



U.S. Department of Justice
Immigration and Naturalization Service

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Office of the General Counsel

425 I Street NW
Washington, DC 20536

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MEMORANDUM FOR STUART ANDERSON
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF POLICY AND PLANNING

FROM: Dea Carpenter /s/
Deputy General Counsel

SUBJECT: Employment Authorization of Aliens Granted Asylum

The Office of the General Counsel has been requested by the Office of Policy and Planning to provide a legal opinion regarding the employment authorization and employment authorization documentation of aliens granted asylum.

ISSUE

Whether an alien granted asylum must apply for and be issued an Employment Authorization Document (EAD, Forms I-766 or I-688B) to be deemed to be authorized for employment in the United States.

SUMMARY CONCLUSION

No. Because an alien granted asylum is employment authorized incident to his or her status, such alien is authorized for employment regardless of whether he or she has applied for or been issued an EAD.

DISCUSSION

Whether an alien granted asylum must apply for and be issued an Employment Authorization Document (EAD, Forms I-766 or I-688B) to be deemed to be authorized for employment in the United States.

The starting point for a discussion on the employment authorization of asylees is the governing statutory provision in the Immigration and Nationality Act (INA). Under section

208(c)(1)(B) of the INA, the Attorney General is required to authorize an asylee "to engage in employment in the United States, and provide the alien with appropriate endorsement of that authorization." Because this statutory provision requires the Attorney General to act in order for an asylee to receive employment authorization, an asylee is not employment authorized by operation of this statutory provision alone.¹

To fulfill his obligation under section 208(c)(1)(B) of the INA, the Attorney General has established processes for granting employment authorization to asylees and issuing an appropriate endorsement of that employment authorization.² The main process is outlined at 8 C.F.R. §§ 274a.12(a)(5) and 274a.13.³ Section 274a.12(a)(5) provides for the granting of employment authorization to asylees and for an endorsement of employment authorization, while section 274a.13 governs the application process for obtaining this employment authorization endorsement.⁴ Section 274a.12(a)(5) provides as follows:

Aliens authorized employment incident to status. Pursuant to the statutory or regulatory reference cited, the following classes of aliens are authorized to be employed in the United States without restrictions as to location or type of employment as a condition of their admission or subsequent change to one of the indicated classes. Any alien who is within a class of aliens described in paragraphs (a)(3) through (a)(8) or (a)(10) through (1)(13) of this section, and who seeks to be employed in the United States,

¹ But see *Hernandez v. Reno*, 91 F.3d 776, 780 (5th Cir. 1997) (Family Unity case). The *Hernandez* case is discussed later in this memorandum.

² On May 14, 2002, the President signed into law the Enhanced Border Security and Visa Entry Reform Act of 2002, which contains a provision pertaining to the Attorney General's obligation to issue evidence of employment authorization to asylees. This provision also applies to arriving refugees. It states:

Not later than 180 days after the date of enactment of this Act, the Attorney General shall ensure that, immediately upon the arrival in the United States of an individual admitted under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157), or immediately upon an alien being granted asylum under section 208 of such Act (8 U.S.C. 1158), the alien will be issued an employment authorization document. Such document shall, at a minimum, contain the fingerprint and photograph of such alien.

Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. Law No. 107-173, § 309 (2002). This provision removes some of the discretion the Attorney General had in section 208(c)(1)(B) of the INA with respect to the timing and contents of the employment authorization documentation issued to asylees. Because the regulations at 274a.12(a) address how the Attorney General will fulfill his statutory obligation to provide an employment authorization endorsement to asylees, this new provision does not invalidate these regulations.

³ For derivative asylees, the process is also described in 8 C.F.R. § 208.21, but with the added option of obtaining a Form I-94, Arrival/Departure Record indicating the alien's status as asylee.

⁴ Note that while 8 C.F.R. § 274a.12(a)(5) appears to refer to employment authorization document generally, 8 C.F.R. § 274a.13(a) clarifies that the document to which 8 C.F.R. § 274a.12(a)(5) is referring is the Employment Authorization Document (EAD). Because the issue in this opinion does not relate to the application process for obtaining evidence of employment authorization, 8 C.F.R. § 274a.13 will not be discussed in this memorandum. The EAD is more than an endorsement of employment authorization. Under 8 C.F.R. § 274a.2(b)(1)(v)(A), the EAD can be used by an asylee to establish both employment authorization and identity to an employer.

must apply to the Service for a document evidencing such employment authorization.

....

