



# An Unsustainable Process: A Proposal to Expand Work Authorization to Prospective Asylees

In 1948, the United Nations General Assembly recognized the universal right of safety from persecution for the first time in history.[1] The Universal Declaration of Human Rights was a response to the horrors of World War II and the Holocaust and set out fundamental human rights that states ought to protect.[2] Among them, the right to seek asylum – or safety from persecution.[3] This right was enshrined in the 1951 Refugee Convention and again in the 1967 Protocol.[4] The core principle of this right is non-refoulement: a refugee should not be returned to a country where they face serious threats to their life or freedom.[5] This principle was codified in United States’ federal law with the passage of the Refugee Act of 1980, when the aftermath of the Vietnam War prompted American legislators to grapple with how to respond to hundreds of thousands of Vietnamese and Cambodians seeking relief from political chaos and physical harm.[6] As of this writing, there is a backlog of least 1,565,966 individuals awaiting asylum hearings in the United States.[7] To be eligible for asylum, an applicant must meet the definition of “refugee” in the Immigration and Nationality Act (INA).[8] A refugee must prove that they face persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[9] A person who believes they qualify as a refugee may seek asylum in the U.S. by arriving at a U.S. border and asking to be screened by a U.S. official at a port of entry, or by entering the U.S. without inspection and claiming they fear persecution.[10]

If upon arrival at a U.S. border an immigration officer determines an individual is inadmissible and the individual demonstrates a fear of persecution, torture, or fear of returning to her home country, she will be referred for an interview by an United States Citizenship and Immigration Services (hereinafter “USCIS”) asylum officer.[11] This “credible fear” interview is used to determine whether an individual should continue to be processed under expedited removal, or if they meet the threshold criteria for asylum eligibility.[12] This criteria is met if the asylum officer finds that the individual established “significant possibility” of persecution or torture in their home country.[13] If an asylum officer finds an individual has a credible fear, USCIS may either consider her application for asylum in a second, Asylum Merits[14] interview, or issue a notice to appear before an Immigration Judge.[15]

Throughout this process, an individual may be detained in immigration detention or non-detained and living in the interior U.S.[16] If an individual is non-detained, they are responsible for their own basic necessities such as food and housing.[17] This is complicated by the fact that those who are neither citizens nor permanent residents need to show they are eligible to work by presenting an Employment Authorization Document

(hereinafter, “EAD”).[18] In order to apply for an EAD with a pending asylum application, an applicant needs to have been waiting 150 days or more with no initial decision on her application from the asylum office or from the immigration court.[19] Someone applying for asylum with USCIS affirmatively would submit her application by mail, and once USCIS replies with a receipt notice, the 150 day count begins.[20] Those applying for asylum after being placed in removal proceedings would file a full asylum application with the immigration court, which would stamp that application thereby starting the “clock.”[21]

Forcing asylum applicants to wait for 150 days after filing their asylum application before being eligible to apply for an EAD places undue burdens on these individuals. [22] First, individuals who fail to submit asylum applications within one year of entering the U.S. are barred from applying for asylum.[23] By granting these individuals work authorization after completion of a credible fear interview, the government would facilitate their employment, thereby making it easier for these individuals to support their basic needs while they adjust to life in the U.S. and prepare to meet a timely filing deadline.[24] Further, asylum applicants who work without authorization while their application is pending will accrue “unlawful presence” under INA § 212(a)(9)(B)(iii)(II). [25] Accruing unlawful presence can make an asylum applicant “inadmissible,” making them ineligible for adjustment of status and placing bars on reentry in the future should they be deported.[26] By granting EADs to individuals with a favorable determination on their credible fear interviews, the U.S. government could allow potential applicants to support themselves in an authorized manner while filing their asylum applications.

[1] Jonathan Blazer & Katie Hoepfner, *Five Things to Know About the Right to Seek Asylum*, ACLU (Sept. 29, 2022), <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum>.

[2] Blazer & Hoepfner, *supra* note 1; *Universal Declaration of Human Rights*, United Nations, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited Feb. 20, 2023).

[3] Blazer & Hoepfner, *supra* note 1.

[4] *Id.*; *The 1951 Refugee Convention*, UNCHR USA: The UN Refugee Agency, <https://www.unhcr.org/en-us/1951-refugee-convention.html> (last visited Feb. 20, 2023).

[5] *The 1951 Refugee Convention*, *supra* note 4.

[6] National Archives Foundation, <https://www.archivesfoundation.org/documents/refugee-act-1980/> (last visited Feb. 20, 2023).

