This document is scheduled to be published in the
Federal Register on 05/04/2022 and available online at
federalregister.gov/d/2022-09539, and on **govinfo.gov**

9111-97-P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 274a

[CIS No. 2714-22; DHS Docket No. USCIS-2022-0002]

RIN 1615-AC78

Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Temporary final rule with request for comments.

SUMMARY: This rule temporarily amends existing Department of Homeland Security (DHS) regulations to provide that the automatic extension period applicable to expiring Employment Authorization Documents (Forms I-766 *or* EADs) for certain renewal applicants who have filed Form I-765, Application for Employment Authorization, will be increased from up to 180 days to up to 540 days from the expiration date stated on their EADs. This increase will be available to eligible renewal applicants with pending Forms I-765 as of May 4, 2022, including those applicants whose employment authorization may have lapsed following the initial 180-day extension period, and any eligible applicant who files a renewal Form I-765 during the 540-day period beginning on or after May 4, 2022, and ending October 26, 2023. In light of current processing times for Forms I-765, DHS is taking these steps to help prevent renewal applicants from experiencing a lapse in employment authorization and/or documentation while their applications remain pending and solutions are implemented to return processing times to normal levels.

DATES: *Effective date:* This temporary final rule is effective May 4, 2022, through October 15, 2025.

Submission of public comments: Written comments must be submitted on or before July 5, 2022. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit comments on the entirety of this temporary final rule package, identified by DHS Docket No. USCIS-2022-0002, through the Federal eRulemaking Portal: https://www.regulations.gov. Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to USCIS or DHS officials, will not be considered comments on the temporary final rule and may not receive a response. Please note that USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is not accepting mailed comments at this time. If you cannot submit your comment by using https://www.regulations.gov, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at 240-721-3000 (not a toll-free call) for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Melissa Lin, Branch Chief, Policy Development and Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240-721-3000 (not a toll-free call). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Public Participation

DHS invites you to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this temporary final rule. Comments providing the most assistance to DHS will reference a specific provision of the temporary final rule, explain the reason for any recommended change, and include data, information, or authority that supports the recommended change. Comments submitted in a manner other than explicitly provided above, including emails or letters sent to USCIS or DHS officials, will not be considered comments on the temporary final rule and may not receive a response.

Instructions: All submissions should include the agency name and DHS Docket No. USCIS-2022-0002 for this rulemaking. Providing comments is entirely voluntary. DHS will post all submissions, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov* and will include any personal information you provide. Because the information you submit will be publicly available, you should consider limiting the amount of personal information in your submission. DHS may withhold information provided in comments from public viewing if it determines that such information is offensive or may affect the privacy of an individual. For additional information, please read the Privacy Act notice available through the link in the footer of *https://www.regulations.gov*.

Docket: For access to the docket and to read comments received, go to https://www.regulations.gov, referencing DHS Docket No. USCIS-2022-0002. You may also sign up for email alerts on the online docket to be notified when comments are posted or subsequent rulemaking is published.

II. Background

Operational challenges, exacerbated by the emergency measures USCIS employed to maintain its operations through the height of the COVID-19 pandemic in 2020, which greatly affected operations and staffing, combined with a sudden increase in Form I-765 filings, have resulted in processing times for Form I-765 increasing to such a level that the 180-day automatic extension period for Form I-765 renewal applicants' employment authorization and/or EADs is temporarily insufficient. For some applicants, the extension has already expired, while for many others, it is in imminent danger of expiring. As a result, renewal applicants are losing their jobs and employers suddenly are faced with finding replacement workers during a time when the U.S. economy is experiencing more job openings than available workers.[1] DHS has determined that it is imperative to immediately increase the automatic extension period of employment authorization and/or EADs for eligible Form I-765 renewal applicants for a temporary period. This temporary increase to the automatic extension period will avoid the immediate harm that otherwise would affect tens of thousands of EAD renewal applicants and their U.S. employers in those cases where USCIS is unable to process applicants' EAD renewal applications before the end of the current 180-day automatic extension period. USCIS is already taking steps to more permanently address its backlogs for EAD applications and other form types, and this temporary increase will provide a temporary extension while USCIS works to return to pre-pandemic processing times.

A. Legal Authority

The Secretary of Homeland Security's (Secretary) authority for the regulatory amendments made in this TFR are found in: section 274A(h)(3)(B) of the Immigration

[1] Bureau of Labor Statistics data show that, as of December 2021, there were 0.6 unemployed persons per job opening. U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Number of unemployed persons per job opening, seasonally adjusted* (Jan. 2007 through Jan. 2022), https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm (last visited Mar. 14, 2022).

AILA Doc. No. 22050300. (Posted 5/3/22)

and Nationality Act (INA), 8 U.S.C. 1324a(h)(3)(B), which recognizes the Secretary's authority to extend employment authorization to noncitizens in the United States; and section 101(b)(1)(F) of the Homeland Security Act, 6 U.S.C. 111(b)(1)(F), which establishes as a primary mission of DHS the duty to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." In addition, section 103(a)(3) of the INA, 8 U.S.C. 1103(a)(3), authorizes the Secretary to establish such regulations as the Secretary deems necessary for carrying out the Secretary's authority under the INA, and section 214 of the INA, 8 U.S.C. 1184, including section 214(a)(1), 8 U.S.C. 1184(a)(1), authorizes the Secretary to prescribe, by regulation, the terms and conditions of the admission of nonimmigrants.

B. Legal Framework for Employment Authorization

1. Types of Employment Authorization: 8 CFR 274a.12(a), (b), and (c)

Whether or not a noncitizen is authorized to work in the United States depends on the noncitizen's immigration status or other conditions that may permit employment authorization (for example, having a pending application for asylum or a grant of deferred action). DHS regulations outline three classes of noncitizens who may be eligible for employment in the United States, as follows:[2]

- Noncitizens in the first class, described at 8 CFR 274a.12(a), are authorized to work "incident to status" for any employer, as well as to engage in self-employment, as a condition of their immigration status or circumstances. Although authorized to work as a condition of their status or circumstances,

[2] There are several employment-eligible categories that are not included in DHS regulations but instead are described in the form instructions to Form I-765, Application for Employment Authorization. Employment-authorized L nonimmigrant spouses are an example. *See* INA sec. 214(c)(2)(E), 8 U.S.C. 1184(c)(2)(E).

certain classes of noncitizens must apply to USCIS in order to receive a Form I-766 EAD as evidence of that employment authorization;[3]

- Noncitizens in the second class, described at 8 CFR 274a.12(b), also are authorized to work "incident to status" as a condition of their immigration status or circumstances, but generally the authorization is valid only for a "specific employer;"[4] and
- Noncitizens in the third class, described at 8 CFR 247a.12(c), are required to apply for employment authorization and may work only if USCIS approves their application. Therefore, they are authorized to work for any employer, as well as to engage in self-employment, upon approval, in the discretion of USCIS, of Form I-765, Application for Employment Authorization, so long as their EAD remains valid.[5]

2. *The Application Process for Obtaining Employment Authorization and EADs: 8 CFR 274a.13(a)*

For certain eligibility categories listed in 8 CFR 274a.12(a) (the first class) and all eligibility categories listed in 8 CFR 274a.12(c) (the third class), as well as additional categories specified in form instructions, an Application for Employment Authorization (Form I-765) must be properly filed with USCIS (with fee or fee waiver as applicable) to receive employment authorization and/or the Form I-766 EAD.[6] If granted, such employment authorization and EADs allow noncitizens to work for any U.S. employer or

---

[3] *See* 8 CFR 274a.12(a).
[4] *See* 8 CFR 274a.12(b).These noncitizens are issued an Arrival-Departure Record (Form I-94) indicating their employment-authorized status in the United States and do not file separate requests for evidence of employment authorization.
[5] *See* 8 CFR 274a.12(c); *Matter of Tong*, 16 I&N Dec. 593, 595 (BIA 1978) (holding that the term "employment' is a common one, generally used with relation to the most common pursuits," and includes "the act of being employed for one's self").
[6] *See* 8 CFR 103.2(a) and 8 CFR 274a.13(a). Applicants who are employment authorized incident to status (e.g., asylees, refugees, TPS beneficiaries) will file Form I-765 to request a Form I-766 EAD. Applicants who are filing within an eligibility category listed in 8 CFR 274a.12(c) must use Form I-765 to request both employment authorization and an EAD.

engage in self-employment, as applicable. Certain noncitizens may file Form I-765 concurrently with a related benefit request if permitted by the form instructions or as announced by USCIS.[7] In some instances, the underlying benefit request, if granted, would form the basis for eligibility for employment authorization.