(5) An alien granted asylum under section 208 of the Act for the period of time in that status, as evidenced by an employment authorization document issued by the Service.

8 C.F.R. § 274a.12(a)(5) (1987).

By designating asylees as one of the classes of aliens authorized employment "incident to status" and authorizing employment as a condition of admission or change to this alien class, the regulations clearly provide for the automatic employment authorization of asylees at the time they receive their grant of asylum.⁵ This obviates the need to authorize employment on a case-by-case basis while still meeting the requirements of section 208(c)(1)(B) of the INA. Section 208.20(c) of the regulations further provide for employment authorization for derivative asylees (i.e., spouses and children), essentially restating the authorization found at § 274a.12(a)(5).⁶ 8

⁵ The regulations at 8 C.F.R. § 274a.12 list all of the classes of employment authorized aliens. The classes of employment authorized aliens are divided into three categories: those employment authorized incident to status; those employment authorized incident to status for a specific employer; and those who are eligible to request employment authorization from the Immigration and Naturalization Service (INS or Service). Asylees are listed in the first category of employment authorized alien classes.

⁶ The asylum regulations have metamorphosed since asylum reform in the mid-1990s. Prior to 1994, the asylum regulations provided:

When an alien's application for asylum is granted, he is granted asylum status for an indefinite period. Employment authorization is automatically granted or continued for persons granted asylum or withholding of deportation unless the alien is detained pending removal to a third country. Appropriate documentation showing employment authorization shall be provided by the INS.

8 C.F.R. § 208.20.

When 8 C.F.R. § 208.20 was revised in 1994, the language was replaced with a cross-reference to 8 C.F.R. § 274a.12(a)(5) and the requirement to apply to the INS for an EAD. 8 C.F.R. § 208.20 (1994) states: "An alien granted asylum and eligible derivative family members are authorized to be employed in the United States pursuant to §274a.12(a)(5) of this chapter and if intending to be employed, must apply to the INS for a document evidencing such authorization. The INS shall issue such document within 30 days of the receipt of the application therefor." In so doing, the regulations at 8 C.F.R. §§ 208.20 and § 274a.12(a)(5) paralleled each other by addressing the two requirements in section 208(c)(1)(B) of the INA: employment authorization and evidence of employment authorization. The reason given in the proposed rule revising 8 C.F.R. § 208.20 was to clarify that asylees will receive evidence of their employment authorization upon application to the INS, though asylees "will continue to be authorized immediately to be employed," as they had been in the past. *See* 59 Fed. Reg. 14779, 14780, 14783 (March 30, 1994).

In March of 1997, general references to the employment authorization of asylees were removed from 8 C.F.R. § 208. *See* 62 Fed. Reg. 10337, 10344 (March 6, 1997). In a later amendment to 8 C.F.R. § 208, the provision returned, but only with respect to the spouse and children of asylees with approved Forms I-730, Refugee/Asylee Relative Petitions. *See* 63 Fed. Reg. 3792-01, 3796 (Jan. 27, 1998). This particular provision was again amended in 1999, but only to move this section from 8 C.F.R. § 208.19 back to 8 C.F.R. § 208.20. The current regulations at 8 C.F.R. § 208.20(c) state:

Employment will be authorized incident to status. To demonstrate employment authorization, the Service will issue a Form I-94, Arrival-Departure Record, which also

C.F.R. § 208.20 (2000); *Getahun v. OCAHO*, 124 F.3d 591, 594-95 (3d Cir. 1997) (in interpreting the pre-1994 version of 8 C.F.R. § 208.20, stating that "[b]y virtue of the grant of asylum her employment authorization was 'automatically' granted or continued"); *see also Hernandez v. Reno*, 91 F.3d at 780 (Family Unity Program).

As previously noted, while authorizing asylees for employment automatically upon attaining asylee status, 8 C.F.R. § 274a.12(a)(5), in conjunction with 8 C.F.R. § 274a.13, also provides a mechanism for asylees to acquire an employment authorization endorsement that can be used to obtain employment. The mechanism provided by the regulations is the Employment Authorization Document (EAD) application process. 8 C.F.R. § 274a.13(a). Because the resulting documentation contains evidence of employment authorization, this mechanism satisfies the endorsement of employment authorization requirement of section 208(c)(1)(B) of the INA. As explained in the Supplementary Information to the 1994 proposed rule amending the asylum regulations, an asylee, by regulation, is immediately work authorized upon becoming an asylee and will receive evidence of employment authorization "expeditiously," but upon application to the Service. 59 Fed. Reg. at 14780, 14783 (amending 8 C.F.R. § 208.20(c)). Requiring a separate application in order to receive an EAD facilitates the administration of EAD issuance processes given INS' resource constraints, and is a permissible exercise of authority under section 103(a)(3) of the INA. To obtain an EAD, the regulations require asylees seeking to be employed in the United States to utilize this mechanism.

