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## Regulatory Comment

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*Comments submitted to the Department of Homeland Security, in the Matter of:*

# Removal of 30-Day Processing Provision for Asylum Applicant-Related EAD Applications

84 FR 47148

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## Introduction

The Department of Homeland Security (DHS) proposes removing the regulatory provision which states that U.S. Citizenship and Immigration Services (USCIS) has 30 days to grant or deny an initial employment authorization application (EAD application) from the date an asylum applicant files the initial Form I-765. The stated purpose of the removal is to provide USCIS with sufficient time to process EAD applications.

The Niskanen Center believes removing the rule altogether, especially without a replacement, imposes unacceptable costs that dwarf the purported benefits.

This comment first describe why DHS's cost estimates, as large as they are, are *underestimates*. Further, it makes conservative adjustments to derive more realistic, though still low, estimates. The comments conclude with alternatives to consider that would better manage the costs.

## I. The costs associated with removing the 30-day processing provision are higher than DHS estimates

DHS's own estimate of lost compensation from removing the provision is between \$256 million and \$775 million annually—with the associated ten-year cost estimated to be somewhere between \$1.797 billion (lower bound wage rate and a high discount rate) to \$6.609 billion (upper bound wage rate and low discount rate). Further, DHS estimates an associated (annual) loss to the federal government of \$39 million to \$119 million in tax revenue.<sup>1</sup> DHS grants that the rule would have no effect on wages,<sup>2</sup> which implies that *even if businesses were able to find replacement labor*, they would be shifting workers from elsewhere in the labor force rather than inducing people to shift away from leisure. It follows that the rule is expected to shrink real output. The costs therefore approximately represent the total economic cost, and not merely transfers.

Such sizeable costs would be concerning enough, but to make matters worse, they are systematic underestimates. Any estimation requires simplifying assumptions, but DHS makes major assumptions that significantly bias the cost estimates downward.

Before criticizing the biased assumptions, we commend the assumptions regarding the lower and upper bounds on asylee wage rates. Data is not directly available on the earnings of asylum applicants, and DHS therefore had to determine reasonable lower and upper bounds. It decided on using the federal minimum wage and the average national wage respectively. We test how well these bounds capture the earnings of asylees by seeing how well they would have predicted the earnings of asylees in the past, when we did have more direct data. We find that DHS's choice of bounds is unbiased and fairly precise.

The New Immigrant Survey (NIS), which, while it does not have data for recent years, has the benefit of explicitly breaking down data by immigration category. Notably, it can be used to see the earnings and wage rates of refugees and asylees in the 12 months prior to their gaining LPR status. The NIS reveals the actual average wage rate among refugees and asylees was \$10.60, using the wage rates of respondents at the time of the survey.<sup>3</sup> Likewise, the survey reports the average earnings among refugees and asylees in the prior 12 months was \$22,236, which, assuming 2,080 annual hours worked, comes out to \$10.69.<sup>4</sup> At the time of the NIS (i.e., 2003), the federal minimum wage was \$5.15<sup>5</sup> and the average hourly earnings nationally was \$15.30.<sup>6</sup> Using those as the lower and upper bounds as DHS does, the midpoint between the two is \$10.22, within 5 percent of the

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<sup>1</sup> Federal Register. Department of Homeland Security. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 Fed. Reg. 47148 (proposed September 9, 2019) (to be codified at 8 C.F.R. pt. 208), at 47150.

<sup>2</sup> *Id.* at 47153.

<sup>3</sup> Author's calculations, using Jasso, Guillermina, Douglas S. Massey, Mark R. Rosenzweig and James P. Smith. "The New Immigrant Survey 2003 Round 1 (NIS-2003-1) Public Release Data." March 2006. Funded by NIH HD33843, NSF, USCIS, ASPE & Pew. <http://nis.princeton.edu>.

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Department of Labor, "History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1939-2009," <https://www.dol.gov/whd/minwage/chart.htm>.

<sup>6</sup> Bureau of Labor Statistics, "Monthly Labor Review, November 2003." Table 14. "Average hourly earnings of production or nonsupervisory workers on private nonfarm payrolls, by industry, monthly data seasonally adjusted." <https://www.bls.gov/opub/mlr/2003/11/clso311.pdf>

actual result indicated by the NIS. This indicates that DHS's choice of upper and lower bounds for wage rates is reliable.