For eligibility categories listed in 8 CFR 274a.12(a) and (c), USCIS has the discretion to establish a specific validity period for the EAD.[8]

3. *Automatic Extensions of EADs for Renewal Applicants: 8 CFR 274a.13(d)*

a. *Renewing Employment Authorization and/or EADs*

EADs are not valid indefinitely, but instead expire after a specified period of time.[9] Noncitizens within eligibility categories listed in 8 CFR 274a.12(c) must obtain a renewal of employment authorization and their EAD before the expiration date stated on the current EAD, or the noncitizen will lose the eligibility to work in the United States unless the noncitizen has obtained an immigration status or belongs to a class of individuals with employment authorization incident to that status (or class) since obtaining a current EAD. The same holds true for some classes of noncitizens authorized to work incident to status whose EADs' expiration dates coincide with the termination or expiration of their underlying immigration status. Other noncitizens authorized to work incident to status, such as asylees, refugees, and Temporary Protected Status (TPS) beneficiaries, may have immigration status that confers employment authorization that continues past the expiration date stated on their EADs. Nevertheless, such individuals may wish to renew their EAD in order to have valid evidence of their continuous employment authorization for various purposes, such as presenting evidence of employment authorization and identity to their employers for completion of the Employment Eligibility Verification (Form I-9), or to obtain benefits such as a driver's

[7] *See* 8 CFR 274a.13(a).
[8] *See* 8 CFR 274.12(a) and (c).
[9] *See* 8 CFR 274a.13(b) and 274a.14(a).

license from a State motor vehicle agency.[10] Failure to renew their EADs prior to the expiration date may result in job loss if such individuals do not have or cannot present alternate evidence of employment authorization, as employers who continue to employ individuals without employment authorization may be subject to civil money penalties.[11]

Those seeking to renew previously granted employment authorization and/or EADs must file the renewal request on Form I-765 with USCIS in accordance with the form instructions.[12]

Module A. b. Minimizing the Risk of Gaps in Employment Authorization and/or EAD Validity Through Automatic Extensions

If an eligible noncitizen is not able to renew their employment authorization and/or EAD before it expires, the noncitizen and the employer may experience adverse consequences. For the noncitizen, the lack of renewal could cause job loss, gaps in employment authorization, and loss of income to the noncitizen and their family member(s). For the noncitizen's employer, the disruption may cause instability with business continuity or other financial harm. Beyond the financial and economic impact that gaps in employment create for the employer and the noncitizen, if the noncitizen engages in unauthorized employment, such activity may render a noncitizen removable,[13]

---

[10] For example, the status of asylees generally continues unless and until it is adjusted to lawful permanent resident status, and asylees are employment authorized incident to status. Therefore, asylees' employment authorization typically will continue beyond the expiration date on the EAD, which is issued in 2-year increments. On the other hand, a K-1 fiancée, while also employment authorized incident to status, will receive only a 90-day period in K-1 nonimmigrant status upon admission to the United States. The expiration date of EADs issued to K-1 fiancées will coincide with the 90-day admission period.

[11] For an initial hire, the employee must present the employer with acceptable documents evidencing identity and employment authorization. The lists of acceptable documents can be found on the last page of the Form I-9. *See* https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf (last updated Oct. 21, 2019). An employer that does not properly complete Form I-9, which includes reverifying continued employment authorization, or continues to employ an individual with knowledge that the individual is not authorized to work may be subject to civil money penalties. *See* https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/100-unlawful-discrimination-and-penalties-for-prohibited-practices/108-penalties-for-prohibited-practices (last updated Apr. 27, 2020).

[12] *See* https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf (08/25/20 edition). In reviewing the Form I-765, USCIS ensures that the fee was paid, a fee waiver was granted, or a fee exemption applies.

[13] *See, e.g.*, INA sec. 237(a)(1)(C), 8 U.S.C. 1227(a)(1)(C).

render a noncitizen ineligible for future benefits such as adjustment of status,[14] and/or may subject the employer to civil and criminal penalties.[15]

Before 2016, USCIS regulations indicated that USCIS would "adjudicate an application [for an EAD] within 90 days" from the date USCIS received the application.[16] If USCIS did not adjudicate the application within that timeframe, the applicant was eligible to be issued an interim document evidencing employment authorization with a validity period not to exceed 240 days. On November 18, 2016, as part of DHS's efforts to implement the flexibilities provided to noncitizens and employers by the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended, and the American Competitiveness and Workforce Improvement Act of 1998, DHS published a final regulation[17] removing the provision and replacing it with the current 8 CFR 274a.13(d).

Under the current provision, certain employment eligibility categories receive an automatic extension of employment authorization and EAD for up to 180 days if certain conditions (outlined below) are met.[18] DHS created the provision to prevent gaps in employment authorization and related consequences for certain renewal applicants,[19] and in light of processing times and possible filing surges.[20] To significantly mitigate the risks of and consequences related to gaps in employment authorization for renewal applicants,

---

[14] *See* INA sec. 245(c), 8 U.S.C. 1255(c).
[15] *See* INA sec. 274A, 8 U.S.C. 1324a.
[16] *See* 8 CFR 274a.13(d) (2016).
[17] *See* Final Rule, *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 81 FR 82398 (Nov. 18, 2016) ("AC21 Final Rule"). The final rule was issued after a proposed rule was published in the *Federal Register*. *See* Notice of Proposed Rulemaking, *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers,* 80 FR 81899 (Dec. 31, 2015) ("AC21 NPRM").
[18] *See* 81 FR at 82455-82463 (AC21 Final Rule).
[19] *See* 80 FR at 81927 ("DHS proposes to amend its regulations to help prevent gaps in employment authorization for certain employment-authorized individuals who are seeking to renew expiring EADs. . . . These provisions would significantly mitigate the risk of gaps in employment authorization and required documentation for eligible individuals, thereby benefitting them and their employers.").
[20] *See* 80 FR at 81927 ("DHS believes that this time period [of up to 180 days] is reasonable and provides more than ample time for USCIS to complete the adjudication process based on USCIS's current 3-month average processing time for Applications for Employment Authorization."); *id.* at 81927 n.77 ("Depending on any significant surges in filings, however, there may be periods in which USCIS takes longer than 2 weeks to issue Notices of Action (Forms I–797C).").

DHS changed its regulations at 8 CFR 274a.13(d) to provide certain categories of renewal applicants with an automatic extension of their EADs and, if applicable, related employment authorization, for up to 180 days from the expiration date on the EAD if:

- The renewal applicants timely file an application to renew their employment authorization and/or EAD on Form I-765 before the EAD expires;[21]
- The renewal Form I-765 is based on the same employment authorization category on the front of the expiring EAD or is for an individual approved for TPS whose EAD was issued pursuant to 8 CFR 274a.12(c)(19);[22] and
- The noncitizen's eligibility to apply for employment authorization continues notwithstanding the expiration of the EAD and is based on an employment authorization category that does not require the adjudication of an underlying application or petition before the adjudication of the renewal application, as announced on the USCIS website.[23]

---

[21] 8 CFR 274a.13(d)(1)(i). TPS beneficiaries must file during the designated period in the applicable Federal Register notice. In addition, the TPS and TPS-related documentation, including EADs, of certain TPS beneficiaries under the TPS designations for Haiti, El Salvador, Sudan, Nicaragua, Honduras, and Nepal are continued subject to current court orders and litigation compliance *Federal Register* notices. *See* 86 FR 50725 (Sept. 10, 2021) (continuing TPS and TPS-related documentation for eligible beneficiaries of the TPS designations for the noted six countries through December 31, 2022, and further noting that DHS will issue future such notices as necessary to comply with court orders in *Ramos, et al. v. Nielsen, et al.,* No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018) ("*Ramos*"); *Saget, et. al. v. Trump, et al.,* No. 18-cv-1599 (E.D.N.Y. Apr. 11, 2019) ("*Saget*"); and *Bhattarai v. Nielsen,* No. 19-cv-00731 (N.D. Cal. Mar. 12, 2019) ("*Bhattarai*"). DHS also will comply with any superseding court orders in these lawsuits. This TFR will be construed in harmony, to the extent possible, with the existing and any future court orders in this referenced litigation.

[22] *See* 8 CFR 274a.13(d)(1)(ii) (exempting individuals approved for TPS with EADs issued pursuant to 8 CFR 274a.12(c)(19) from the requirement that the employment authorization category on the face of the expiring EAD be the same as on the request for renewal (Form I-765)). *See also* DHS, USCIS, *Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses*, PA-2021-25 (Nov. 12, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-EmploymentAuthorization.pdf (explaining that certain H-4, E, or L dependent spouses may submit a document combination including an unexpired Form I-94 indicating H-4, E, or L-2 nonimmigrant status alongside Form I-797C).

[23] *See* 8 CFR 274a.13(d)(iii).

The following classes of noncitizens filing to renew an EAD may be eligible to receive an automatic extension of their employment authorization and/or EAD for up to 180 days, which USCIS discusses in detail at https://www.uscis.gov/eadautoextend:[24]

- Noncitizens admitted as refugees (A03).[25]
- Noncitizens granted asylum (A05).[26]
- Noncitizens admitted as parents or dependent children of noncitizens granted permanent residence under section 101(a)(27)(I) of the INA, 8 U.S.C. 1101(a)(27)(I) (A07).[27]
- Noncitizens admitted to the United States as citizens of the Federated States of Micronesia or the Marshall Islands pursuant to agreements between the United States and the former trust territories (A08).[28]
- Noncitizens granted withholding of deportation or removal (A10).[29]
- Noncitizens granted TPS, regardless of the employment authorization category on their current EADs (A12 or C19).[30]
- Noncitizen spouses of E-1/2/3 nonimmigrants (Treaty Trader/Investor/Australian Specialty Worker) (A17).[31]
- Noncitizen spouses of L-1 nonimmigrants (Intracompany Transferees) (A18).[32]
- Noncitizens who have properly filed applications for TPS and who have been deemed *prima facie* eligible for TPS under 8 CFR 244.10(a) and have received an EAD as a "temporary treatment benefit" under 8 CFR 244.10(e) and 274a.12(c)(19) (C19).[33]

---

[24] *See* DHS, USCIS, *Automatic Employment Authorization Document (EAD) Extension*, https://www.uscis.gov/eadautoextend (last updated Nov. 12, 2021).
[25] *See* 8 CFR 274a.12(a)(3).
[26] *See* 8 CFR 274a.12(a)(5).
[27] *See* 8 CFR 274a.12(a)(7).
[28] *See* 8 CFR 274a.12(a)(8).
[29] *See* 8 CFR 274a.12(a)(10).
[30] *See* 8 CFR 274a.12(a)(12) or (c)(19).
[31] *See* INA sec. 214(e)(2), 8 U.S.C. 1184(e)(2).
[32] *See* INA sec. 214(c)(2)(E), 8 U.S.C. 1184(c)(2)(E).
[33] *See* 8 CFR 274a.12(c)(19).

