s [electronic Form I-94](#) OR
- Asylum applicant’s passport OR
- Asylum applicant’s travel document

- d. Two identical color passport-style photos

---

<sup>9</sup> These are the requirements for asylum applicants at the immigration court level. Applicants who have had their claims denied and have appeals pending before the BIA or Circuit Courts, or who have had their claims remanded to the immigration court, need to submit additional documentation. Please see page 4 of the [I-765 instructions](#) for more details.

<sup>10</sup> If you are not entering your appearance before the Immigration Court, some of these strategies may be harder. You may need to call the Court with the client on the phone or help the client prepare a *pro se* FOIA request instead.



- e. \$85 biometric service fee or fee waiver form<sup>11</sup>
- f. Documentation relating to arrests, convictions, and criminal charges (if applicable)<sup>12</sup>

\*If the asylum applicant has any criminal history in the United States and you are not an experienced immigration practitioner, we recommend that you consult with a mentor.<sup>13</sup>

- ***Evidence of arrests and convictions***
  - If the asylum applicant was EVER arrested or detained by a law enforcement officer for *any reason in any country*, they must submit an original or certified copy of the complete arrest report and an official statement by the arresting authority or an applicable court order that indicates the final disposition of the arrest or detention.
- ***Evidence of criminal charges***
  - If the asylum seeker was ever charged for *any reason in any country*, they need to provide (1) an original or certified copy of the complete arrest report, (2) certified copies of the indictment information, or other formal charging document, and (3) the final disposition of each charge.
- ***Evidence Relating to Alternative Sentencing or Rehab Programs***
  - If the asylum seeker was ever convicted or placed in an alternative sentencing or rehab program (i.e. drug treatment, community service, etc.) in *any country*, they need to provide: (1) an original or certified copy of the arrest report, (2) certified copies of the formal charging document; any plea agreement; and the final disposition for each incident, and (3) an original or certified copy of the probation or parole record showing that the asylum applicant completed the mandated sentence or program.
- ***Vacated, Sealed, Expunged or Removed Arrests and Convictions***
  - Asylum applicants who have had arrests or convictions vacated, set aside, sealed, expunged, or otherwise removed from their records need to provide (1) a certified or original copy of the complete arrest report, formal charging document, any plea agreement, and the final disposition of the incident and (2)

---

<sup>11</sup> ASAP and CASA members do not need to pay the biometrics fee or attend a biometrics appointment. If the asylum applicant is not an ASAP or CASA member, the fee can be paid as a check or money order payable to U.S. Department of Homeland Security. Non-ASAP and CASA members will be scheduled for a biometric service appointment, which they must attend.

<sup>12</sup> Documentation relating to traffic incidents where there was no physical arrest and the fine was less than \$500 does not need to be submitted unless the incident resulted in criminal charges or involved alcohol, drugs, or injury to a person or property.

<sup>13</sup> Figuring out whether you need to submit documents relating to criminal history can be tricky. ASAP and CASA members are not subject to discretionary denials of EAD applications. They are, however, barred from obtaining an EAD if the crime is considered an aggravated felony or particularly serious crime.



a certified copy of the court order removing the arrest or conviction from the asylum applicant's record.

If the above evidence cannot be obtained, asylum applicants should submit (1) an explanation explaining why the evidence is not available, (2) secondary evidence showing the disposition of the case, or (3) one or more written statements by someone who has personal knowledge of the disposition.

❖ **Practice Pointer:** If your client was arrested, detained, or charged with a crime in their home country, your client may not have any documents relating to this, and it may not be safe for their family members or friends back home to obtain this documentation. In fact, their arrest, detention, and criminal charges may be a reason they are seeking asylum in the United States. You should explain this on the I-765 form.

Note as well that if your client was arrested, charged and/or convicted for reasons connected to her request for asylum, it will be very important to ensure that any response on the I-765 to this question is consistent with what your client wrote in the pending I-589 asylum application she submitted to the Immigration Court. If you are not an experienced immigration practitioner, it will be important to consult with an experienced practitioner if your client is in this situation.

2. Parole, (c)(11)

a. A copy of one of the following identity documents showing that the asylum applicant was paroled into the United States pursuant to INA 212(d)(5):

- A printout of the asylum applicant's [electronic Form I-94](#) OR
- Asylum applicant's passport OR
- Asylum applicant's travel document

The I-94 is a document that DHS issues to noncitizens it allows to enter the U.S.; it contains a person's name, the date of entry, and the immigration category in which the person is being allowed to enter the U.S., as well as the date that immigration status will expire. For asylum seekers entering from MPP, the I-94 should indicate that they are being allowed to enter as 212(d)(5) parolees.

