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

**RE: Request for Comments on U.S. Citizenship and Immigration Services Asylum Application, Interview, and Employment Authorization for Applicants (November 14, 2019) DHS Docket No. USCIS-2019-0011-0001**

Dear Ms. Deshommes,

The Center for Gender & Refugee Studies (CGRS) writes in response to DHS Docket No. USCIS-2019-0011-0001, the U.S. Citizenship and Immigration Services (USCIS) Request for Comments on U.S. Citizenship and Immigration Services Asylum Application, Interview, and Employment Authorization for Applicants (November 14, 2019) (hereinafter, the Rule).

CGRS was founded in 1999 by Karen Musalo following her groundbreaking legal victory in *Matter of Kasinga*<sup>1</sup> to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for gender asylum, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions. We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,<sup>2</sup> produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with immigrant, refugee, LGBTQ, children's, and women's rights networks. Since our founding, we have also engaged in international human rights work to address the underlying causes of forced migration that produce refugees—namely, violence and persecution committed with impunity when governments fail to protect their citizens.

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<sup>1</sup> 21 I&N Dec. 357 (BIA 1996).

<sup>2</sup> See, e.g., *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019); No.3:19-cv-00807-RS (D.N.Cal.) (pending); *Damus v. McAleenan*; No. 1:18-cv-00578-JEB (D.D.C.) (pending); see also *Damus v. Nielsen*, No. 18-578, 313 F.Supp.3d 317 (D.D.C. Jul. 2, 2018); *Grace v. Barr*, 344 F.Supp.3d 96 (D.D.C. Dec. 18, 2018), *appeal docketed*, No. 195013 (D.C.Cir. Jan. 30, 2019)); and *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018).

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the legitimate asylum claims of those fleeing persecution, with a special focus on women, children and LGBTQ refugees. Our goal is to create a U.S. framework of law and policy that responds to the rights of these groups and aligns with international law.

For the reasons set forth below, CGRS urges USCIS to refrain from implementing:

- (I) a general policy of barring employment authorization to asylum seekers who enter without inspection;
- (II) barring employment authorization to asylum seekers who fail to meet the one-year asylum filing deadline; and
- (III) extending the waiting period to apply for employment authorization to 365 days.<sup>3</sup>

It is our expert opinion that these proposed changes will be particularly harmful for women and LGBTQ people seeking asylum in the United States.

#### COMMENTS

##### **I. A GENERAL POLICY OF BARRING EMPLOYMENT AUTHORIZATION TO ASYLUM SEEKERS WHO ENTER WITHOUT INSPECTION VIOLATES THE REFUGEE CONVENTION AND PROTOCOL**

DHS proposes to exclude asylum seekers from receiving employment authorization if they entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry without good cause. (Rule at 62392). Good cause is defined as “a reasonable justification” for entering the United States without inspection “as determined by the adjudicator on a case-by-case basis.” (Rule at 62392). The Rule provides a limited exception where an asylum seeker who entered or attempted to enter between ports of entry presented him or herself without delay to a DHS officer; indicated to a DHS officer or agent an intent to apply for asylum or expressed a fear of persecution or torture; and otherwise had good cause for the illegal entry or attempted entry. Examples of reasonable justification include requiring immediate medical attention or fleeing imminent serious harm. (Rule at 62392).

USCIS has justified this proposed bar, in part, on an erroneous interpretation of U.S. obligations under the 1967 Protocol Relating to the Status of Refugees. (Rule at 62392). Specifically, USCIS states “DHS believes that it is consistent with U.S. obligations under the 1967 Protocol because it exempts [foreign nationals] who establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry.” (Rule at 62392). This interpretation is incorrect as it is based on a misreading of the 1951 Convention Relating to the Status of Refugees.