- Noncitizens who have properly filed applications for asylum and withholding of deportation or removal (C08).[34]
- Noncitizens who have filed applications for adjustment of status to lawful permanent resident under section 245 of the INA, 8 U.S.C. 1255 (C09).[35]
- Noncitizens who have filed applications for suspension of deportation under section 244 of the INA (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the INA, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (C10).[36]
- Noncitizens who have filed applications for creation of record of lawful admission for permanent residence (C16).[37]
- Noncitizens who have properly filed legalization applications pursuant to section 210 of the INA, 8 U.S.C. 1160 (C20).[38]
- Noncitizens who have properly filed legalization applications pursuant to section 245A of the INA, 8 U.S.C. 1255a (C22).[39]
- Noncitizens who have filed applications for adjustment of status pursuant to section 1104 of the Legal Immigration Family Equity Act (C24).[40]
- Noncitizen spouses (H-4) of H-1B nonimmigrants with an unexpired Form I-94 showing H-4 nonimmigrant status (C26).[41]

---

[34] *See* 8 CFR 274a.12(c)(8).
[35] *See* 8 CFR 274a.12(c)(9).
[36] *See* 8 CFR 274a.12(c)(10).
[37] *See* 8 CFR 274a.12(c)(16).
[38] *See* 8 CFR 274a.12(c)(20).
[39] *See* 8 CFR 274a.12(c)(22).
[40] *See* 8 CFR 274a.12(c)(24).
[41] *See* 8 CFR 274a.12(c)(26).

- Noncitizens who are the principal beneficiaries or qualified children of approved VAWA self-petitioners, under the employment authorization category "(c)(31)" in the form instructions to Form I-765 (C31).

Currently, the extension automatically terminates the earlier of up to 180 days after the expiration date of the EAD, or upon issuance of notification of a decision denying the renewal request.[42] An EAD that has expired on its face is considered unexpired when combined with a Form I-797C indicating a timely filing of the application to renew the EAD.[43] Therefore, when the expiration date on the front of the EAD is reached, a noncitizen who is continuing in their employment with the same employer and relying on their extended EAD to show their employment authorization must present to the employer the Form I-797C to show continued employment authorization, and the employer must update the previously completed Form I-9 to reflect the extended expiration date based on the automatic extension while the renewal is pending. For new employment, the automatic extension date is recorded on the Form I-9 by the employee (if applicable) and employer in the first instance. In either case, the reverification of employment authorization or the EAD occurs when the automatic extension period terminates.[44]

USCIS policy generally permits the filing of a Form I-765 renewal application up to 180 days before the current EAD expires.[45] If the renewal application is granted, the employment authorization and/or EAD generally will be valid as of the date of approval of the application. If the application is denied, the employment authorization and/or

---

[42] *See* 8 CFR 274a.13(d)(3).
[43] *See* 8 CFR 274a.13(d)(4).
[44] *See* DHS, USCIS, *Completing Section 3, Reverification and Rehires,* https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires (last updated July 10, 2020).
[45] *See* USCIS' webpage at https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document (last updated Feb. 11, 2022); *see also* 81 FR at 82456 (AC21 Final Rule).

EAD generally is terminated on the day of the denial.[46] If the renewal application was timely and properly filed but remains pending beyond the 180-day automatic extension period and the employee cannot provide other evidence of current employment authorization, the employee must stop working on the beginning of the 181st day after the expiration of the EAD, and the employer must remove the employee from the payroll.[47] As a result, both the employee and the employer will experience the negative consequences of gaps in employment authorization and/or EAD validity. Since its promulgation in 2016, the automatic extension provision at 8 CFR 274a.13(d) has helped to minimize the risk of these negative consequences for applicants who are otherwise eligible for the automatic extension and their employers.

Recently, however, it has become apparent that the 180-day automatic extension is not enough for a growing number of renewal applicants. Thousands of renewal applications remain pending beyond the 180-day automatic extension period resulting in applicants losing employment authorization and/or EAD validity. The grave situation that applicants and, in turn, their employers are facing generally is not the result of the applicant's actions, but instead the result of several converging factors affecting USCIS operations that have been compounded by the COVID-19 public health emergency. These factors resulted in a significant increase in USCIS processing times for several categories of Form I-765 renewal applications, as described in detail below. DHS has determined that the 180-day automatic extension provision is currently insufficient to protect applicants as was originally intended.

---

[46] *See* 8 CFR 274a.13(d)(3).
[47] *See* 8 CFR 274a.2(b)(vii) (reverification provision).

AILA Doc. No. 22050300. (Posted 5/3/22)

III. Purpose of this Temporary Final Rule

A. Overview of Issues Negatively Impacting Form I-765 Processing Times

Prior to 2019, USCIS generally kept pace with the steady flow of Form I-765 filings and met its 3-month internal processing goal. However, in the years leading up to 2019, USCIS began accruing backlogs in adjudications across various other form types owing to shifting priorities, increased form lengths, expanded interview requirements, increased Request for Evidence issuance, and insufficient staffing levels due to a hiring freeze within the Field Operations Directorate beginning December 2019 and one in the Service Center Operations Directorate beginning February 2020.[48] Those backlogs in other program areas strained USCIS resources, which, when coupled with USCIS' worsening fiscal situation beginning in late 2019 and continuing into 2020 and part of 2021, hindered USCIS' ability to allocate resources to respond to the increase in Form I-765 filings in a manner that would allow USCIS to continue to meet its 3-month internal processing goal as it historically had. Additionally, strain on USCIS' financial resources, which was due in part to USCIS' inability to update its fee structure since 2016, negatively affected staffing levels and hampered the ability to quickly respond to shifting workload demands. The COVID-19 pandemic exacerbated USCIS' precarious fiscal situation, deepening its fiscal emergency. The pandemic also led to new and significant operational disruptions, reversing any gains the agency had made on existing backlogs;[49]

---

[48] A U.S. Government Accountability Office report observed that despite receipts remaining steady (between 8 million and 10 million) from fiscal year (FY) 2015 through FY 2019, USCIS' processing times increased through FY 2020, and the overall pending caseload grew an estimated 85 percent, with USCIS having received more than 4 million applications and petitions in the first two quarters of FY 2020, owing to the factors listed above. Factors that affected Form I-765, specifically, will be discussed in further detail below. *See* GAO-21-529, U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload (Aug. 2021), pp. 9, 12, 14, and 20, https://www.gao.gov/assets/gao-21-529.pdf. The hiring freezes that began in the Field Operations and Service Center Operations Directorates were eventually subsumed by an agency-wide hiring freeze beginning May 1, 2020, which is discussed in further detail below. USCIS lifted the agency-wide hiring freeze in March 2021.

[49] USCIS had made some progress in addressing these backlogs before the COVID-19 pandemic. In FY 2019, USCIS observed a backlog growth rate of less than 1 percent—the smallest growth in backlogs since 2012. This was due to a 4-percent decrease in receipts, increases in completions (naturalizations, adjustments of status, and nonimmigrant and immigrant worker petitions), and additional staffing. However, the COVID-19 pandemic reversed any gains USCIS had made.

AILA Doc. No. 22050300. (Posted 5/3/22)

these pandemic-related disruptions impacted adjudications of immigration benefit requests as well as the pipeline of work for which all required pre-adjudicative processing was completed (making forms "adjudication-ready"), including for Form I-765 adjudications.[50] In 2021, before USCIS could recover from these fiscal and operational impacts, USCIS experienced a sudden and dramatic increase in Form I-765 filings due to: increased filings in the C09 (pending adjustment) category generally caused by changes in employment-based visa availability, new Temporary Protective Status (TPS) designations and redesignations, and the cyclical nature of the C08 (pending asylum) and C33 (DACA) categories. USCIS has experienced significant Form I-765 backlogs since then.

