



June 7, 2024

Submitted via www.regulations.gov

Chief Charles Nimick
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Re: American Immigration Council Comment on Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants, Docket No. USCIS-2024-0002

Dear Chief Nimick:

The American Immigration Council (Council) submits the following comments in response to the above-referenced U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS) Temporary Final Rule (TFR, or “temporary rule”), Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document (“EAD”) Renewal Applicants, 89 Fed. Reg. 24628 (Apr. 8, 2024).

About the American Immigration Council

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. The Council litigates in the federal courts to protect the statutory, regulatory, and constitutional rights of noncitizens, advocates on behalf of noncitizens before Congress, and has a direct interest in ensuring that those seeking protection in the United States have a meaningful opportunity to do so.

The Council believes that immigrants are crucial in supporting a vital and globally-competitive economy. To this end, we anchor several business-focused networks and coalitions that see immigration as an economic growth strategy. This includes the Global Talent Chamber Network,¹ which comprises more than 85 chambers of commerce from across the country, as

¹ *American Immigration Council*, Global Talent Chamber Network, accessed June 2, 2024, <https://www.americanimmigrationcouncil.org/state-local-initiatives/global-talent-chamber-network>.

well as Colorado Business Coalition for Immigration Solutions,² Ohio Business for Immigration Solutions,³ and Texans for Economic Growth,⁴ which collectively include nearly 300 businesses, trade associations, chambers of commerce, and economic development groups that value immigrants' contributions to our economy while advocating for common-sense immigration reforms.

I. The Council supports this temporary final rule, which provides much needed certainty and relief to immigrant workers and their employers.

The U.S. finds itself grappling with chronic labor shortages. According to the Bureau of Labor Statistics' most recent reports, nearly 2 million jobs would go unfilled even if all unemployed Americans were able to accept a job.⁵ The percentage of people participating in the labor force is expected to decline largely due to the aging of the American population.⁶ However, in February of this year, the Congressional Budget Office modified its annual projections for the U.S. deficit due to increased levels of migration into the U.S. in recent years.⁷ Specifically, it estimated that the labor force in 2033 will be larger by 5.2 million people, mostly because of higher net immigration.⁸ As a result, between 2023 and 2034, U.S. GDP will be greater by about \$7 trillion and revenues will be greater by about \$1 trillion than they would have been otherwise.⁹

Given the particularly crucial role that immigration plays in our economy, the Council believes that DHS and its subagency, USCIS, should implement administrative policies that provide relief from burdensome work permit-related processes on businesses, while removing barriers for noncitizens who have already been authorized to work by USCIS. For this reason, the Council submits this comment in support of this TFR and applauds the agency's efforts to prevent any lapses in employment for nearly 800,000 workers covered by this rule.¹⁰ In addition, the Council believes that this temporary rule should be made permanent to remove any uncertainty placed on employers and immigrant workers due to USCIS' ongoing processing backlogs. We also take this opportunity to provide additional solutions that could mitigate the risk to workers of expiring employment authorization.

² *Colorado Compact on Immigration*, Coalition, accessed June 2, 2024, <https://www.cocompact.org/coalition>.

³ *Ohio Business for Immigration Solutions*, Coalition, accessed June 2, 2024, <https://www.ohcompact.org/coalition>.

⁴ *Texans for Economic Growth*, About, accessed June 2, 2024, <https://www.txcompact.org/>.

⁵ See *U.S. Bureau of Labor Statistics*, Job Openings and Labor Turnover Summary, May 1, 2024, <https://www.bls.gov/news.release/jolts.nr0.htm>, <https://www.bls.gov/news.release/empsit.nr0.htm>; and *U.S. Bureau of Labor Statistics*, Employment Situation Summary, May 3, 2024, <https://www.bls.gov/news.release/empsit.nr0.htm>.

⁶ *American Immigration Council*, "Amid Rising Inflation, Immigrant Workers Help Ease Labor Shortages," May 2, 2022, <https://data.americanimmigrationcouncil.org/en/labor-market-forecast-2022/>.

⁷ *Congressional Budget Office*, "The Budget and Economic Outlook: 2024 to 2034," Chapter 2: Economic Outlook, Feb. 2024, https://www.cbo.gov/publication/59946#_idTextAnchor095.

⁸ *Congressional Budget Office*, "Director's Statement on the Budget and Economic Outlook for 2024 to 2034," Feb. 7, 2024, <https://www.cbo.gov/publication/59933>.

⁹ *Id.*

¹⁰ See Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants (hereinafter "Temporary Final Rule"), 89 Fed. Reg. 24628, 24634 (Apr. 8, 2024).