However, DHS makes dubious assumptions that cause its final estimates to be significantly lower than what the costs would actually be:

**A. DHS assumes that asylum applicants' earnings are constant and unaffected by delays in work authorization.**

DHS calculates the cost of lost compensation by multiplying a constant wage rate by the projected length of the delay. However, this fails to account for the trajectory of future earnings. Asylum seekers' wage rates do not remain constant while they work, but rise the longer they have been in the work force. The NIS included a follow-up survey repeating the same questions about income and employment to respondents four to five years after they originally answered the survey as new asylees. The NIS data show that refugees and asylees saw very fast wage growth as they integrated into the economy. On average, refugees and asylees saw compound annual growth rates of 16 percent in their earnings and 11 percent in their wage rates.<sup>7</sup>

Further, DHS treats the earnings of pending asylum applicants as unrelated to the length of the delay before they have work authorization. However, long-term economic integration can be severely slowed by relatively short delays. A study out of the Immigration Policy Lab at Stanford University on German asylum-seekers, for instance, found that a seven month delay in work authorization for asylum-seekers had persistent effects, dragging down the economic outcomes of those who had to wait longer for work authorization for a decade. The authors summarized their paper saying that "our findings suggest that longer employment bans considerably slowed down the economic integration of refugees and reduced their motivation to integrate early on after arrival."<sup>8</sup> Notably, they found that income among those asylum seekers who faced shorter delays was about 27% higher.<sup>9</sup>

DHS's ten year cost estimates are therefore inadequate since they only consider foregone compensation while EADs are being processed and ignore the significant long term effects of delays on the labor market outcomes of pending applicants with work authorization and of those approved for asylum.

**B. DHS assumes that without the provision, processing times will resemble those in FY2017.**

DHS cites the historic asylum application backlog for the overall increase in pending asylum applications<sup>10</sup> While an asylum application is pending, the applicant may file an initial EAD application and renew the initial EAD until their asylum application is adjudicated.<sup>11</sup> Using FY 2017 as a baseline, in which 78 percent of initial

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<sup>7</sup> Author's calculations, using Jasso, Guillermina, Douglas S. Massey, Mark R. Rosenzweig and James P. Smith. "The New Immigrant Survey 2003 Round 2 (NIS-2003-2) Public Release Data." April 2014. Funded by NIH HD33843, NSF, USCIS, ASPE & Pew. <http://nis.princeton.edu>.

<sup>8</sup> Marbach, Moritz, Jens Hainmueller, and Dominik Hangartner. "The Long-Term Impact of Employment Bans on the Economic Integration of Refugees." *Science Advances* 4, no. 9 (September 2018): eaap9519. <https://doi.org/10.1126/sciadv.aap9519>.

<sup>9</sup> *Id.*

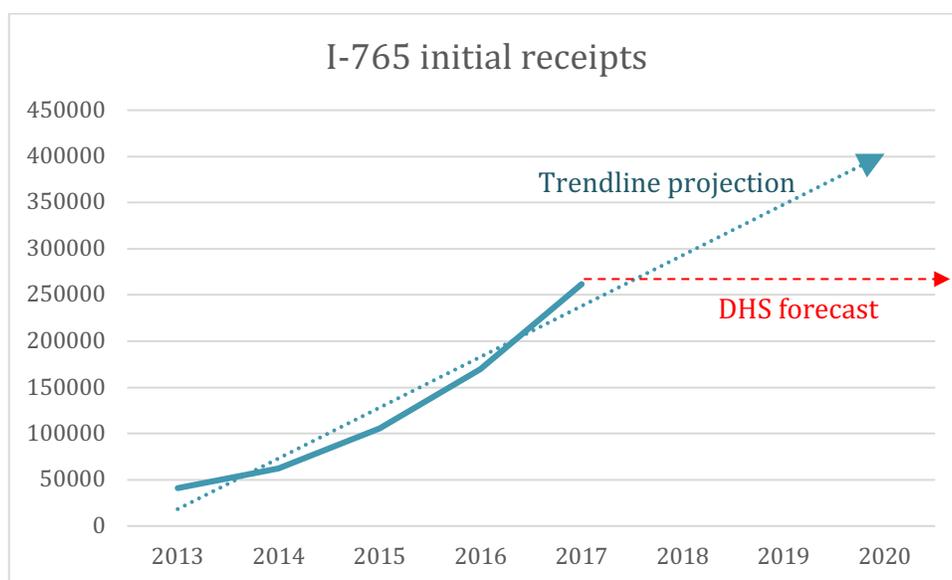
<sup>10</sup> FR, DHS, Removal.

<sup>11</sup> *Id.* at 47153.

EAD applications were adjudicated within 60 days of the original filing date, DHS asserts that if the proposed rule were to go into effect, those numbers would be sustained.<sup>12</sup> While we do not doubt DHS’s intention to maintain 2017 level processing times, especially in the short-run, without any regulatory guidance constraining processing times, future obligations may necessitate making tradeoffs at the expense of purely discretionary processing goals, which would then include EAD application processing times.