The Refugee Convention, whose provisions are binding on the U.S. through our ratification of its 1967 Protocol, specifically prohibits States from imposing penalties on refugees on account of their illegal entry or presence.<sup>4</sup> It is correct that the Refugee Convention limits this protection from penalization to

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<sup>3</sup> The limitation of our comments to these aspects of the Rule should not be interpreted to indicate our agreement with the remaining aspects.

<sup>4</sup> 1951 Convention relating to the Status of Refugees, Art. 31(1).

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>. See also *Introductory note* by the Office of the United Nations High Commissioner for Refugees (UNHCR) to the Text of the 1951 Convention Relating to the Status of Refugees Text of the 1967 Protocol Relating to the Status of Refugees Resolution 2198 (XXI)

refugees who present themselves without delay to the authorities and show good cause for their illegal entry or presence. However, the Rule's limited exception as written goes far beyond the Refugee Convention's provision, and as likely to be applied, will certainly result in the U.S. violating the Refugee Convention. It also conflicts with the expedited removal system established by Congress and thus will lead to confusion, inconsistent treatment of asylum seekers, and the establishment of a *de facto* Rule barring employment authorization to nearly all those who enter without inspection.

The Rule's limited exception states that, among other requirements, the asylum seeker must affirmatively indicate to the authorities her fear of return or intention to apply for asylum. This requirement does not appear in the Refugee Convention, which lists only the need to present oneself without delay and show good cause. It is also contrary to U.S. law as it directly contradicts the procedure established by Congress for expedited removal, during which the Customs and Border Protection (CBP) officer is required to ask each person subject to expedited removal four fear-related questions. The foreign national is not required to affirmatively volunteer that she has a fear of return or intention to seek asylum; it is the responsibility of CBP to elicit such information. Therefore, if the Rule goes into effect, it is foreseeable that the government will argue that it can deny employment authorization to all persons who entered without inspection and whose intention to apply for asylum or fear of return was discovered, *as it is designed to be*, in response to mandatory questioning by the CBP officer. This "limited exception" will therefore swallow the Rule, and the *de facto* Rule will be that most if not all people entering without inspection will be found ineligible for employment authorization.

An additional defect of the limited exception is the highly restrictive examples given for what constitutes a reasonable justification for the purposes of establishing good cause for illegal entry or presence. The examples listed are requiring immediate medical attention or fleeing imminent serious harm. (Rule at 62392). The Refugee Convention does not require that a person be in a life or death situation in order to justify their illegal entry or presence. Good cause should be interpreted to include attempts to reach safety in the U.S. where entering without inspection is a response to U.S. violations of international and domestic law including the practice of metering, the Migrant Protection Protocols, the third country transit ban, and the asylum cooperative agreements established with Guatemala, Honduras and El Salvador, as well as any additional countries in the future. Adjudicators should also be given guidance that the asylum seeker's good faith belief that she or a member of her family requires immediate medical attention or is facing imminent serious harm is sufficient to establish a reasonable justification. Given the generally dangerous conditions and lack of social services including food, shelter, and medical care in northern Mexico, which are exacerbated by U.S. policies designed to deter asylum seekers, there should be a presumption that any asylum seeker entering without inspection has in fact established good cause.

The number of people seeking protection in the U.S. does not justify imposing a general rule denying employment authorization to asylum seekers. The United States, as a member of the United Nations High Commissioner for Refugees (UNHCR)'s Executive Committee, has joined an international consensus in agreeing that even in situations of large-scale influx, asylum seekers "should not be penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is

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adopted by the United Nations General Assembly, available at <https://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

considered unlawful.”<sup>5</sup> Barring an asylum applicant from work authorization based on their entry without inspection, even if a limited exception - insufficient for the reasons outlined above - is available, would be such a penalty.