II. USCIS should permanently lengthen the period of the automatic extension for work authorization to 540 days (or longer) for eligible renewal EAD applicants.

While USCIS has made progress in addressing its overall processing backlogs, it continues to receive a high number of filings, including setting a record of 10.9 million in fiscal year (FY) 2023.¹¹ As noted in the preamble to the TFR, USCIS has been unable to keep pace with the timely processing of EAD applications.¹² The agency also expects EAD application filings to increase from 3.49 million in FY 2023 to 4.6 million in FY 2024.¹³ DHS has not proposed that USCIS will be able to fully address the work permit backlogs anytime soon and thus, should make a longer automatic EAD extension permanent. While USCIS has increased the validity period from two years to five years for certain initial and renewal EADs since September 2023, that longer validity period is limited to six categories of noncitizens.¹⁴ A permanent extension of this rule would provide DHS the opportunity to shift resources elsewhere, as needed, as it continues to chip away at its overall processing backlogs.

In addition, permanently lengthening the period of the automatic extension to 540 days would eliminate unnecessary uncertainty for noncitizen workers, including their families and communities. A permanent extension will give them long-term predictability, and mitigates potential lapses in work authorization after the temporary extension expires. Practically speaking, this helps alleviate anxiety and worry that workers face when they have to contend with the possibility of losing their jobs in the coming years because of USCIS' work permit renewal processing delays. In addition, many states issue other licenses based on the validity periods of noncitizens' EADs, including drivers' and professional licenses which are vital to work.

Similarly, employers benefit from the stability and clarity that a permanent change to the automatic extension would provide. Since 2021, employers across the country have dealt with the stress of employing individuals whose work authorization was on the verge of lapsing. In some cases, employers lost critical workers due to lapsing work authorizations. By making the extension 540 days (or longer) permanent, the business community would know that their employees will be less likely to lose work authorization due to processing backlogs. Furthermore, permanently extending the 540-day (or longer) automatic renewal period would be less confusing for employers who must not only track different methods a person can prove their authorization to work,¹⁵ but whether a person received a 540-day or 180-day work permit extension, which includes reviewing the dates of filing and the category of employment.

¹¹ *U.S. Citizenship and Immigration Services*, "Completing an Unprecedented 10 Million Immigration Cases in Fiscal Year 2023, USCIS Reduced Its Backlog for the First Time in Over a Decade," Feb. 9, 2024, <https://www.uscis.gov/EOY2023> (compared to the more typical levels of 9 million filings in FY 2022 and FY 2021).

¹² Temporary Final Rule, 89 Fed. Reg. at 24639.

¹³ *Id.* at 24639 fn. 121. In FY 2023, the agency received 50% more EAD requests than in FY 2022, including a 77% increase in initial work permit applications.

¹⁴ *U.S. Citizenship and Immigration Services*, "Some EADs Can be Valid for up to 5 Years," <https://www.uscis.gov/save/whats-new/some-eads-can-be-valid-for-up-to-5-years-0> (last updated Nov. 16, 2023).

¹⁵ See *U.S. Citizenship and Immigration Services*, "Handbook for Employers M-274," Section 4.0: Completing Section 2: Employer Review and Verification, Table 1: Special Form I-9 Instructions (listing special situations where a noncitizen worker can provide an expired EAD in combination with other documents, including a Federal Register Notice, a regulation, a receipt notice, a website notice, or an individual letter to prove their continued eligibility to work), accessed June 2, 2024, <https://www.uscis.gov/book/export/html/59502>.

III. USCIS should expand the extension period to 730 days to provide a clearer timeline for employers and to ensure noncitizen workers do not fall out of the workforce.

The Council urges USCIS to lengthen the automatic work permit extension to 730 days for all eligible applicants. This includes lengthening the work permit extension to 730 days for individuals who previously received a 540-day extension under the 2022 TFR. We believe that this validity period is less confusing for employers as it tracks with a 2-year extension period. This would create clearer guidance for employers and individuals. While USCIS noted that a longer period could cause “confusion and potential mistakes in employer verification” in the TFR’s preamble,¹⁶ we believe that a retroactive application and a permanent extension at a 730-day interval could provide more clarity for employers moving forward.

In addition, this would protect all workers who are currently estimated to fall out of the workforce due to USCIS’ processing delays. USCIS estimates that despite the TFR’s 540-day extension, about 260,000 renewal EAD applicants are still at risk of losing their work authorization.¹⁷ As previously mentioned, EADs not only affect workers’ jobs, but could impact their ability to drive and engage in professionally licensed work.