The provision at 8 C.F.R. § 274a.12(a)(5) specifically references the employment authorization documentation mechanism in two instances. Examination of these two instances is necessary to determine the scope of the EAD application requirement. The first instance is the establishment of the EAD application requirement itself. Second, 8 C.F.R. § 274a.12(a)(5) describes asylees as employment authorized, "as evidenced by an employment authorization document issued by the Service." Each of these references will be analyzed in turn.

With respect to the requirement to apply for an EAD, the plain language of this requirement simply directs asylees seeking employment on how they may obtain evidence of their employment authorization: by application rather than automatically upon receiving asylee status. For those seeking employment in the United States, the EAD has been chosen as the ideal document to provide asylees because it contains more than just the employment authorization endorsement required by section 208(c)(1)(B) of the INA; it also contains evidence of identity, the combination of which will enable the asylee to meet the documentation presentation

reflects the derivative's current status as an asylee or the derivative may apply under § 274a.12(a) of this chapter, using Form I-765, Application for Employment Authorization, and a copy of the Form I-797.

This language was added to the regulations in 1998 without explanation. 63 Fed. Reg. 3792-01 (stating generally that the provisions relating to derivative spouses and children of both refugees and asylees were being clarified and made more consistent with each other). It echoes 8 C.F.R. § 274a.12(a)(5) in its statement that these asylees are employment authorized incident to status. However, it also goes further than 8 C.F.R. § 274a.12(a)(5) in that it provides for the automatic issuance of the Form I-94, Arrival/Departure Record, as evidence of employment authorization and status, while also referring to the EAD application process as another option for derivative asylees.

requirements of the employment eligibility verification rules. *See* INA § 274A(b); 8 C.F.R. § 274a.2(b)(1)(A). The EAD is also a document that contains security features that make it tamper-resistant, which is a statutorily required consideration for the document to be acceptable to an employer pursuant to the rules in section 274A of the INA. *See* INA §§ 274A(b)(1)(B)(ii) and 274A(b)(1)(E).

Aside from the EAD provision in 8 C.F.R. § 274a.12(a)(5) for those seeking employment, the INS issues to asylees the Form I-94, Arrival/Departure Record indicating asylee status, which can be used as evidence of employment authorization.⁷ *See* 8 C.F.R. § 208.20(c) (employment authorization of derivative asylees); *see also Procedures Manual*, International Affairs, p.125-6 (Jan. 18, 2000) (providing for the issuance of Form I-94 indicating asylee status in the case of asylum grant by INS). Thus, the application requirement in 8 C.F.R. § 274a.12(a)(5) is only triggered where an asylee seeking to be employed wishes to obtain a document evidencing his or her employment authorization issued by the INS pursuant to 8 C.F.R. § 274a.13(a). The requirement in 8 C.F.R. § 274a.12(a)(5) to file an application for an EAD is a direction for asylees on how to obtain evidence of their employment authorization for obtaining employment in the United States and is not a condition of their employment authorization.

The phrase in 8 C.F.R. § 274a.12(a)(5) that lists asylees as employment authorized, "as evidenced by an employment authorization document issued by the Service," has often been the source of confusion or misunderstanding, and is pointed to as further evidence that an asylee must apply for employment authorization. Two interpretations of this phrase are conceivable.

First, the phrase could be read to mean that an asylee is employment authorized only when in possession of an employment authorization document. After all, section 274a.12(a) of the regulations sets forth the list of classes of aliens with employment authorization incident to status, and the phrase "as evidenced by . . ." is tacked on to the end of each alien class listed. Thus, the phrase could be viewed as a condition of employment authorization.

Second, the phrase could be interpreted as referring to the document of choice that the INS will issue to asylees, rather than a condition of employment authorization. Asylees then would be employment authorized with or without obtaining an EAD. Under this interpretation, the phrase is merely a reference to the EAD application process stated earlier in § 274a.12(a) so that paragraph (a) of § 274a.12 and subparagraph (a)(5) would contain the same two points: employment authorization and evidence of employment authorization.