Presently, Form I-765 processing times vary, with many categories' processing times extending far beyond USCIS' 3-month processing goal for the form type. By December 2021, the median[51] processing time for all initial and renewal Form I-765 applications was 6.5 months, and the median processing time for all Form I-765 renewal applications was 5.4 months. For those renewal applicants within employment authorization categories eligible for the up to 180-day automatic extension of employment authorization provided by 8 CFR 274a.13(d), as of December 2021, USCIS'

---

[50] Other contributing factors include competing priorities, such as litigation obligations and administration priorities, that shifted resources away from Form I-765 adjudications or caused the agency to focus resources on certain categories or subcategories of Form I-765; and policy changes (such as expanding biometrics requirements to certain applicants filing Form I-539, Application to Extend/Change Nonimmigrant Status), which delayed USCIS' ability to approve any Form I-765 relying on an underlying Form I-539 decision. *See* GAO-21-529, U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload (Aug. 2021), pp. 15-20. However, these factors, while relevant, have been mitigated through recent policy changes and, therefore, are no longer a significant cause of gaps in employment authorization for applicants. For example, on May 17, 2021, USCIS temporarily suspended the biometrics requirement for certain Form I-539 applicants to address the processing delays exacerbated by limited Application Support Center (ASC) capacity due to COVID-19. *See* USCIS News Alert, USCIS Temporarily Suspends Biometrics Requirement for Certain Form I-539 Applicants, https://www.uscis.gov/news/alerts/uscis-temporarily-suspends-biometrics-requirement-for-certain-form-i-539-applicants (last updated May 13, 2021).

[51] The median processing time represents the time it took to complete 50 percent of the cases completed in a given time period.

median processing time was 8.0 months.[52] Given these processing times, DHS recognizes that approximately 87,000 renewal applicants eligible for an automatic extension under 8 CFR 274a.13(d)(1) are, or soon will be, past the 180-day automatic extension period of their employment authorization and/or EAD validity.

The vast majority of applicants filing renewal Form I-765 applications and who are eligible for the automatic extension of EADs under 8 CFR 274a.13(d) fall under three filing categories: (1) noncitizens who have properly filed applications for asylum and withholding of deportation or removal (C08); (2) noncitizens who have properly filed applications for adjustment of status to lawful permanent resident under section 245 of the INA, 8 U.S.C. 1255 (C09);[53] and (3) noncitizens who have properly filed applications for suspension of deportation under section 244 of the INA (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the INA, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (C10).[54] As of December 2021, the processing time range (between median and 93rd percentile) for Form I-765 renewal applications filed based on the C08 category was 10.1 to 11.5 months; for the C09 category, 7.7 to 11.6 months; and for the C10 category, 6.1 to 8.6 months. By comparison, this processing time range as of December 2020, for the C08 category, was 5.0 to 6.9 months; for the C09 category, 2.5 to 5.6 months; and for the C10 category, 3.2 to 4.2 months.

Table 1. Recent Dramatic Growth in 50th and 93rd Percentile Processing Times for Form I-765 Renewal Applications Filed by Top Three Filing Categories

[52] The time it took USCIS to complete 93 percent of these cases was 11.4 months. For more information on how USCIS calculates its processing times, see USCIS' webpage at https://egov.uscis.gov/processing-times/more-info (last visited Feb. 9, 2022).

[53] Applicants filing a Form I-765 based on a pending LRIF-based adjustment application also use "(c)(9)" as their eligibility category on Form I-765.

[54] In December 2021, these three filing categories made up nearly 95 percent of the renewal EAD receipts filed in categories eligible for the automatic extension of employment authorization. Broken down further among these three categories: the C08 category comprised approximately 58 percent of the renewal EAD receipts filed in categories eligible for the automatic extension, while the C09 category comprised approximately 19 percent and the C10 comprised approximately 18 percent.

Fiscal Year[55]	Pending Asylum Applicants (C08)	Adjustment of Status Applicants (C09)	Suspension/Cancellation Applicants (C10)
2017	6.5 to 7.1 months	4.6 to 6.5 months	6.3 to 8.4 months
2018	2.8 to 4.4 months	4.7 to 8.1 months	7.0 to 9.5 months
2019	4.1 to 5.2 months	5.2 to 7.8 months	2.7 to 4.6 months
2020	5.0 to 6.9 months	2.5 to 5.6 months	3.2 to 4.2 months
2021	10.1 to 11.5 months	7.7 to 11.6 months	6.1 to 8.6 months

With current processing times far exceeding USCIS' normal 3-month goal, the 180 days of additional employment authorization/EAD validity provided for these renewal (and some additional) categories by 8 CFR 274a.13(d) is insufficient.[56] After the additional 180 days is exhausted, many applicants are still waiting for their Form I-765 renewal applications to be approved. Such applicants therefore lose employment authorization and/or their EADs become invalid while the decision on their renewal applications remains outstanding. By December 31, 2021, approximately 66,000 renewal EAD applicants were in this situation. By comparison, in December 2020, approximately 3,300 applicants[57] had Form I-765 renewal applications pending beyond the 180-day automatic extension.[58]

---

[55] In some cases, USCIS' data is based on its fiscal year, beginning on October 1 and ending on September 30 of the reporting period.

[56] Other renewal categories that fall within 8 CFR 274a.13(d) experiencing processing times in December 2021 that exceed the 3-month goal include EAD applicants filing under 8 CFR 274a.12(a)(5) for individuals granted asylum (6.1 to 10.2 months), (a)(10) for individuals granted withholding of deportation or removal (7.2 to 10.3 months), and (c)(31) for VAWA self-petitioners (6.3 to 13.1 months).

[57] Reasons for delays in case completions for these approximately 3,300 applicants included competing priorities, Requests for Evidence, staffing, and the COVID-19 pandemic.

[58] The 66,000 and approximately 3,300 figures reflect *all* EAD categories eligible for automatic extension of employment eligibility and/or EAD validity. Therefore, some applicants within this population, namely applicants filing under 8 CFR 274a.12(a) (employment authorized incident to status or circumstance), do not necessarily lose their employment authorization after the 180-day automatic extension period is exhausted. Because their employment authorization is incident to their immigration status or circumstance, these renewal EAD applicants' primary consequence is that their EADs become invalid. Considering that the vast majority (approximately 95 percent as of December 2021) of renewal EAD applicants are those filing under 8 CFR 274a.12(c)(8), (9), and (10), however, the 66,000 and 3,300 figures are presumed to represent largely applicants whose primary consequence is a loss of employment authorization itself. Even so, DHS recognizes harm may be experienced by applicants filing under 8 CFR 274a.12(a) categories as well. While these applicants may have available alternative evidentiary options other than an EAD that they

Without immediate intervention, DHS estimates that the situation will only worsen over time, as each month, thousands of additional EAD renewal applicants are at risk of losing their employment authorization and/or EAD validity despite the 180-day automatic extension period currently provided by regulation. Beginning in calendar year (CY) 2022, DHS estimates that approximately 14,500 or more renewal applicants, the majority of whom are in the C08 pending asylum applicant category, lost or could lose their employment authorization and/or EAD validity *each month* unless immediate action is taken to remedy the situation.

The situation for asylum applicants is especially dire because of the significant time that asylum applicants must wait to become employment-authorized in the first place. Under regulations that were in effect from August 2020 through February 2022, most members of this vulnerable population were not permitted to apply for employment authorization until 365 calendar days had elapsed since the filing of their asylum application.[59] Although this regulation was vacated[60] in February of 2022, by statute, asylum applicants still cannot be approved for initial EADs until their asylum applications have been pending for 180 days.[61] This initial wait time exacerbates the often-precarious economic situations asylum seekers may be in as a result of fleeing persecution in their home countries. Many lacked substantial resources to support themselves before they fled, or spent much of what they had to escape their country and travel to the United States. Those with resources may have been forced to leave what they had behind because they lacked the time to sell property or otherwise gather what they

---

can use to show proof of employment authorization to their employers for Form I-9 completion or for purposes of receiving State or local public benefits (e.g., driver's licenses), DHS recognizes that having no valid EAD may nevertheless cause harm, including job loss.

[59] *See* Employment Authorization Applications Rule and the Asylum Application, Interview, and Employment Authorization for Applicants Rule ("Broader Asylum EAD Rule"), 85 FR 38532 (June 26, 2020), and preliminary injunction in *Casa de Maryland Inc. et al. v. Chad Wolf et al.*, 8:20-cv-02118-PX (D. Md. Sept. 11, 2020).

[60] *See Asylumworks, et. al. v. Alejandro N. Mayorkas, et. al.*, No 20-CV-3815 BAH, 2022 WL 355213 (D.D.C. Feb 7, 2022).

[61] *See* INA 208(d)(2), 8 U.S.C. 1158(d)(2).

owned. When whole families are threatened, the primary earner may be the first to travel to the United States to establish a new home before bringing the rest of the family. The cost to travel to the United States is high, as is the relative cost of living. In these circumstances, if the asylum seeker is unable to seek employment for extended periods of time, it can not only negatively impact that individual, but the whole family as well.

For those who have already found jobs to support their needs, the potential for their initial EADs to expire prior to the approval and issuance of a renewed EAD may force them back into instability caused by a gap in the ability to legally work. Some employers, notwithstanding possible violation of INA section 274B governing unfair immigration-related employment practices (8 U.S.C. 1324b), or other laws, may also be hesitant to accept EADs as proof of employment authorization or hire employees who present EADs in the first place if it appears maintaining their employment will be difficult due to potential lapses in employment authorization. Continuous employment authorization during the pendency of an asylum application is vital for asylum seekers in the United States in order to access housing, food, and other necessities. In addition, asylum seekers may need income or employment to access medical care, mental health services, and other resources, as well as to access legal counsel in order to pursue their claims before USCIS or the Executive Office for Immigration Review (EOIR). Access to mental health services is particularly crucial for asylum seekers due to the prevalence of trauma-induced mental health concerns, including depression and post-traumatic stress disorder (PTSD). The physical harm experienced by many asylum seekers necessitates continuous medical care for extended periods of time. Finally, the purpose for which asylum seekers came to the U.S. is to seek long-term protection by receiving asylum.

