

USCIS Work Proposals Add To LGBTQ Asylum Seekers' Risks

By **Richard Kelley**

In the past few years, the asylum process in the United States has seen several large changes, whether through executive order, a decision by the U.S. attorney general, or new proposed regulations or policies. 2019 was no different.

The current administration has often couched these new proposals[1] in arguments that the U.S. Department of Homeland Security, the parent agency of the U.S. Citizenship and Immigration Services, is seeking to “reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization filed by asylum applicants seeking an employment authorization.”



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These new policies create adverse consequences for legitimate asylum seekers that will critically impact some of the most vulnerable, including LGBTQ migrants fleeing violence based on persecution for their sexual orientation or gender identity.

Asylum for LGBTQ Individuals

Ever since 1994, when the U.S. attorney general designated Matter of Toboso-Alfonso[2] as a precedential decision for all cases regarding same or similar issues, sexual orientation has been viewed as a form of membership in a particular social group for the purpose of asylum law. Since this initial decision, various U.S. circuit courts and U.S. Board of Immigration Appeals decisions have reinforced the viability of an asylum claim for individuals fleeing violence based on sexual orientation and gender identity.[3]

However, even with clear precedent in favor of LGBTQ asylum seekers, LGBTQ migrants face unique challenges when fleeing violence that leave these individuals vulnerable to particular physical, emotional and psychological harm. In October 2016, the Organization for Refuge, Asylum and Migration released an analysis focused on enhancing protections of sexual and gender minorities that reports that because “values and beliefs surrounding gender, sex, sexual orientation and gender identity are deeply held ... challenges to these values are viewed with great offence and may be perceived as an attack on the local culture and religion.”[4]

This leads to sexual and gender minorities being subject to “outright legal discrimination, criminalization, deeply pervasive social marginalization, violence, and other human rights abuses.”

For LGBTQ asylum seekers, family and community ostracization is a particular concern. Many applicants for asylum express concerns about publicly outing themselves for fear of family backlash and ostracization from their migrant diaspora in the United States. Others have already been ostracized from these important social structures. The loss of family and diaspora support — communities that can often provide at least some basic supports to migrants — makes the asylum process seemingly even more insurmountable for LGBTQ individuals.

New Rules Impacting Ability for Asylum Seekers to Gain Stability

Individuals access the asylum system through two primary paths: affirmatively applying for asylum while in the United States or asserting asylum as a defense during removal proceedings. Individuals who present themselves at ports of entry, including the southern border of the United States, can request asylum at the port of entry as a defense as to why the U.S. should not return them to their home country, notwithstanding a lack of other legal basis to enter the United States. Individuals who present at a port of entry traditionally have had the opportunity to be paroled (released to live in the United States) while waiting for their asylum case to be heard.[5]

Unfortunately, there is an extensive backlog related to asylum interviews. In fact, as of May 2019, the defensive asylum backlog included approximately 869,000[6] immigration cases being handled by about 400 immigration judges.

According to a March 2019 report from USCIS,[7] there are an additional 327,984 individuals awaiting interviews in their affirmative asylum matters across the United States. This number has been steadily on the rise, year after year, with 318,624 pending applications[8] just a year prior and 254,128 pending applications in March 2017.[9]

USCIS has adopted a last-in, first-out policy, meaning that new applications are prioritized for interview. With the ever-growing backlog, this means individuals who are the oldest applications have no sense of when they might finally have the opportunity to be interviewed.

One of the few benefits available to asylum seekers while their application is pending is an employment authorization document. An EAD is only available after applying for asylum and only if the applicant doesn't receive an interview within 180 days after applying. Only then will individuals seeking asylum be permitted to seek work in order to support themselves while waiting for the opportunity to be heard.

However, recent proposed regulations aim to drastically change the availability of EADs for asylum seekers. Three separate proposed rules threaten the ability for asylum seekers waiting for the opportunity to be heard to engage in work legally to be able to support themselves:

- On Sept. 6, 2019, USCIS proposed to change a regulation for initial applications for EADs by scrapping a requirement that EAD applications be adjudicated within 30 days; [10]
- On Nov. 14, 2019, USCIS proposed to change asylum regulations that would expand the wait period for asylum seekers for an EAD from 180 days to 365 days;[11] and
- On Dec. 9, 2019, USCIS proposed a change to the fee schedule that would create a fee for asylum applications and require asylum seekers to pay the fee associated with the application for an EAD,[12] where prior regulations provided no fee for an asylum application and no fee for the first EAD.[13]

These regulations, collectively and individually, will adversely affect legitimate asylum seekers' ability to work toward stability. In particular, the ability to gain work authorization is a critical first step for asylum seekers in their effort to reach safety and stability for themselves and their family. This safety and stability is particularly critical for LGBTQ migrants who are in constant fear of losing any remaining support from family or their diaspora.

Why the 30-Day Limit Matters

The elimination of the 30-day processing time for initial EADs given to asylum seekers would essentially remove any predictability in the EAD process, coming at a cost to asylum seekers and their families, who are already vulnerable. USCIS acknowledges the adverse impact of this proposed rule in quantifying the lost compensation to asylum applicants to be between \$255.88 million and \$774.76 annually.

In addition, without any limitation on processing time, EAD approval becomes indefinite and unstable, making it harder for employers to rely on employees with EADs who may not receive renewed approval in time to continue to work, which impacts the ability for asylum seekers to gain employment, even with an EAD.