Given that in paragraph (a) of § 274a.12, asylees are stated as being employment authorized without condition as a result of obtaining their status, espousing the first interpretation would read this language out of the regulations. Therefore, the first interpretation is not an acceptable construction of the provision. Paragraph (a) and subparagraph (a)(5) must be read to

⁷ The Form I-94 is only endorsed with asylee status. Because an asylee is employment authorized incident to status, the asylee status endorsement also functions as an employment authorization endorsement.

give effect to both paragraphs. The second interpretation successfully accomplishes this goal. It is in keeping with the spirit of the statutory and regulatory framework by providing for automatic employment authorization for asylees, and then to provide for how INS will evidence this employment authorization.

This point is made clearer when applying the second interpretation to a class of aliens that is not subject to the EAD process. For example, lawful permanent residents, who are listed in 8 C.F.R. § 274a.12(a) along with asylees as employment authorized incident to status, are issued the Form I-551 by the Service to evidence their employment authorization. The absence of a Form I-551 does not mean that the lawful permanent resident is not employment authorized, for such authorization is one of the direct benefits given to lawful permanent residents upon attaining that status. *See* INA §§ 274A(b)(1)(B) & 274A(h)(3); *see also* *Loa-Herrera v. Trominski*, 231 F.2d 984, 988 (5th Cir. 2000); *Kossov v. Perryman*, 2002 WL 849610 (May 1, 2002). Yet, 8 C.F.R. § 274a.12(a)(1) also joins lawful permanent residents and Form I-551 with the phrase, "as evidenced by." Clearly, the phrase does not place a condition on receiving this benefit of the status.

Under the plain language of the regulations, then, failing to utilize the EAD application process results in nothing more than the asylee being employment authorized without an INS-issued EAD. Despite this plain language reading of the regulations, some statements made by INS would seem to support the first and more restrictive interpretation of the EAD language in 8 C.F.R. § 274a.12(a)(5). These statements, however, are flawed and, therefore, have little, if any, interpretive value. For example, in the Supplementary Information to the 1994 final rule amending 8 C.F.R. § 208.20, the following was expressed:⁸

The proposed amendments to section 208.20 are designed to ensure that asylees receive their EAD promptly upon application. *They do not create new requirements or obstacles for asylees seeking authorization to work. Asylees are among the categories of persons who are eligible for employment incident to their status but must nevertheless apply for an employment authorization document.* 8 CFR 274a.12(a)(5). Among others in this category are those aliens who are admitted as refugees, granted withholding of deportation, or granted Temporary Protected Status. *Since authorization for employment is a discretionary immigrant benefit*, the INS will continue to require that persons in these categories file a separate application for an EAD. Accordingly, this provision of the proposed rule will be retained in the final rule with an amendment for clarity.

59 Fed. Reg. 62284, 62296 (Dec. 5, 1994) (emphasis added). Upon analysis of the italicized portions of this paragraph, it is evident that a number of misstatements were made.

⁸ This explanation was given in response to a commenter's challenge of the proposed EAD requirement.

The first italicized statement from the above-quoted paragraph—"they do not create new requirements or obstacles for asylees seeking authorization to work"—incorrectly separates the granting of employment authorization from the status of asylee. Under 8 C.F.R. § 274a.12(a)(5), employment authorization is incident to status, so asylees will not be separately *seeking* work authorization from the INS; by operation of law (i.e., the regulations), they will already have such authorization upon becoming an asylee. This was properly explained in the Supplementary Information of the proposed rule. *See* 59 Fed. Reg. at 14780, 14783. The regulations at 8 C.F.R. § 274a.12(a)(5) do place a requirement on asylees, but that requirement has to do with asylees seeking *evidence* of employment authorization rather than employment authorization itself.

The second italicized statement from above, citing to 8 C.F.R. § 274a.12(a)(5)—"[a]sylees are among the categories of persons who are eligible for employment incident to their status but must nevertheless apply for an employment authorization document"—is also incorrect. Section 274a.12(a)(5) lists asylees not as aliens who are *eligible* for employment incident to their status, but, instead, as aliens who are *authorized* for employment incident to their status.

Finally, by characterizing the granting of employment authorization to asylees as discretionary, the third italicized statement from above—"since authorization for employment is a discretionary immigrant benefit"—is likewise incorrect. Because of the mandatory language in the statute, the Attorney General has no discretion to withhold employment authorization once an individual is granted asylum. *See* INA § 208(c)(1)(B).

