



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

December 12, 2017

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via: www.regulations.gov

**Re: USCIS 60-Day Notice and Request for Comments: Application for
Employment Authorization, Form I-765
OMB Control Number 1615-0040
Docket ID No.: USCIS-2005-0035**

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-Day Notice and request for comments on the proposed revisions to the Application for Employment Authorization, Form I-765, and the accompanying instructions, published in the Federal Register on October 13, 2017.¹

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this notice and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Comments on the I-765 Form

Preparer's Certification

While the previous language accompanying the preparer's signature was straightforward, stating, "I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge," the proposed revisions to the Form I-765 includes the following more expansive language on page 6:

¹ 82 Fed. Reg. 47761 (Oct. 13, 2017).

*By my signature, I certify, under penalty of perjury, that I prepared this application at the request of the applicant. **The applicant then reviewed this completed application and informed me that he or she understands all of the information contained in, and submitted with, his or her application, including the Applicant's Declaration and Certification, and that all of this information is complete, true, and correct.** I completed this application based only on information that the applicant provided to me or authorized me to obtain or use.*

The Applicant's Declaration found on page 4 of the proposed Form I-765 includes similar language:

I certify, under penalty of perjury, that all of the information in my application and any document submitted with it were provided or authorized by me, that I reviewed and understand all of the information contained in, and submitted with, my application, and that all of this information is complete, true, and correct.

AILA proposes deleting the bold text in the proposed Preparer's Certification because it is duplicative of language in the Applicant's Declaration, which is already signed under penalty of perjury. If USCIS objects to removing the bold text, we suggest that the language be revised to be more precise, such as the language found in the Preparer's Declaration on page 7 of the current the Form I-129.²

Comments on the I-765 Instructions

Asylees and Refugees

Substantial revisions were made to the Special Filing Instructions section for those with pending asylum applications, or those filing in the (c)(8) category, found on page 20 of the proposed Form I-765 Instructions. Significantly, asylum seekers would be required to submit their arrest and conviction records to determine whether the applicant has been convicted of an aggravated felony. Under 8 CFR §208.7(a)(1), and as noted in the instructions, only asylum applicants who have not been *convicted* of an aggravated felony are eligible for employment authorization. The aggravated felony analysis is an exceptionally complex legal determination, and in accordance with the regulations, such an analysis should be limited only to actual convictions. Therefore, USCIS should amend the I-765 Instructions to remove the requirement that these applicants submit arrest records, when the alleged incident did not result in a conviction.

The Special Filing Instructions for the (c)(8) category also indicate that applicants with pending

² The language in the current I-129 form is as follows:

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this petition on behalf of, at the request of, and with the express consent of the petitioner or authorized signatory. The petitioner has reviewed this completed petition as prepared by me and informed me that all of the information in the form and in the supporting documents, is complete, true, and correct.

asylum applications that were filed with EOIR must provide a date-stamped copy of the Form I-589. This is not a realistic requirement as the asylum application is only date-stamped when it is filed at the window of the court clerk. When an application is filed in court, which it often is, the immigration judge does not stamp the Form I-589, and the court clerk is often unwilling to stamp the application after the fact. Therefore, we suggest that this documentation requirement be removed.

In addition, the proposed I-765 Instructions provide a note on page 15 discussing the option of providing a safe mailing address for VAWA self-petitioners, and T and U visa applicants. While this is a welcome addition to the instructions, we suggest that the option to use a safe mailing address should also be provided for Special Immigrant Juveniles (SIJs), asylum applicants, and individuals granted withholding of removal.

Further, 3.A. of the Required Documentation section on page 20 of the proposed Form I-765 Instructions notes that when submitting a Form I-765 to USCIS, at least one of the following documents must be included: “Form I-94, Arrival-Departure Record (front and back), *passport, or other travel document*. If you are filing Form I-765 under the (c)(9) category, *copies of any of the above are not required*.” While the instructions note that submission of one of these documents is not necessary for a (c)(9) applicant, exceptions for other categories of applicants are not provided. We suggest that this section be further amended to note that applicants who do not have these documents, such as an asylum seeker fleeing a war-torn country, alternative identification documentation may be submitted.