Importantly, given the importance of noncitizen workers to the success of many industries, including construction, medicine, technology, and trucking, the Council believes that a longer extension will minimize disruption to industries already struggling with labor shortages while ensuring that all workers impacted by USCIS’ processing delays are protected from experiencing gaps in their employment.

IV. USCIS should provide additional solutions that could mitigate the risk to workers of expiring employment authorization.

A. USCIS should provide a standardized notice demonstrating an automatic EAD extension, including issuing these notices to individuals covered by this temporary final rule.

Despite USCIS’ efforts to provide guidance to employers about the different methods noncitizen workers with expired EADs may prove their continued authorization to work,¹⁸ the Council has heard directly from workers that are fired because employers do not accept copies of the Federal Register notice or other documentation in combination with an expired EAD.¹⁹ While it’s difficult to quantify the pervasiveness of this issue, it exists largely because of employers’

¹⁶ Temporary Final Rule, 89 Fed. Reg. at 24674.

¹⁷ *Id.*

¹⁸ See *U.S. Citizenship and Immigration Services*, “Handbook for Employers M-274,” Section 4.0: Completing Section 2: Employer Review and Verification, Table 1: Special Form I-9 Instructions, accessed June 2, 2024, <https://www.uscis.gov/book/export/html/59502>.

¹⁹ See also Asylum Seeker Advocacy Project, Comment to the Temporary Final Rule: Temporary Increase of the Automatic Extension Period of Employment Authorization, DHS Docket No. USCIS-2022-0002, July 1, 2022, pgs. 7-9, <https://www.asylumadvocacy.org/wp-content/uploads/2022/07/ASAP-Comment-on-TFR-re-EAD-540-day-Auto-Ex-extension> (including testimony from ASAP’s members who were terminated due to their employers’ requests for a receipt notice showing that their EADs had been extended).

confusion about the types of documents they may accept for the employment verification process. In addition, as mentioned previously, many states provide benefits based on EADs and state Departments of Motor Vehicles have refused to accept an expired EAD without a USCIS notice that explicitly confirms that the EAD remains valid during the extension period.

A standardized notice, including the name of the applicant, a date of issuance, and language explaining their continued authorization to work during the extended period of time, if presented with an expired EAD, could provide more clarity for employers. USCIS should also automatically re-issue either these standardized notices, or Form I-765 renewal receipt notices with the relevant language, for every applicant eligible for an automatic extension that clearly indicates that their employment authorization has been extended consistent with the regulatory extension.

B. USCIS should create mechanisms to help workers stuck in processing backlogs who do not benefit from the work permit extension, including DACA recipients.

Not all workers will benefit from this current work permit extension. For example, DACA recipients are not included in this rule or in the permanent 180-day automatic extension regulation.²⁰ While USCIS had made progress in decreasing its processing backlog of DACA renewal applications, recently the backlog has increased once again.²¹ There are about 554,000 DACA recipients impacted nationwide.²²

Individuals who apply for a work permit renewal after their work authorization has expired are also not included in the 180-day automatic extension regulation or the TFR. Excluding these individuals leaves thousands in limbo and causes employers to lose valued employees. These individuals are unfairly punished and are unable to receive the automatic extension often because they had to refile after their renewal application was rejected due to erroneous USCIS instructions or despite noncitizens' having reasonable explanations for the delay.²³ Nevertheless, the end result is the same—employers go without valuable workers.

We believe USCIS should take steps to prioritize processing work permit applications for these populations to minimize the impact on businesses. This could include investing in new technology that allows USCIS to sort and assign EAD applications based on the expiration date of the EAD. While USCIS states that “it is currently not possible” to assign cases in this manner, the agency estimates that it could add this feature within about a year’s time.²⁴ The Council believes that investment in this technology could provide USCIS a valuable tool to mitigate the risk of noncitizens losing their work authorization. This could include a process for workers to

²⁰ See 8 C.F.R. 274a.13(d)(1).

²¹ See Letter to U.S. Citizenship and Immigration Services, Apr. 1, 2024, https://drive.google.com/file/d/1VYIA0yIe8qvd3-HpCbqX_v1grkiwAKMq/view.

²² *Id.*

²³ See Asylum Seeker Advocacy Project, Comment to the Temporary Final Rule: Temporary Increase of the Automatic Extension Period of Employment Authorization, DHS Docket No. USCIS-2022-0002, July 1, 2022, pgs. 9-12, <https://www.asylumadvocacy.org/wp-content/uploads/2022/07/ASAP-Comment-on-TFR-re-EAD-540-day-Auto-Ex-tension>.