[7] *A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC Immigr. (Dec. 22, 2022), <https://trac.syr.edu/reports/705/>.

[8] 8 U.S.C. §§ 1158(b)(1)(B)(i), 1229a(c)(4)(A).

[9] INA § 101(a)(42)(A).

[10] Blazer & Hoepfner, *supra* note 1.

[11] Removal of asylum seekers, generally. 18B Fed. Proc., L. Ed. § 45:1447.

[12] *Questions and Answers: Credible Fear Screening*, U.S. Citizenship and Immigr. Services (May 31, 2022),

[https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening#:~:text=If%20an%20asylum%20officer%20finds%20that%20you%20have%20a%20credible,CAT\)%20in%20a%20second%20interview.](https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening#:~:text=If%20an%20asylum%20officer%20finds%20that%20you%20have%20a%20credible,CAT)%20in%20a%20second%20interview.)

[13] *Id.*

[14] If, after a credible fear interview, an asylum officer finds an individual has a credible fear of returning to their home country, USCIS may consider that individual's application through a second interview, called an Asylum Merits interview. *Id.*

[15] *Id.*

[16] *A Sober Assessment of the Growing U.S. Asylum Backlog*, *supra* note 7.

[17] Asylum seekers can receive unemployment benefits only if they are otherwise eligible to work in the U.S. *See* Trixie Torres, *Can Asylum Seekers Apply For Unemployment In 2023?*, Shoreline Immigr. (Oct. 7, 2022), <https://shorelineimmigration.com/asylum/can-asylum-seekers-apply-for-unemployment/>. Asylees may qualify for federal benefits such as cash assistance, but only if they can show proof of having been granted asylum, thereby excluding those awaiting their determinations. *See ORR Asylee Fact Sheet*, Admin. for Child. & Families, Office of Refugee Resettlement, Health & Hum. Services (Sept. 2022),

[https://www.acf.hhs.gov/sites/default/files/documents/orr/orr\\_asylee\\_fact\\_sheet.pdf](https://www.acf.hhs.gov/sites/default/files/documents/orr/orr_asylee_fact_sheet.pdf).

[18] *Employment Authorization*, U.S. Citizenship and Immigr. Services (Oct. 09, 2020),

<https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/employer-information/employment-authorization>.

[19] Breanna Cary, *When Can Asylum Applicants Get a Work Permit (EAD Card)?*, NOLO,

<https://www.nolo.com/legal-encyclopedia/asylum-applicants-work-permit-timing-32297.html> (last visited Feb, 20, 2023).

[20] *Id.*

[21] *Id.*

[22] Proposals for legislation to shorten the waiting period before asylum seekers are allowed to receive work authorizations have been introduced in both the House and Senate. *See* Rachel Ohm, *Sen. Collins Introduces Bill to Help Asylum Aseekers Get Jobs Sooner*, Pressherald (Feb. 18, 2022),

<https://www.pressherald.com/2022/02/17/sen-collins-introduces-bill-to-help-asylum-seekers-obtain-jobs-more-quickly/> ("The law currently prohibits asylum seekers from working for extended periods of time, which prevents them from supporting themselves and their families as they want to do. It also inadvertently places the burden of care on states and municipalities"); *see* Press Release, *Pingree Sponsors Bill to Speed Up Work Authorization for Asylum Seekers*, Congresswoman Chellie Pingree1st Dist. Maine, (Feb. 10, 202),

<https://pingree.house.gov/news/documentsingle.aspx?DocumentID=3976>.

[23] *Asylum in the United States*, Am. Immigr. Council (Aug. 2022),

[https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum\\_in\\_the\\_united\\_states\\_o.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_o.pdf), at 2.

[24] *See* Ohm, *supra*, note 22; *see* Press Release, *supra*, note 22.

[25] *Working Without Authorization*, Landerholm Immigr., A.P.C. (Dec. 11, 2019),

<https://www.landerholmimmigration.com/blog/2019/december/working-without-authorization/>.

[26] *Asylum: Exception to 'Unlawful Presence,'* Hanlon L. Grp., <https://visaandgreencard.com/blog/asylum-exception-to-unlawful>

[presence/#:~:text=The%20law%20states%20that%20an,will%20be%20barred%20from%20readmission](https://visaandgreencard.com/blog/asylum-exception-to-unlawful-presence/#:~:text=The%20law%20states%20that%20an,will%20be%20barred%20from%20readmission), (last visited Feb. 20, 2023).