Nor is it permissible to differentiate between asylum seekers who approach a port of entry and those who enter without inspection. In accordance with our international treaty obligations, Congress for almost 40 years has clearly supported the right to claim asylum *anywhere* on the U.S. border or at a land, sea or air port of entry. In the Refugee Act of 1980, Congress authorized asylum claims by any foreign national “physically present in the United States or **at a land border** or port of entry”.<sup>6</sup> Later, Congress expressly reaffirmed the eligibility for asylum of “any” foreign national “who is physically present in the United States or who arrives in the United States (**whether or not at a designated port of arrival**)”.<sup>7</sup> This inclusive provision reflected Congress’s ongoing intent to comply with international law, as well as its recognition that allowing an applicant for refugee status to assert a claim for asylum at any point along a land border is a necessary component of essential refugee protections because asylum seekers often flee for their lives and cannot pick and choose where they will ask for protection.<sup>8</sup>

Therefore, DHS’s contention that the proposed Rule is consistent with our obligations under the Refugee Protocol is simply wrong, and leads to an arbitrary and impermissible proposed Rule.

## **II. BARRING EMPLOYMENT AUTHORIZATION TO ASYLUM SEEKERS WHO FAIL TO MEET THE ONE-YEAR ASYLUM FILING DEADLINE INCREASES HARM TO WOMEN AND LGBTQ INDIVIDUALS**

DHS has proposed to make asylum seekers who file their asylum application more than a year after their most recent entry to the United States ineligible for work authorization with limited exceptions for unaccompanied children and those who meet an exception under 208(a)(D) of the Immigration and Nationality Act. (Rule at 62390). The stated justification for this change is to prevent foreign nationals seeking to apply for cancellation of removal, who are not in removal proceedings, from filing an asylum claim in order to trigger a removal hearing and provide an avenue to present their application for cancellation of removal. (Rule at 62390).

CGRS is sympathetic to the effect this practice of seeking cancellation of removal through the asylum system has had on the asylum case backlog. However, creating a Rule which will harm asylum seekers who have legitimate claims and reasons for their delay in filing is not a reasonable solution. Women and

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<sup>5</sup> Protection of Asylum-Seekers in Situations of Large-Scale Influx, No. 22 (XXXII) II.B.2(a) - 1981 Executive Committee 32nd session. Contained in United Nations General Assembly Document No. 12A (A/36/12/Add.1). Conclusion endorsed by the Executive Committee of the High Commissioner’s Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees. <https://www.unhcr.org/en-us/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>.

<sup>6</sup> <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf> (emphasis added).

<sup>7</sup> <https://casetext.com/statute/united-states-code/title-8-alien-and-nationality/chapter-12-immigration-and-nationality/subchapter-ii-immigration/part-i-selection-system/section-1158-asylum> (emphasis added).

<sup>8</sup> See <https://www.humanrightsfirst.org/sites/default/files/US-Southern-Border-Fact-Sheet.pdf> (providing a detailed explanation of why some asylum seekers cross the U.S. southern border between ports of entry).

members of the LGBTQ community, who fled or fear gender-based persecution in their home countries—such as female genital cutting, domestic violence, rape (including as a weapon of war), human trafficking, “honor” crimes, and forced marriage—must be able to seek safe haven in the United States and utilize all measures, such as work authorization, to create the durable solution that they require.

Women and others escaping gender-based harms may fail to file within one year of arrival for many legitimate reasons, such as suffering from Post-Traumatic Stress Disorder (PTSD) caused by their past persecution, or out of fear of being stigmatized even within their own diaspora community. While regulatory exceptions to the one-year filing deadline contemplate PTSD and other extraordinary reasons for delay, some adjudicators narrowly construe the exceptions and refuse to waive the deadline in such cases. In addition, the regulatory exceptions to the one-year filing deadline do not expressly reference the many compelling but “ordinary” circumstances that can reasonably prevent a woman fleeing persecution from filing for asylum within her first year—or within any rigid time period—after arriving. She may be consumed by the challenges of surviving in a new country; not know that she can ask for asylum at all and specifically from gender-based persecution, let alone that she is “on the clock” to submit a timely application; she may fear bringing herself to the attention of U.S. authorities; and she may resist applying for asylum until she absolutely must, since by taking that drastic step she may be forever severing ties with her family and community, as well as her country. To the extent that many women seeking asylum based on domestic violence come from repressive, patriarchal societies, it may take a very long time for a woman to build up the courage to come forward and request asylum.