²⁴ 89 Fed. Reg. at 24643.

identify themselves to USCIS if they have a work permit that will expire in less than 60 days or expired in the last 60 days if they were unable to timely file their EAD renewal request.

Employers would greatly benefit from this mechanism and new technology. If USCIS implements these systems, fewer employees will lose their work authorization due to processing delays, which reduces disruptions to the labor force. Businesses who employ applicants ineligible for the work permit extension would especially benefit from new systems that allow workers to stay on the job without interruption.

C. USCIS should extend the validity period for C08 EADs throughout the pendency of an applicant's asylum case, including administrative appeals and judicial review.

USCIS has the discretion to assign the validity period for EADs issued to noncitizens with a pending asylum application.²⁵ The agency also states that it expects to continue to receive historic levels of affirmative asylum applications due to “economic and political instability around the world [that] has been fueling high levels of global migration, including in the Western Hemisphere.”²⁶ Last year, the CIS Ombudsman estimated that “affirmative asylum processing times are likely now approaching a decade”.²⁷ Since that report was issued, the number of pending asylum applications has grown by nearly 43%.²⁸

While USCIS has extended the validity period for EADs based on a pending asylum application to 5 years,²⁹ it's clear that a 5 year period is simply not enough. To ensure that asylum applicants do not have gaps in employment authorization, and to reduce the financial burden imposed by renewal fees and the administrative burden on USCIS to process renewal applications, the Council proposes that USCIS align the validity periods for EADs based on affirmatively filed asylum applications during the pendency of the case with USCIS, including periods in administrative appeal and judicial review.

Alternatively, USCIS could streamline the processing of these EAD renewals in a manner similar to its recently announced process for eligible refugees after they are admitted into the United

²⁵ See 8 CFR 274a.12(a) (“USCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an alien's authorization to work in the United States.”); and 8 CFR 274a.12(c) (“USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.”).

²⁶ USCIS notes that it received more than 240,600 affirmative asylum applications in FY 2022 and more than 454,300 affirmative asylum applications in FY 2023. See 89 Fed. Reg. at 24638. Asylum processing backlogs have grown, which have resulted in an increase in C08 (asylum applicant-based) renewal applications. See *id.*

²⁷ *Citizenship and Immigration Services Ombudsman*, “Annual Report 2023,” June 30, 2023, https://www.dhs.gov/sites/default/files/2023-07/2023%20Annual%20Report%20to%20Congress_0.pdf.

²⁸ According to USCIS, in April 2024, there were 1,206,980 asylum applications pending with USCIS. See *U.S. Citizenship and Immigration Services*, “Asylum Division Monthly Statistics Report. Fiscal Year 2024. April 2024,” May 29, 2024,

https://www.uscis.gov/sites/default/files/document/reports/asylumfiscalyear2024todatestats_240430.xlsx. This is compared to 842,000 referenced in the CIS Ombudsman's Annual Report 2023. See *Citizenship and Immigration Services Ombudsman*, “Annual Report 2023,” June 30, 2023,

https://www.dhs.gov/sites/default/files/2023-07/2023%20Annual%20Report%20to%20Congress_0.pdf.

²⁹ See *U.S. Citizenship and Immigration Services*, “Policy Alert: Employment Authorization Document Validity Period for Certain Categories,” Sept. 27, 2023,

<https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230927-EmploymentAuthorizationValidity.pdf>.

States.³⁰ Under this new process, USCIS will digitally create a Form I-765 for arriving refugees and begin adjudicating it as soon as they are admitted into the United States. After USCIS approves a refugee's Form I-765, USCIS will generate the refugee's EAD and mail it to the address of record. Asylum applicants needing to renew their EADs are in a similar situation, where USCIS has already accepted their asylum application and should know through its Electronic Immigration System online system whether the application is still pending. Such a streamlined process should greatly reduce the staff time required to process these EAD renewals.

Conclusion

The Council urges USCIS to permanently extend this temporary final rule and to consider the above-mentioned solutions to minimize the unpredictability that workers and businesses face while the agency addresses its processing backlogs. USCIS has the opportunity to invest in creative solutions to process work permit applications.

For any questions, please reach out to Adriel D. Orozco at aorozco@immcouncil.org.

Sincerely,

THE AMERICAN IMMIGRATION COUNCIL

³⁰ *U.S. Citizenship and Immigration Services*, "USCIS Streamlines Process for Refugee Employment Authorization Documents," Mar. 12, 2024, <https://www.uscis.gov/newsroom/alerts/uscis-streamlines-process-for-refugee-employment-authorization-document>.