Legal assistance may be key for an asylum seeker to successfully claim asylum,[62] but it is also often expensive.

B. Effect of Operational Challenges on Form I-765 Adjudications

1. Precarious Fiscal Status in 2020 and Part of 2021

USCIS is a fee-based agency that relies on predictable fee revenue and its carryover from the previous year. USCIS began experiencing fiscal troubles as early as December 2019, when at least one USCIS directorate initiated a hiring freeze.[63] These fiscal troubles were due in part to the fact that USCIS has not been able to update its fee structure since the 2016 Fee Rule[64] (including fees for Form I-765), which does not fully cover the costs of administering current and projected volumes of immigration benefit requests.

USCIS promulgated a new Fee Rule in August 2020 to address this fee/cost disparity.[65] In September 2020, however, the 2020 Fee Rule was enjoined before it took effect and remains under a preliminary injunction.[66] As such, the current fee for Form I-765 remains at $410, the fee set by the earlier 2016 Fee Rule.[67] The 2016 Fee Rule also exempts applicants from paying a fee if filing a Form I-765 to request renewal or

---

[62] *See* Transactional Records Access Clearinghouse, *Asylum Grant Rates Climb Under Biden* (2021), https://trac.syr.edu/immigration/reports/667/ (last updated Nov. 10, 2021) ("Asylum seekers who are represented by an attorney have greatly increased odds of winning asylum or other forms of relief from deportation.").

[63] USCIS' Field Operations Directorate (FOD) initiated a hiring freeze in December 2019; USCIS' Service Center Operations Directorate (SCOPS) did the same starting in February 2020. While both FOD and SCOPS adjudicate Forms I-765, SCOPS adjudicates the vast majority, including all those filed by pending asylum applicants (C08 category).

[64] *See* 81 FR 73292 (Oct. 24, 2016).

[65] *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 85 FR 46788 (Aug. 3, 2020) ("2020 Fee Rule"). The 2020 Fee Rule, among other things, adjusted certain immigration and naturalization benefit request fees charged by USCIS, removed certain fee exemptions, and changed the fee waiver requirement.

[66] On September 29, 2020, the U.S. District Court for the Northern District of California in *Immigration Legal Resource Center, et al. v. Wolf, et al.*, 20-cv-05883-JWS, preliminarily enjoined DHS from implementing or enforcing any part of the 2020 Fee Rule.

[67] *See* 81 FR 73292 (Oct. 24, 2016).

replacement under 8 CFR 274a.12(c)(9) (pending adjustment of status application), as well as some additional categories.[68]

The 2020 Fee Rule would have made various changes to USCIS filing fees to help cover the increased cost of adjudicating benefit requests, including a 34 percent increase for the Form I-765 filing fee to $550, and removing fee exemptions for Form I-765 renewals or replacements for applicants filing under 8 CFR 274a.12(c)(9), among other categories.[69] USCIS continues to rely on the fee schedule established in the 2016 Fee Rule, which does not fully account for current costs associated with adjudicating benefit requests. This unsustainable fiscal situation has, among other things, resulted in the inability to fund sufficient new officer positions to handle the heavy adjudication workload,[70] meaning that USCIS was already in a precarious financial position with regard to staffing when the COVID-19 pandemic began.

2. Public Health Emergency

On January 31, 2020, the Secretary of Health and Human Services (HHS) declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19, which is caused by the SARS-CoV-2 virus.[71] On February 24, 2021, the President issued a continuation of the national emergency concerning the COVID-19 pandemic.[72] Effective October 15, 2021, HHS

---

[68] *See* 85 FR 46788 (Aug. 3, 2020). Additional categories exempt from the filing fee include 8 CFR 274a.12(a)(8) and (10) and (c)(1), (4), (7), and (16). The category at 8 CFR 274a.12(c)(9) is one of the top categories experiencing unusually long processing times and, therefore, is one of the main focuses of this rule.

[69] *See* 85 FR 46788 (Oct. 2, 2020). As noted above, DHS is preliminarily enjoined from implementing or enforcing any part of this rule.

[70] From FY 2015 through FY 2020, USCIS received a range of approximately 2.0 to 2.3 million Form I-765 filings (seeking both initial EADs and renewal of initial EADs) each fiscal year. In FY 2021, this figure increased to approximately 2.6 million. This increase in Form I-765 filings, which was largely observed in the volume of Form I-765 renewal applications sought in categories eligible for automatic extension of EADs, contributed to the formation of backlogs, as discussed further in Section II.C below.

[71] *See* HHS, Determination that a Public Health Emergency Exists (Jan. 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.

[72] Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 86 FR 11599 (Feb. 26, 2021); Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

renewed the determination that "a public health emergency exists and has existed since January 27, 2020 nationwide."[73] On January 14, 2022, and as a result of the continued consequences of the COVID-19 pandemic, HHS renewed yet again the determination that a public health emergency exists.[74]

As noted above, USCIS was already in a precarious financial situation in 2019. This was severely exacerbated by a significant drop in receipts across many of the most common benefit types at the beginning of the COVID-19 pandemic in spring 2020.[75] The significant drop in revenue USCIS experienced early in the pandemic led the agency to plan for a sweeping furlough of approximately 70 percent of its workforce to avoid financial collapse, including furloughing immigration services officers who adjudicate the Form I-765.[76] To avoid the drastic furlough measures, USCIS employed every available means to preserve sufficient funds to meet payroll and carryover obligations. These measures included drastic cuts for supplies, facilities, overtime, and contractor support services, as well as an agency-wide hiring freeze lasting from May 1, 2020, through March 31, 2021. The loss of overtime funds hindered USCIS' ability to address and mitigate backlogs through use of existing staff, which has been a strategy used successfully in the past to ensure processing times remain within goals. For example, in FY 2019, USCIS used $5.52 million of overtime funds for assigned staff to conduct

---

[73] HHS, Renewal of Determination that a Public Health Emergency Exists (Oct. 15, 2021), https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVDI-15Oct21.aspx).

[74] *See* HHS, Office of the Assistant Secretary for Preparedness and Response, Renewal of Determination that a Public Health Emergency Exists (Jan. 14, 2022), https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx.

[75] *See* 2020 USCIS Statistical Annual Report, p. 4: "[During the onset of the COVID-19 pandemic], incoming receipts were 32 percent lower compared to the same time period in FY 2019. By the end of FY 2020, USCIS received about 5% fewer receipts than in FY 2019. Although receipts decreased in some of the most frequently submitted form types, others such as the N-400 (Application for Naturalization) and I-129 (Petition for Nonimmigrant Worker) increased slightly from FY 2019." In addition to the lowest number of receipts in the past 5 years, USCIS also completed the lowest number of benefit requests in the past 5 years. The worst rates of completion were observed during the beginning of the pandemic when USCIS field offices and ASCs were closed to the public. While USCIS attempted to recover by shifting adjudications to form types not requiring in-person appearances, USCIS still completed fewer benefit requests than it received in FY 2020. *See* 2020 USCIS Statistical Annual Report, p. 4.

[76] During this time period, USCIS had an estimated $1.2-billion budget shortfall.

border case[77] processing after working business hours and on the weekends, instead of assigning more staff to those caseloads during regular work hours, which would have pulled them away from affirmative asylum processing. Through the use of overtime, USCIS was able to continue to maintain its assigned staffing levels to affirmative asylum processing, but this option was not available in 2020, due to USCIS' worsening fiscal situation beginning in late 2019 and continuing into 2020 and part of 2021. USCIS took action to avert a fiscal crisis, including limiting spending to salaries and mission-critical activities; making drastic cuts to spending on supplies, facilities, and contractor support services; and eliminating overtime. The loss of contractor support services also hindered USCIS' ability to intake filings efficiently and prepare cases for adjudication by officers. The agency-wide hiring freeze expanded upon individual USCIS components' hiring freezes already in place.

These fiscal issues had a direct impact on staffing, and insufficient staffing levels directly impacted the processing times for Form I-765. In addition to a direct shortage of staff due to hiring freezes, USCIS experienced a noticeable increase in attrition following announcement of a potential furlough that could have impacted nearly 70 percent of employees.[78] Although DHS cannot quantify employees' reasons for leaving, it is likely that the threatened furlough and uncertain fiscal status of the agency played a role. The hiring freeze also meant that the higher-than-normal number of vacancies could not be filled. Additionally, a number of initiatives have taken staff away from their normal duties such as important temporary assignments to the southern border, efforts relating to unaccompanied children, and processing petitions and applications by or on behalf of Afghan evacuees. All these factors contributed to a decrease in Form I-765 completions.

---

[77] A border case included credible and reasonable fear interviews, as well as Migrant Protection Protocols (MPP) non-refoulement interviews.

[78] *See* DHS, USCIS, News Release, *Deputy Director for Policy Statement of USCIS' Fiscal Outlook* (June 25, 2020), https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook.