While the Rule proposes to allow asylum seekers who meet an exception for filing late to be granted work authorization, it does not allow an asylum seeker the right to work while that exception is being adjudicated. Given the current years-long asylum backlog, this new Rule would expose vulnerable women and LGBTQ individuals to lengthy periods of uncertainty, exploitation and abuse if they must remain in or move to the shadow economy to survive or rely on others to support them while their work authorization is being adjudicated based on a substantive exception.

### **III. EXTENDING THE WAITING PERIOD TO APPLY FOR EMPLOYMENT AUTHORIZATION TO 365 DAYS INCREASES HARM TO WOMEN AND LGBTQ ASYLUM SEEKERS**

DHS proposes to extend the time period an asylum seeker must wait before she or he is eligible to be granted employment authorization based on a pending asylum application from 180 to 365 calendar days from the date their asylum application is received. For the following reasons, CGRS urges USCIS not to increase the wait for eligibility for asylum-based employment authorization.

Extending the time before asylum seekers can lawfully work will exacerbate their economically precarious and socially vulnerable situations. Asylum seekers are not entitled to most forms of government assistance or social welfare benefits and can support themselves only by working. Creating obstacles, such as extending the time before they can apply for work authorization, puts women and members of the LGBTQ community in particular at greater risk of hunger, potentially abusive living situations, and homelessness, as well as trafficking and other coercive employment practices.<sup>9</sup> Most

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<sup>9</sup> Human Rights Watch, *At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States* (November 2013), available at

asylum seekers have experienced trauma and harm either in their home country and/or on their journey to safety. This is especially true for women and LGBTQ asylum seekers.<sup>10</sup> As long as they are not able to work, they remain in a highly vulnerable situation having to rely on others.

The sooner asylum seekers can begin to work, the sooner they can be, and begin to feel, self-reliant. The UNHCR Executive Committee, of which the United States is a member, has recognized that asylum seekers are capable of attaining self-reliance if provided with an opportunity to do so.<sup>11</sup> Providing asylum seekers with an early and financially accessible opportunity to work legally also recognizes the lack of assistance provided by the U.S. government to asylum seekers. Moreover, once employed, an asylum seeker can be a contributing member of U.S. society, and can take pride in providing for herself and her family. This sense of empowerment is particularly important for women and LGBTQ refugees, and allows them to begin to heal from their traumatic experiences and regain their confidence.<sup>12</sup>

For the reasons stated above, the Rule's various proposals will violate our international obligations, flout Congressional intent, result in unnecessary suffering, and increase the vulnerability of an already traumatized population. We call upon USCIS to reject the proposed Rule and instead work to provide a humane, effective employment authorization policy consistent with international law.

Thank you for the opportunity to submit comments on the Rule.

Sincerely,

*Kate Jastram*

Kate Jastram  
Director of Policy & Advocacy  
Center for Gender & Refugee Studies  
[jastramkate@uchastings.edu](mailto:jastramkate@uchastings.edu)

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<https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united>.

<sup>10</sup> U.N. High Commissioner for Refugees, *Women on the Run: First-hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, 26 October 2015, available at <https://www.refworld.org/docid/56307e2a4.html>.

<sup>11</sup> Executive Committee Conclusion No. 93 (LIII) 2002, in U.N. High Commissioner for Refugees (UNHCR), *A Thematic Compilation of Executive Committee Conclusions (7th Edition)*, June 2014, available at <https://www.refworld.org/docid/5698c1224.html>.

<sup>12</sup> Women's Refugee Commission, *Refugee women's path to equality and self-reliance*, March 7, 2019, available at <https://www.womensrefugeecommission.org/blog/3458-refugee-women-s-path-to-equality-and-self-reliance>.