Why the 180-Day Wait Time Matters

In addition to eliminating clarity around processing time for EADs, proposed regulations seek to expand the initial wait time for an EAD. At present, asylum seekers are permitted to apply for employment authorization if their application has not been adjudicated within 180 days of filing. This time frame is already difficult for asylum seekers — waiting in a foreign country without access to self-sufficiency for at least six months to a year, depending on how fast they were able to apply for asylum.

While DHS' stated goal is to "reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization," the proposed rule will have far-reaching consequences for legitimate asylum seekers and makes no path for asylum seekers on the margins to become able to support themselves as they wait for the opportunity to be safe from harm.

An inability to receive authorization to obtain legal employment has physical, financial, emotional and psychological costs. These costs are amplified when additional factors make the immigrant even more vulnerable, including being LGBTQ.

DHS estimates the financial loss to asylum seekers to be between \$1.2 billion and \$3.6 billion annually.[14] However, the financial impact cannot capture the psychological and emotional impact for asylum seekers, who already suffer extensively while awaiting work authorization. Some become homeless, live in overcrowded or unsafe conditions, or lack basic needs like food and clothing.

Without work authorization, asylum seekers cannot purchase health insurance or obtain a social security number, and often cannot apply for a state-issued identification card or driver's license, which limits access to transportation, banking and private support services. Lack of income also hinders opportunities to find and retain competent legal counsel. They are forced to live in a state of poverty that inhibits their ability to be a productive member of American society.

Why No Fees Matter

Currently, there is no fee associated with filing an I-589, the government form required to apply for asylum. In addition, if asylum seekers do not receive an interview within 180 days, they are able to apply for an initial EAD, again without any associated additional cost.[15] However, the new and increased fees proposed by DHS, combined with the elimination of many fee waivers, will create unprecedented barriers for asylum seekers.

Under the proposed fee schedule, individuals seeking protection from persecution through asylum would, for the first time in the United States, be required to pay a fee. Asylum seekers, prohibited from working and often without resources, would be required to pay \$50 just to access the opportunity to be heard on their claim and an additional \$490 to seek work authorization needed to gain safety and stability while waiting for USCIS to schedule their interview.

Charging these fees for asylum applications and initial work authorizations will likely prevent persons with legitimate asylum claims from seeking protection, rendering them even more vulnerable. A central tenet of U.S. immigration and refugee law is that “[a]ny alien who is physically present in the United States or who arrives in the United States ... irrespective of such alien’s status, may apply for asylum.”

The proposed changes in regulation may eliminate that promise because asylum seekers who are unable to pay the fee will be shut out of the refugee protection system. Indeed, in the proposed rule, DHS readily recognizes that “some applicants may not be able to afford this new fee and would no longer be able to apply for asylum.”

Conclusions

While none of these rules have been adopted as final rules, the potential consequences are dire for migrants seeking asylum. Collectively and individually, these rules hamper the ability of individuals seeking refuge from persecution to access the asylum process in the United States and to build a safe and stable existence while waiting for the opportunity to be heard.

These changes will be particularly detrimental to vulnerable communities like LGBTQ asylum seekers, who often already have a support deficit because they have lost family and diaspora support. The ability to establish safety and stability while waiting for the opportunity to seek refuge is particularly critical to LGBTQ asylum seekers who will otherwise be forced to remain hidden longer and place themselves in physically and psychologically unsafe situations for a longer period.

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[1] <https://www.federalregister.gov/documents/2019/11/14/2019-24293/asylum-application-interview-and-employment-authorization-for-applicants>.

[2] Matter of Toboso-Alfonso, 20 I&N. Dec. 819 (BIA 1994); <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3222.pdf>.

[3] See, e.g. Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (holding that "all alien homosexuals are members of a 'particular social group'"); Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015) (finding that the BIA erred in not considering specific potential future harm to transgender people by improperly conflating the experience of non-trans gay people with that of transgender people).

[4] <https://oramrefugee.org/wp-content/uploads/2016/10/Code-of-Conduct.pdf>.

[5] In January 2019, the Trump administration implemented a program called Migrant Protection Protocols, which forcibly returns asylum seekers to Mexico. Asylum seekers wait months in Mexico for their hearings and face life-threatening dangers. These protocols are particularly dangerous for LGBTQ asylum seekers who have been targeted when returned to Mexico based on their sexual orientation or gender identity. While this new policy is not addressed in this article, Human Rights First released the report "Human Rights Fiasco" (December 2019), detailing concerns related to the implementation of the Migrant Protection Protocols.

[6] <https://www.rpc.senate.gov/policy-papers/asylum-current-law-and-proposed-changes>.

[7] [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AffirmativeAsylumStatisticsMar2019.pdf).

[8] [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/PED_AsylumOfficeWorkloadMarch2018.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_AsylumOfficeWorkloadMarch2018.pdf).

[9] https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Affirmative_Asylum_Statistics_-_March_2017.pdf.

[10] <https://www.federalregister.gov/documents/2019/09/09/2019-19125/removal-of-30-day-processing-provision-for-asylum-applicant-related-form-i-765-employment>.

[11] <https://www.federalregister.gov/documents/2019/11/14/2019-24293/asylum-application-interview-and-employment-authorization-for-applicants>.

[12] <https://www.federalregister.gov/documents/2019/12/09/2019-26521/us-citizenship-and-immigration-services-fee-schedule-and-changes-to-certain-other-immigration>.

[13] As of the date of the writing of this article, all three of these rules are still within the proposed rule stage of the regulatory process (some still seeking comment).

[14] <https://www.federalregister.gov/documents/2019/11/14/2019-24293/asylum-application-interview-and-employment-authorization-for-applicants>.

[15] Asylum seekers do have to pay for the renewal of their EAD (required every two years), which can be a barrier for many asylum seekers to maintaining work authorization.