Judicial review of this issue has been limited and generally is inapplicable to the particular question of asylee employment authorization. In *Hernandez v. Reno*, 91 F.3d 776 (5th Cir. 1997), the court interpreted statutory language similar to the directive in section 208(c)(1)(B) of the INA for the Attorney General to authorize employment and provide an employment authorization endorsement; however, this case involved the Family Unity Program. One of the issues in *Hernandez* was whether INS regulations at 8 C.F.R. § 274a.12(a) improperly require an alien to file separately for employment authorization and an employment authorization document under the Family Unity Program. *Id.* at 779. The court found that INS cannot require an eligible alien to apply separately. *Id.* at 780. The court added that INS' mandated separate application procedure in the regulations reads the statutory requirements that INS authorize employment and provide an employment authorized endorsement or other work permit out of the law. *Id.* The court failed to explain its conclusion, but limited it to the particular case that was before the court.⁹ *Id.* at 781.

The court appears to have based its conclusion on a faulty premise—that the regulations require eligible aliens to apply for employment authorization. An eligible alien is not required to apply for employment authorization, but receives it automatically. The regulations, instead,

⁹ Notwithstanding the limited scope of the decision, the INS merged its EAD application into the application for Family Unity Program in response to the lawsuit.

require that *evidence* of this employment authorization be obtained by application to the INS. The regulation was properly promulgated under the Attorney General's authority in section 103(a)(3) of the INA to perform such acts as deemed necessary to carry out his authority under the INA. The authority supplied by section 103(a)(3) of the INA permits the Attorney General to institute procedures for providing the statutorily mandated employment authorization and employment authorization documentation. Because the court limited its holding to the particular case at bar, and based its decision on faulty premises, the court's decision has little to no authoritative value in the asylee context.

The case that comes closest to discussing the issue is *Getahun v. OCAHO*, 124 F.3d 591 (3d Cir. 1997). However, the court specifically left the issue unanswered. This litigation actually concerned an alleged violation of the prohibition against an employer's request to see more or different employment eligibility verification documents from an employee when completing the Form I-9. The Third Circuit considered the case upon appeal of the decision of the Office of the Chief Administrative Hearing Officer of the Executive Office for Immigration Review of the United States Department of Justice (OCAHO), which held, in part, that an asylee is employment authorized upon receiving such status, but the regulations at 8 C.F.R. § 274a.12(a) require the asylee to apply for and receive an EAD in order to be able to work in the United States. *Getahun v. Merck*, 6 OCAHO 880, at 6 (July 24, 1996). The Third Circuit disagreed. In *dicta*, the court stated that 8 C.F.R. § 208.20 (pre-1994 version) clearly provides for an automatic grant or continuation of employment authorization upon a grant of asylum.¹⁰ *Id.* at 594-95. Because the asylee in *Getahun* already applied for a new EAD in accordance with 8 C.F.R. § 274a.12(a), the court did not further opine on the alien's contention that 8 C.F.R. 208.20, as it existed in 1991, provided employment authorization regardless of whether the asylee applied for a new EAD. However, the court stated that it found the alien's argument persuasive. *Id.* at 595. Though this discussion in *Getahun* was *dicta*, it does support the reading of the regulations advocated by this memorandum.

CONCLUSION

Section 208(c)(1)(B) of the INA clearly directs the Attorney General to authorize for employment in the United States those individuals who have been granted asylum. This provision also requires the Attorney General to provide to asylees an endorsement of this authorization. The Attorney General, through the INS, has complied with the first directive of section 208(c)(1)(B) of the INA by issuing regulations that provide for the automatic employment authorization of asylees upon attaining that status. The Attorney General has also complied with the second directive of section 208(c)(1)(B) of the INA by providing the EAD application process for asylees, which supplies evidence of employment authorization and identity that may be used standing alone to obtain employment. In addition, by policy directive, asylees are provided with the Form I-94 containing an endorsement of their work-authorized asylee status which, therefore, constitutes an endorsement of their work authorized status.

¹⁰ The pre-1994 version of 8 C.F.R. § 208.20 is quoted in footnote 5, *supra*.

While it is our opinion that the current regulations properly implement the statutory directive to authorize employment to asylees and provide asylees with evidence of employment authorization, we recommend that the regulations nevertheless be amended to ensure greater consistency between sections 208, 274a.12, and 274a.13, and to clarify the confusion that appears to have developed both within the INS and among the public since the employment authorization regulations were first published. We also recommend the issuance of field guidance on the automatic employment authorization of asylees, INS-issued employment authorization documentation for asylees, and the documentation that can be presented to employers for satisfaction of the employment eligibility verification requirements of section 274A of the INA.