❖ **Practice Pointer:** The EAD will only last the length of the asylum applicant's parole period, if they file under the (c)(11) category. If the end of the client's parole period is approaching, you should discuss with them whether it is worthwhile to apply for an EAD given the cost and risk that they will not have enough time to actually receive the EAD and/or find employment.

b. Two identical color passport-style photos

c. \$410 filing fee plus \$85 biometric service fee (please note that the asylum applicant will be scheduled for a biometric service appointment which they must attend)<sup>14</sup>

Applicants may pay these fees by money order, personal check, or cashier's check. Checks and money orders must be made out to "U.S. Department of Homeland Security."

d. Fee Waiver (optional). If your client is not able to pay the fees she may be able to request a fee waiver. To be eligible for a fee waiver, an applicant must provide evidence that:

- The applicant, her or his spouse, or the head of household living with the applicant, currently receives a means-tested public benefit;  
OR
- The applicant's household income is at or below 150 percent of the current Federal Poverty Guidelines at the time of filing;  
OR
- The applicant is currently experiencing financial hardship that prevents the applicant from paying the filing fee; this includes unexpected medical bills or emergencies.

\*Note that for each of these fee waiver categories, the applicant will have to provide specific supporting documentation. See [this page](#) on the USCIS website for detailed information about what documentation is needed and how to file a fee waiver request. This includes filing a [form I-912](#) and required supporting documents.

❖ **Practice Pointer:** Submitting a few waiver will likely delay adjudication of the I-765. If the fee waiver is denied, the entire application will be returned and will need to be re-submitted. As a result, many asylum applicants choose to just pay the EAD filing fee when at all possible.

#### **IV. Filing the Application**

Both you and your client must sign the I-765 application form. If an interpreter assisted, the interpreter will also need to sign. Each person must sign his or her own name (in other words, you cannot sign the form you on your client's behalf), but the signature on the form does not have to be original. USCIS explains [here](#) exactly what types of signatures it will and will not accept.

You will file the application with USCIS. Check [here](#) for an updated list of filing addresses for all the different EAD categories. Make sure to send the application using a method that allows you to track delivery of the application.

#### **V. What to Expect After Filing EAD Application**

---

<sup>14</sup> The payment can be made as a check or money order payable to U.S. Department of Homeland Security.

### ***A. EAD adjudication overall***

USCIS adjudicates EAD applications at several “Service Centers” around the country. USCIS officers adjudicate the applications. Within several weeks to a month or more after filing an EAD application, both you and the applicant should receive a Notice of Receipt from the USCIS Service Center that is processing the case. The Notice of Receipt will indicate that your client filed an I-765 application and the date it was received at the Service Center. Following the Notice of Receipt, you may receive either a Request for Evidence (RFE) requesting further documents; a denial of the application; or your client’s EAD card if the application is approved.

### ***B. Issues to watch out for***

#### **1. Receipt delays**

When an applicant sends an EAD application to USCIS, USCIS should soon thereafter issue a Notice of Receipt. Especially since the start of the pandemic, this process has slowed to a crawl at some service centers, and numerous advocates have experienced months-long delays in receiving Notices of Receipt from USCIS Service Centers.

#### **2. Requests for Evidence (RFEs)**

At some point after the Notice of Receipt is issued, a USCIS adjudications officer will review the case and either make a decision or request further evidence in order to make the decision. If that officer believes that one or more pieces of required evidence is missing from the file, he or she may issue a Request for Evidence, known as an RFE. An RFE should contain a list of the documents the adjudicator believes is missing. The RFE will also have a deadline for responding to it.

It is not uncommon to receive an RFE for a document that you already sent with the initial application. If this happens, you must still respond to the RFE by the deadline. Best practice is to make another copy of the requested document and include that with your response.

#### **3. Adjudication delays**

Over the past year, applicants and advocates have experienced increasingly long delays in the adjudication of EAD applications. USCIS publishes the current processing times for all case types [here](#). As of early March 2021, it was taking USCIS between 3.5 and 11 months to process EAD applications, including EAD applications for asylum seekers and parolees. This extremely slow processing is one more reason that it is advantageous to join either ASAP or CASA and file for an asylum pending EAD as an ASAP or CASA members. If you are representing an ASAP or CASA member whose initial EAD has not be processed within 30 days, please consult [this](#) practice advisory created by the American Immigration Council and colleague organizations.