For example, in FY 2019, the Service Center Operations Directorate (SCOPS) allocated 343,399 officer hours to its Form I-765 workload[79] and completed 1,443,235 adjudications (mostly Form I-765 applications filed under 8 CFR 274a.12(c)(8), followed by (c)(33) (granted DACA) and (c)(3)(B) (student post-completion optional practical training (OPT)). By comparison, in FY 2020, SCOPS allocated 327,947 (or approximately 4.5 percent fewer) officer hours to the same workload and subsequently was only able to complete 1,379,745 (or approximately 4.4 percent fewer) adjudications. These reductions were partly attributable to the overall decrease in staff, as well as competing priorities which factor into how existing resources are allocated. At the start of FY 2020, SCOPS had 5,102 employees on board. This diminished to 4,886 at the start of FY 2021 and 4,731 at the start of FY 2022 as the effects of attrition and the hiring freeze continued. This overall decrease of approximately 7.3 percent does not include the additional loss of I-765 adjudication hours that stemmed from SCOPS supporting several programs requesting detailees.[80] The number of detailees temporarily missing from the SCOPS workforce has not been static, but exceeded 200 employees at points during FY 2021, leaving SCOPS staffed at levels less than 89 percent of what existed going into FY 2020. This data does not include contractor hours, which also were severely impacted by USCIS' fiscal situation as USCIS was forced to reduce the number of contractors available to assist with case processing.

Nonetheless, despite the reduction in officer hours, USCIS was able to maintain its 3-month processing goal up until December 2020, due to a corresponding reduction in Form I-765 receipts. This changed in CY 2021, when USCIS experienced an extraordinary, 2-month surge of Form I-765 filings in spring 2021 and a sustained

[79] Form I-765 workload includes requests for initial, renewal, and replacement employment authorization and/or EADs.
[80] A detail is a temporary assignment of an employee to a different position for a specified period, with the employee returning to his or her regular duties at the end of the detail.

increase of filings thereafter, which is discussed further in Section C below. Despite the surge of Form I-765 filings, SCOPS was able to allocate only 314,924 officer hours (or approximately 4.0 percent fewer than FY 2020 and approximately 8.3 percent fewer than FY 2019) to its Form I-765 workload and completed only 1,249,548 adjudications (or approximately 9.4 percent fewer than FY 2020 and approximately 13.4 percent fewer than FY 2019) due to insufficient staffing and competing priorities. USCIS was unable to surge additional resources to increase officer hours adjudicating Form I-765 applications because of USCIS' limited resources and the need to manage e other competing priorities in FY 2021. For example, USCIS surged officers to adjudicate employment-based Form I-485 applications to minimize the number of employment-based immigrant visas that would go unused at the end of FY 2021, after an extraordinary number of such unused family-preference visa numbers from FY 2020 "fell across" to the employment-based visa allocation for FY 2021, *see generally* INA 201(d)(2)(C), 8 U.S.C. 1151(d)(2)(C), due primarily to Department of State consular closures caused by the COVID-19 pandemic.

Table 2. Impact of Steadily Decreasing Staffing Levels on SCOPS' Form I-765 Completions (Initial and Renewal Applications)

Fiscal Year	Officer Hours Allocated	Form I -765 Completions
2019	343,399	1,443,235
2020	327,947 (approximately 4.5 percent fewer than 2019)	1,379,745 (approximately 4.4 percent fewer than 2019)
2021	314,924 (approximately 8.3 percent fewer than 2019 and 4.0 percent fewer than 2020)	1,249,548 (approximately 13.4 percent fewer than 2019 and 9.4 percent fewer than 2020)

Note: This data does not include contractor hours, which also were severely impacted by USCIS' fiscal situation as USCIS was forced to reduce the number of contractors available to assist with case processing. SCOPS' contractor staff has been reduced by approximately 8.2% since October 1, 2020.

The Field Office Directorate's National Benefit Center (NBC), which also adjudicates a number of Form I-765 applications[81] observed a similar reduction in staff and completions.

Table 3. Impact of Steadily Decreasing Staffing Levels on NBC's Form I-765 Completions (Initial and Renewal Applications)		
Fiscal Year	**Officer Hours Allocated**	**Form I -765 Completions**
2019	115,510	612,464
2020	112,266 (approximately 2.8 percent fewer than 2019)	605,105 (approximately 1.2 percent fewer than 2019)
2021	102,099 (approximately 11.6 percent fewer than 2019 and 9.1 percent fewer than 2020)	509,973 (approximately 16.7 percent fewer than 2019 and 15.7 percent fewer than 2020)
Note: This data does not include contractor hours, which also were severely impacted by USCIS' fiscal situation as USCIS was forced to reduce the number of contractors available to assist with case processing.		

3. Other Impacts to Operations

In response to the declaration of a public health emergency, USCIS instituted a number of changes to protect USCIS employees and immigration benefit applicants. From March 18 through June 3, 2020, USCIS closed all field offices and asylum offices to the public, nearly halting all in-person services.[82] At USCIS field offices, officers conduct in-person interviews related to Form I-485, Application to Register Permanent Residence or Adjust Status, as well as Form N-400, Application for Naturalization, to become a U.S. citizen, among other work. At USCIS asylum offices, officers conduct in-person interviews of asylum applicants (using Form I-589, Application for Asylum and Withholding of Removal). Upon reopening to the public, many asylum offices operated at lower capacity than before the halt in in-person services. Interviewing rooms that previously accommodated asylum officers, asylum applicants, interpreters (if present),

[81] Such as initial and renewal Forms I-765 filed under 8 CFR 274a.12(c)(9) and (10), which experienced a dramatic growth in processing times in 2021, as detailed in this rule.
[82] *See, e.g.*, News Alert, USCIS Temporarily Closing Offices to the Public March 18-April 1 (Mar. 17, 2020), https://www.uscis.gov/news/alerts/uscis-temporarily-closing-offices-to-the-public-march-18-april-1. Some limited emergency in-person services were available upon request during this time.

AILA Doc. No. 22050300. (Posted 5/3/22)

and attorneys (if present) all in one room, now would accommodate just the asylum officer, with applicants and any other participants each sitting in separate interview rooms and connecting electronically. This setup substantially decreased daily interview capacity.[83]

SCOPS' service centers and the NBC, which are not open to the public, never closed, but all Federal functions that could be accomplished at an alternate location were designated for telework to minimize in-person contact and allow proper social distancing for Federal and contract staff whose work required on-site presence. In the early weeks of COVID-19 restrictions, assignments were adjusted to provide telework-suitable work as logistics relating to industrial hygiene were put in place to expand capacity for on-site functions while providing appropriate protections for on-site workers. Service centers and the NBC continued operations by expanding telework capabilities; however, logistics associated with completing work that could not be conducted at home, such as accepting filings, mailroom activities, and file movement, remained a challenge. There was high absenteeism due to COVID-19 quarantine rules among contractors engaged in receipt and file movement activities, which created "frontlogs" in receipts—delays in entering receipt data into USCIS systems—as well as delays in other areas requiring physical handling of

---

[83] USCIS has issued a series of temporary final rules that allow asylum offices to increase the use of telephonic interpreters, in order to minimize the impact of this safety measure on the agency's ability to adjudicate asylum applications in a timely manner. *See Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 85 FR 59655 (Sept. 23, 2020) (TFR); *Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 86 FR 15072 (Mar. 22, 2021); and *Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 86 FR 51781 (Sept. 17, 2021). As described in Section D.1. below, asylum application processing times impact Form I-765 renewal processing because the longer an asylum application is pending, the more times an applicant may need to file Form I-765 to renew employment authorization. If an individual's asylum application is approved, they no longer need to file Form I-765 to obtain employment authorization because asylees are employment authorized incident to status. *See* 8 CFR 274a.12(a)(5). While some asylees may choose to file Form I-765 using the (a)(5) category to receive EADs as evidence of their employment authorization, asylum applicants under the (c)(8) category make up approximately 10 times more Form I-765s than asylees under the (a)(5) category. *See* DHS, USCIS, *Form I 765 Application for Employment Authorization All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type* (FY 2019–21), https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf (last updated Oct 2021). Therefore, USCIS' efforts to minimize the impact of safety measures on the agency's ability to adjudicate asylum applications is helping to reduce the number of asylum applicants making up the pending Form I-765 applicant pool, which is helping to reduce the overall Form I-765 adjudication backlog.

AILA Doc. No. 22050300. (Posted 5/3/22)

files and mail. Furthermore, Form I-765 generally is adjudicated on a paper receipt file,[84] and up until 2020, application intake and initial processing generally was handled by Federal contractors, many of whom were terminated due to USCIS' fiscal troubles as detailed above. Proactive adjustments to workspaces, schedules, and file movement practices restored these functions despite a contractor workforce shortfall, but adjustments took approximately 3-5 months to develop and take effect.

USCIS Application Support Centers (ASC), which primarily collect biometrics such as photographs and fingerprints in relation to immigration benefit requests, were similarly impacted by the COVID-19 public health emergency. ASCs were temporarily closed from March 18 through July 12, 2020, and began a phased reopening with limited capacity on July 13, 2020. Under normal circumstances, individuals who must appear at an ASC are scheduled to do so within 3-4 weeks of USCIS receiving the underlying application; however, the lengthy closures created massive appointment backlogs. The ASC appointment backlog reached its peak of 1.4 million in January 2021. Although this backlog has been largely addressed, the downstream effects linger in many work streams.[85] Historically, there have been limited Form I-765 categories that require biometrics submission;[86] however, the Employment Authorization Applications Rule and the Asylum Application, Interview, and Employment Authorization for Applicants Rule

---

[84] Although some Form I-765 applications for certain eligibility categories (e.g., (c)(3)(A), F-1 Pre-completion OPT; (c)(3)(B), F-1 Post-completion OPT; and (c)(3)(C), F-1 STEM OPT extension) now can be received and adjudicated in an electronic system, in early 2020, all Form I-765 applications were adjudicated on paper.