It should be noted that USCIS requires applicants with asylum pending or withholding granted (as well as SIJ, T, and U nonimmigrants) to also provide a passport or U.S. or foreign government issued ID. This is problematic for asylum seekers or those fleeing persecution (who are also granted withholding) because often these individuals have left their identity documents behind or the documentation has been destroyed or stolen while traveling. Further, replacing these documents may put an asylum seeker at risk if they approach their home government. In addition to the change noted in the above paragraph, AILA recommends including language in the Required Documentation section on page 20 or the Special Filing Instructions for such applicants noting that, where a passport or foreign government issued ID is not available due to such circumstances, an explanation may be provided in lieu of the documentation.

If the documentation requirements for applicants with pending asylum applications are not changed as suggested, or if an explanation is not accepted in lieu of documentation where it is not available, processing times will be adversely affected. First, because many applicants will not be able to procure certain documents, and applicants filing *pro se* may not know how to obtain them, this will likely result in the issuance of an increased number of Requests for Evidence (RFEs). This extends the total time for adjudication and will necessarily result in asylum-based EADs taking longer than the required 30-day processing period. Second, requiring submission of additional documents will necessitate additional review time by USCIS officers, which will further increase processing times.

Family-Based Nonimmigrant Categories

- **Family Unity Program--(a)(13).** Page 10 of the proposed Form I-765 Instructions discusses eligibility for applicants in the Family Unity Program. The current form instructions include the following language that has been omitted from the proposed instructions: “If your non-expired Family Unity EAD is lost or stolen, file Form I-765 with proper fee(s), along with a copy of your approval notice for Family Unity benefits, to request a replacement.” We recommend that this language be included in the revised Form I-765 Instructions as it provides needed clarification to applicants.
- **LIFE Family Unity--(a)(14).** Page 10 of the proposed Form I-765 instructions discusses eligibility for LIFE Family Unity applicants. The revised language states, “[I]f you are applying for initial employment authorization under section 1504 of the LIFE Act Amendments, complete and submit Form I-817. We will issue an EAD if we approve your Form I-817; no Form I-765 is necessary.” We recommend that this language be amended to include the following bolded and italicized text, “If you are applying for initial employment authorization ***or an extension of such authorization...***” In addition, the text from the current I-765 instructions states, “If you are applying for a replacement EAD that was issued under LIFE Act Amendments Family Unity provisions, file Form I-765 with the required evidence listed in the **Required Documentation** section of these Instructions.” This language was omitted from the proposed revisions, but we recommend that it be included in the revised Form I-765 Instructions as it provides needed clarification.

Adjustment of Status Categories

- **Adjustment Applicant--(c)(9).** Page 10 of the proposed Form I-765 instructions discusses eligibility for adjustment of status applicants. It includes a new note, the last sentence of which states, “[Y]ou will need to pay the filing fee or obtain a fee waiver for Form I-765 if your Form I-485 is still pending with USCIS and this is not your first EAD as a refugee and you did not pay the Form I-485 filing fee for any reason.” This text is unclear and requires additional clarification for applicants to understand when a fee is required for asylee or refugee I-765 applicants that have applied to adjust status to that of a lawful permanent resident.

Other Categories

- **Granted Withholding of Deportation or Removal--(a)(10).** The current I-765 instructions state, “File Form I-765 with a copy of the Immigration Judge’s order. It is not necessary to apply for a new EAD until 90 days before the expiration of your current EAD.” This entire section was removed from the proposed Form I-765 instructions. This language should be added back in under “Other Categories” on page 11, as it provides helpful instructions to those applicants in this category.

- **Applicant for Cancellation of Removal--(c)(10).** We appreciate the addition of this section on page 11 of the proposed I-765 instructions. However, it appears that this section replaces a previous section entitled “**Applicant for Suspension of Deportation--(c)(10).**” We recommend that the new section be kept, and the previous section be added back in, including its supporting text. Applicants still occasionally apply for suspension of deportation, so it is helpful to have separate instructions for both cancellation of removal applicants and suspension of deportation applicants.
- **Final Order of Deportation or Removal, including Deferral of Removal under the Convention Against Torture--(c)(18).** This section now requires a copy of the EOIR IJ’s Order of Removal to be submitted. This order is not always accessible to applicants, so we recommend removing this requirement. If USCIS is not amenable to making this change, at a minimum, we suggest amending this section to the following: “File Form I-765 with a copy of the EOIR IJ’s Order of Removal and Form I-220B, Order of Supervision (if available).”

Conclusion

We appreciate the opportunity comment on the proposed changes and we look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION