



October 22, 2019

Kenneth Cuccinelli  
Acting Director, U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue NW  
Washington, D.C. 20529

**RE: Requiring Criminal and Arrest Records of Asylum Applicants Who Apply for Employment Authorization**

Dear Acting Director Cuccinelli,

The American Immigration Lawyers Association's Asylum & Refugee Committee ("Committee") writes to express our serious concern regarding USCIS's overbroad requirement that asylum applicants seeking employment authorization under the (c)(8) category furnish the agency with all criminal and arrest records. We respectfully request that you modify the associated form and instructions to conform with regulation and to prevent erroneous case decisions.

Under 8 CFR § 208.7, asylum seekers who have been convicted of aggravated felonies under INA § 101(a)(43) cannot be granted an employment authorization document (EAD). The regulation extends no such bar against asylum seekers who have been arrested but have not been convicted of aggravated felonies. Nonetheless, Question 30 of the current version of Form I-765, *Application for Employment Authorization* (expires May 31, 2020), directs applicants under category (c)(8) to answer whether they have "ever been *arrested for* and/or convicted of a crime."<sup>1</sup> The accompanying form instructions note that if the applicant has been arrested for and/or convicted of a crime she must provide "a certified copy of all *arrest reports*, court dispositions, sentencing documents, and any other relevant documents."<sup>2</sup> In those instructions, USCIS appears to justify this requirement by stating that the agency must determine whether the applicant has been convicted of an aggravated felony.

Critically, Question 30 and the associated instruction call for information on arrests *irrespective of whether the underlying incident resulted in a conviction*. This requirement stands to sweep in information irrelevant to assessments concerning aggravated felony convictions and could unfairly prejudice Form I-765 adjudications. No less important, arrests may have occurred abroad, have

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<sup>1</sup> Emphasis added. USCIS, Form I-765, *Application for Employment Authorization*, OMB No. 1615-0040 (expires May 31, 2020): <https://www.uscis.gov/sites/default/files/files/form/i-765.pdf>.

<sup>2</sup> Emphasis added. USCIS, Instructions for Application for Employment Authorization, OMB No. 1615-0040 (expires May 31, 2020): <https://www.uscis.gov/sites/default/files/files/form/i-765instr.pdf>.

resulted in limited documentation, and comprise part of the asylum claim itself, when, for example, a government wrongfully arrested an individual on account of a protected ground. In this way, the requirement could exert a chilling effect on applicants with unfounded criminal charges in their home countries that form the basis of their asylum claims.

The lengthy case processing delays faced by asylum applicants makes this requirement and its potentially prejudicial effect all the more concerning. An applicant unjustly denied an EAD due to the overbreadth of the form and accompanying instruction could wait many years for the adjudication of her asylum case without a means of self-support.

For these reasons, the Committee respectfully requests modification of Question 30 and the accompanying instruction such that USCIS seeks information limited to: (1) whether the individual has been convicted of an aggravated felony under INA § 101(a)(43); and (2) certified records of conviction—not arrest records—in those instances. This change would help align USCIS policy with regulation and forestall unjustified adjudicative outcomes.

If you require any additional information, please contact Dree Collopy, Chair of the Asylum and Refugee Liaison Committee at [dcollopy@benachcollopy.com](mailto:dcollopy@benachcollopy.com) or Jason Boyd, Policy Counsel at the American Immigration Lawyers Association at [jboyd@aila.org](mailto:jboyd@aila.org).

Thank you for your consideration of this request.

Sincerely,

The American Immigration Lawyers Association's Asylum & Refugee Liaison Committee

cc: Mr. Mark Koumans, Deputy Director, USCIS  
Ms. Lora Ries, Chief of Staff, USCIS  
Mr. Donald Neufeld, Associate Director, Service Operations Directorate, USCIS  
Ms. Julie Kirchner, CIS Ombudsman, DHS  
Ms. Stacy Shore, Deputy CIS Ombudsman, DHS  
Ms. Elissa McGovern, Chief of Policy, Office of the CIS Ombudsman, DHS