C. DHS assumes that the number of I-765 receipts will indefinitely resemble 2017.

DHS explicitly considered using “a trendline to forecast future projected applications” but decided against it, reasoning that “various factors outside of this rulemaking” lead to too much uncertainty.<sup>13</sup> If anything, uncertainty should have prompted the use of a range of estimates, as DHS did with earnings, rather than the use of a single point estimate that rests on applications remaining level.



Source: DHS

While claiming that the level of applications is something that “USCIS cannot predict,” DHS nevertheless *did* make a prediction by merely adopting the 2017 level. However, in spite of uncertainty, we believe a trendline forecast is better than using one year’s level as a default prediction.

<sup>12</sup> *Id.* at 47149.

<sup>13</sup> *Id.* at 47162.

## II. Toward a more accurate estimate of cost

Recognizing the limitations of the original assumptions, we can make adjustments to the cost model to arrive at more accurate estimates. Cost estimates can be seen in the table below.

### Ten-year cost estimates of proposed rule

Wage designation:			Lower bound		Upper bound	
Discount rate:			3%	7%	3%	7%
DHS estimates:			\$2.183 b	\$1.797 b	\$6.609 b	\$5.442 b
Processing time increased by <sup>14</sup>	Initial receipts growing <sup>15</sup>	Delay effect on wages <sup>16</sup>				
5%	Linearly	1%	\$10.002 b	\$7.964 b	\$30.283 b	\$24.113 b
		5%	\$21.484 b	\$17.467 b	\$65.050 b	\$52.887 b
	Asymptotically	1%	\$4.288 b	\$3.570 b	\$12.985 b	\$10.808 b
		5%	\$9.983 b	\$8.469 b	\$30.228 b	\$25.643 b
10%	Linearly	1%	\$10.759 b	\$8.557 b	\$32.577 b	\$25.910 b
		5%	\$22.489 b	\$18.255 b	\$68.095 b	\$55.274 b
	Asymptotically	1%	\$4.593 b	\$3.819 b	\$13.906 b	\$11.563 b
		5%	\$10.387 b	\$18.255 b	\$31.452 b	\$26.644 b

None of these new estimates is strongly preferred to any other, and indeed, they are still likely conservative, since they neither fully capture the wage effects of delayed work authorization nor the dynamics of how processing times react to increases in initial receipts. In any case, they illustrate how reliant the original low estimates were on the assumptions that produced them.

<sup>14</sup> In 2017, USCIS completed 119,088 cases past the deadline. On average, it took 31 days beyond the deadline (i.e., 61 days in total) to complete one of those cases. The total number of calendar days processing applications past the deadline was 3,651,326. Adjusting for slower processing speeds was simply a matter of scaling the total number of calendar days by 1.05 or 1.1.

<sup>15</sup> We take year one to begin with 119,088 adjudicated cases. In the linear trend cases, each year, we increase the number of adjudicated cases by 54,932 (the fitted slope of the trendline), but only consider costs for the 53% of them we assume take longer than 30 days. For simplicity, even with slower processing, we assume a constant proportion of total adjudicated cases that take longer than 30 days. In the “slowing down” cases, the marginal increase begins at 54,932 but is halved every year.

<sup>16</sup> Relying on data from TRAC Immigration, “Immigration Court Processing Time by Outcome, by Removals, Voluntary Departures, Terminations, Relief, Administrative Closures,” September 2019, and estimating over the last five years, we estimate that 9.9% of asylum applicants will successfully get asylum and that the average time it takes to complete a case is 542 days. We then calculate the net present value of the earnings an asylum applicant would have received in the absence of delays, assuming that the delay length is above 31 days by the amount indicated in the first column, that their earnings would be reduced by the “delay effect” given, that those who get asylum continue to earn until the end of the ten year period, and that those who do not get asylum leave after 542 days.

## Conclusion

Accounting for wage growth over time, the effects of delays on economic integration, the likelihood of slower processing, and the likelihood of increased asylum applications all point to higher costs than originally supposed. The original estimates were by no means trivial, but the true cost of this proposed rule is likely many times higher than in published estimates. In addition, no estimates of the benefits have been produced, nor has there been any comparison to the costs of alternative solutions like additional staffing.

Because even short delays can have persistent negative consequences on economic integration, removing all provisions on the length of adjudication is very costly. Even a 90 day deadline raises concerns about the long-term effects on those asylum applicants who will become Americans. A 60 day window should be considered, even if DHS has taken longer with some applications in 2017 (though it was able to return most within 60 days). 60 days recognizes the need for some flexibility to address other DHS priorities, as well as the increased asylum backlog. In addition, conditioning the length of the deadline on objective and reportable metrics may also offer a middle ground.