[85] USCIS sought to mitigate the impact of this biometrics capture delay by reusing biometrics where possible. *See*, *e.g.*, USCIS News Alert, USCIS to Continue Processing Applications for Employment Authorization Requests Despite Application Support Center Closures (Mar. 30, 2020), https://www.uscis.gov/news/alerts/uscis-to-continue-processing-applications-for-employment-authorization-extension-requests-despite.

[86] For example, in general, applicants must pay an $85 biometric collection services fee if filing with one of the following eligibility categories: (c)(8) An applicant with a pending asylum application requesting an initial or renewal EAD; (c)(33) Requesting consideration of Deferred Action for Childhood Arrivals (DACA); (c)(35) A principal beneficiary of an approved employment-based immigrant petition who is facing compelling circumstances; (c)(36) A spouse or unmarried dependent child of a principal beneficiary of an employment-based immigrant petition who is facing compelling circumstances; or (c)(37) An applicant for Commonwealth of the Northern Mariana Islands long-term resident status.

("Broader Asylum EAD Rule"), 85 FR 38532 (June 26, 2020), imposed a biometrics collection requirement for initial and renewal Forms I-765 in the C08 asylum applicant category—which represents approximately 58 percent of the renewal EAD receipts filed that are eligible for the automatic extension. Consequently, when ASCs were closed, most Form I-765 renewal applications in the C08 category could not be processed.[87] Furthermore, once ASCs reopened, a large number of applications of varying types needed to be rescheduled, yet there were a limited number of ASC appointments available. This led to delays in applicants receiving ASC appointments, which further delayed the processing of their applications, including Form I-765 renewal applications in the C08 category. The delay in biometrics capture created an interruption to adjudications by preventing applications from getting to the "adjudication-ready" stage. Many categories of I-765s are dependent on their own biometrics requirement or a biometrics requirement associated with an underlying benefit, resulting in bottlenecks that slowed overall adjudications and increased processing times. The new biometrics collection requirement for Form I-765 renewal applications in the C08 category thus played a significant role in the downstream effects of ASCs' temporary closures.

In addition, while adjudication of Form I-765 does not generally include an in-person interview, some Forms I-765 are based on pending applications that do involve in-person interviews. With the fiscal and operational constraints outlined above, USCIS had processing delays in adjustment of status applications and asylum applications; applicants seeking employment authorization based on a pending adjustment of status application or

---

[87] However, the U.S. District Court for the District of Maryland's Sept. 11, 2020, preliminary injunction in *Casa de Maryland Inc. et al. v. Chad Wolf et al.*, 8:20-cv-02118-PX (D. Md. Sept. 11, 2020), provided limited injunctive relief to members of two organizations, CASA de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP), who file Form I-589 or Form I-765 as asylum applicants. Specifically, the court preliminarily enjoined enforcement of several regulatory changes in the Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications Rule, 85 FR 37502 (June 22, 2020), and the Broader Asylum EAD Rule for CASA and ASAP members, including the requirement to submit biometric information as part of the filing of a Form I-765 based on an asylum application. On February 7, 2022, the U.S. District Court for the District of Columbia in *Asylumworks, et. al. v. Alejandro N. Mayorkas, et. al.* vacated these two rules entirely.

AILA Doc. No. 22050300. (Posted 5/3/22)

asylum application comprise the great majority of the filing population seeking renewal EADs and eligible for an automatic extension of their EADs under 8 CFR 274a.13(d).[88] Owing to USCIS' inability to adjudicate interview-dependent adjustment of status and asylum applications while its offices were closed, those cases were pending longer than usual, in addition to an influx of new applications. With those underlying applications taking longer to process, the population of applicants who needed to request EAD renewals during the pendency of their primary applications increased.[89]

Even though USCIS reopened its ASCs, field offices, and asylum offices in mid-2020, USCIS still is working to return to pre-pandemic levels of operation, with varying progress across programs. For example, social distancing guidelines result in reduced interview capacity and productivity for some interview-dependent benefit requests, including some adjustment of status and asylum applications. USCIS implemented measures to recapture productivity under social distancing protocols, including video-assisted interviewing, increased use of telephonic interpreters,[90] expanded work

---

[88] *See* above section entitled "Overview of Issues Negatively Impacting Form I-765 Processing Times."

[89] For example, in 2020, an applicant seeking employment authorization based on a pending adjustment of status application would have obtained an EAD valid for 1 year, if eligible. With processing times for adjustment of status applications extending beyond 1 year, the applicant would have to apply to renew the EAD to obtain employment authorization while their adjustment of status application remains pending. Where adjustment of status applications with an immediately available immigrant visa are processed within the 6-month processing goal, such applicants generally should not have to renew their EAD as they would receive employment authorization incident to their lawful permanent resident status upon approval of their adjustment of status application. In recognition of prolonged processing times for adjustment of status applications, USCIS updated its policy guidance to provide a 2-year validity period for initial and renewal EADs issued based on pending adjustment of status applications. *See* USCIS Policy Manual, Policy Alert (PA-2021-10), Employment Authorization for Certain Adjustment Applicants (Jun. 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-EmploymentAuthorization.pdf. In doing so, USCIS attempted to alleviate the burden on adjustment of status applicants seeking EADs. Unfortunately, USCIS was unable to take similar steps for the asylum applicant population, as it was already providing 2-year validity periods for employment authorization and EADs, the maximum allowed by the Broader Asylum EAD Rule. As of December 2021, the median processing time for affirmative asylum applications (Form I-589) is 55.4 months. As of December 2021, the median processing time for adjustment of status applications (Form I-485) is 13.2 months, however some adjustment applications remain pending much longer because of regression in the cutoff dates used to determine when an immigrant visa is immediately available.

[90] *See Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 85 FR 59655 (Sept. 23, 2020) (TFR); *Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 86 FR 15072 (Mar. 22, 2021); and *Asylum Interview Interpreter Requirement Modification Due to COVID-19*, 86 FR 51781 (Sept. 17, 2021).

flexibilities for USCIS employees,[91] and remote applicant-centric services such as a pilot remote-attorney participation program.[92] However, the impacts of the operational disruptions in 2020 are still evident in USCIS' prolonged processing times, illustrating USCIS' continued struggle to address the pending cases that accrued when offices were closed while attempting to keep pace with new filings (which, in the case of Form I-765 renewals, unexpectedly surged in 2021, as described below).[93]

Additionally, USCIS continues to provide flexibilities in recognition of the pandemic's ongoing impacts on benefit requestors, which in some cases negatively impact the efficiency of USCIS operations.[94] For example, USCIS continues to provide rescheduling flexibilities for interviews and ASC appointments, limit the number of staff and members of the public that may appear in person at a USCIS office, and provide flexibilities pertaining to responses to Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) by considering a response received within 60 calendar days after the response due date set in the request or notice before taking any action.[95] While USCIS believes these steps have been critical to address the impacts of the COVID-19 pandemic, these measures have not been implemented without costs. Limiting the number of in-person staff at any given time may reduce the number of interviews USCIS can conduct in any given day, although USCIS is exploring additional alternatives to in-person

---

[91] As an example, USCIS expanded telework flexibility arrangements under which an employee could perform the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from which the employee would normally work. In addition, certain telework restrictions were lifted (e.g., allowing split shifts, non-standard work hours, and mixing telework and leave) so that caregivers and parents could meet personal and work obligations while working from home.

[92] *See* Impact of Pandemic Response Measures, p. 6, in Backlog Reduction of Pending Affirmative Asylum Cases: Fiscal Year 2021 Report to Congress (Oct. 20, 2021), https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf.

[93] In the last three fiscal years, the median processing time across all form types was 8.7 months in FY 2021, 8.3 months in FY 2020, and 6.5 months in FY 2019.

[94] For a detailed description of the many flexibilities and precautionary measures USCIS provides to combat COVID-19, *see* USCIS's website at https://www.uscis.gov/about-us/uscis-response-to-covid-19 (last updated Mar 30, 2022).

[95] *See* Deadlines for Certain Requests, Notices, and Appeals in the USCIS Response to COVID-19 webpage at https://www.uscis.gov/about-us/uscis-response-to-covid-19 (last updated Mar. 30, 2022).

interviewing that may mitigate this impact. Providing rescheduling flexibilities for interviews and time for responses for RFEs or NOIDs also prolong the officer's adjudication times. The downstream effect of delays in initial file processing, delays at the ASC and field offices, and insufficient staffing levels due to USCIS' fiscal situation in calendar years 2019 and 2020, as well as delays caused in certain workloads due to workforce shifts to ensure timely adjudication of other benefits, contributed to USCIS accruing an overall net backlog[96] of approximately 5.1 million cases as of the end of December 2021, of which 930,000 (approximately 18%) were pending Form I-765 applications.

C. Sudden Increase in Form I-765 Filings in 2021

1. Comparing FY 2021 Receipts to Prior Years' Receipts

The most recent contributing factor to the severe backlog and increased processing times for Forms I-765 is a substantial and unprecedented 2-month increase of Form I-765 renewal filings in March and April 2021, and a sustained increase in filings thereafter. In CY 2019, the average number of monthly renewal applications filed for the C08, C09, and C10 categories combined was 46,715. In CY 2020, the average number of monthly renewal applications filed for these three categories was 43,232. In March 2021, the renewal receipt numbers for these three categories spiked 56 percent over the previous month and 76.4 percent over the monthly average total for 2020. In April 2021, the renewal receipt numbers for these three categories remained elevated such that they were 25.6 percent higher than February 2021, and 53.6 percent over the monthly average

[96] Backlog is defined as the volume of pending applications that exceed the level of acceptable pending cases. Whether a pending case load is acceptable is pegged to the volume of applications receipted during the target cycle time period (e.g., 5 months). The target cycle time refers to the processing time goal for a given application type. Net backlog is defined similarly to backlog, except that the number of pending applications is reduced to account for cases in active suspense categories (i.e., cases that are deducted from the gross backlog, such as cases with a pending Request for Evidence, cases awaiting visa availability from the Department of State, or cases pending re-examination for an N-400, Application for Naturalization).

total for 2020. The March and April 2021 increase in Form I-765 renewal applications was unexpected based on historical filing patterns and appears to be related to litigation.[97]

Table 4. Surge in Renewal Form I-765 Filings				
Month	**C08 Category**	**C09 Category**	**C10 Category**	**Average Total**
February 2021	30,857	14,661	8,367	52,885
March 2021	52,007	19,589	10,840	82,436
April 2021	42,101	15,189	9,134	66,424
May 2021	32,751	13,332	7,887	53,960

In the eight months following April 2021, the receipt numbers for these categories fell to an average of 52,400 receipts per month, but that was still 21 percent above the average monthly total for CY 2020. The increase in the number and duration of pendency of asylum and adjustment of status applications, which form the basis for the two most populous EAD filing categories eligible for the automatic extension under 8 CFR 274a.13(d)(1), may have led to this sustained increase in applications for initial and renewal employment authorization (in the C08 and C09 categories, respectively), which further compounded the Form I-765 adjudication backlog.[98]

Specifically, in the years leading up to FY 2022, asylum application receipts outpaced available resources leading to an increase in pending asylum cases, both in

[97] This increase in Form I-765 filings may have been driven primarily by litigation and the "frontlog" of applications at the three USCIS lockbox facilities, which receive and process applications and payments in Chicago, Illinois; Phoenix, Arizona; and Lewisville, Texas. On July 20, 2020, Casa de Maryland, Inc. filed suit against then-Acting DHS Secretary Chad Wolf and DHS to enjoin changes to EAD rules for asylum seekers. On September 11, 2021, the U.S. District Court of Maryland issued a preliminary injunction of the new EAD rules. *See Casa de Maryland v. Wolf*, 486 F.Supp.3d 928 (D. Md. Sept. 11, 2020). Consequently, approximately 23,000 applications pending at the USCIS lockbox were rejected in late October 2020 for a failure to pay the required biometrics fee or a failure to provide proof that the applicant was a member of the litigation class. These applications were refiled and, coupled with the prioritization of initial Form I-765 applications under category C08 due to the litigation, led to a redirection of resources away from Form I-765 renewal applications. In addition, as noted above, the lockbox was experiencing a "frontlog" of applications, which led to a processing delay.

[98] USCIS is actively working to address prolonged processing times affecting applications and petitions that form the basis of a Form I-765 filing. These measures are described in further detail in Section D.1 below.

AILA Doc. No. 22050300. (Posted 5/3/22)

affirmative and defensive filings, as shown in Table 5.[99] The increase in pending asylum cases contributed to the increase in C08 renewal filings in FY 2021, which further impacted the Form I-765 renewal backlog.

Table 5. Total Asylum Cases Pending			
Total Asylum Cases Pending in:	**DOJ[100]**	**USCIS[101]**	**Total**
FY 2017 (Sep 2017)	377,140	289,835	666,975
FY 2018 (Sep 2018)	473,510	319,202	792,712
FY 2019 (Sep 2019)	608,976	339,836	948,812
FY 2020 (Sep 2020)	647,923	386,014	1,033,937
FY 2022 (Dec 2021)	628,551	432,341	1,060,892

The number of employment-based adjustment of status applications increased significantly in FY 2021, as well, due to the inordinate number of employment-based visas that became available as a result of unusually low visa usage in other categories in FY 2020 due to the COVID-19 pandemic. At the start of FY 2021, there were approximately 126,000 employment-based adjustment of status applications pending with USCIS. Approximately 313,000 employment-based adjustment of status applications were received during FY 2021, which likely contributed to the increase in C09 initial filings in FY 2021, consequently further taxing USCIS' resources to timely process

[99] *See* Background, p. 2, in Backlog Reduction of Pending Affirmative Asylum Cases: Fiscal Year 2021 Report to Congress (Oct. 20, 2021), https://www.dhs.gov/sites/default/files/2021-12/USCIS%20-%20Backlog%20Reduction%20of%20Pending%20Affirmative%20Asylum%20Cases.pdf ("The affirmative asylum backlog is the result of a prolonged, significant increase in affirmative asylum application filings and credible fear screenings, which are processed by the U.S. Citizenship and Immigration Services (USCIS) asylum offices. Between FY 2013 and FY 2017, despite significant staffing increases, receipt growth in asylum office workloads outpaced the expansion of asylum office staffing and the establishment of new or expanded facilities needed to support additional staffing growth.").

[100] See Executive Office of Immigration Review Adjudication Statistics, Total Asylum Applications (Jan 19, 2022), https://www.justice.gov/eoir/page/file/1106366/download.

[101] Data reflects affirmatively filed I-589 asylum applications and do not include defensive asylum claims before a DOJ EOIR immigration court. See USCIS, Number of Service Wide Forms, October 1, 2021-December 31, 2021, https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2022_Q1.pdf (last updated Feb. 2022).

renewal applications. USCIS also saw significant increases in filings across other benefit request types during CY 2021.[102]

This surge and sustained increase in Form I-765 receipts over the course of CY 2021 as compared to the previous calendar year compounded what otherwise might have been a moderate Form I-765 backlog and created a substantial spike in processing times. In CY 2021, USCIS received approximately 2,550,000 initial and renewal Forms I-765, which was 22 percent higher than the volume received in CY 2020 (approximately 2,090,000) and 15 percent higher than the volume received in CY 2019 (approximately 2,210,000). Similarly, in CY 2021, USCIS received approximately 1,260,000 Form I-765 renewal applications, which was 21 percent higher than the volume received in CY 2020 (approximately 1,040,000) and 13 percent higher than the volume received in CY 2019 (approximately 1,120,000).

Table 5A. Initial and Renewal Form I-765 Filings		
Calendar Year	**Form I-765 Filings**	**Surge or Difference**
2019	2,210,000	--
2020	2,090,000	5 percent lower than 2019
2021	2,550,000	15 percent higher than 2019 22 percent higher than 2020

Table 5B. Renewal Form I-765 Filings		
Calendar Year	**Form I-765 Filings**	**Surge or Difference**
2019	1,120,000	--
2020	1,040,000	7 percent lower than 2019
2021	1,260,000	13 percent higher than 2019 21 percent higher than 2020

[102] For example, USCIS also encountered large increases of filings of Form I-131, Application for Travel Document, possibly related to the increase in filings of Form I-485, Application to Register Permanent Residence. From CY 2020 to CY 2021, USCIS observed an overall 25.8 percent increase in receipts across form types. Although this represents a substantial increase, there was a 29 percent increase in Form I-765 renewal applications in the auto extension categories.

Table 5B. Renewal Form I-765 Filings		
Calendar Year	**Form I-765 Filings**	**Surge or Difference**

As demonstrated above, calendar years 2020 and 2021 were difficult years for USCIS because unprecedented financial strains led to staffing issues, resulting in an inability to handle the 2-month spike and monthly increase in filings in CY 2021 over CY 2020. The average monthly receipts in 2021 for the automatic extension categories were 60,300, which was 13,500 per month (or 29 percent) higher than 2020 monthly averages. In addition to this higher overall receipt volume in 2021, there was a surge in receipts in March 2021 (88,500) and April 2021 (71,200) that led to a rapid increase in pending applications. On top of the higher receipt volumes, due to staffing issues, the average number of monthly completions in 2021 was 33,900 per month, which was 10,600 per month (or 24 percent) lower than 2020 monthly averages. The combination of higher receipts and lower completions led to increased processing times, which downstream resulted in higher numbers of renewal applications pending past the 180-day automatic extension period.

2. Workforce Planning Shortfall

USCIS normally uses an annual workforce planning process to assess staffing requirements, known as the Staffing Allocation Model (SAM). The SAM is focused on allocating staff to process the anticipated number of new/incoming receipts for all workloads for the next fiscal year. Workforce planning is based on USCIS estimates for each adjudication workload for the coming year. These workload estimates are established through a cross-disciplinary committee, the Volume Projection Committee, that forecasts receipts on the basis of statistical modeling and any recent policy changes. In 2021, new receipts rose too rapidly to provide new staffing allocations within the SAM

for both new receipts and backlog cases. In other words, despite the predictions based on data and historic trends, the Form I-765 filings in FY 2021 were significantly greater than forecasted. USCIS relies on a combination of internal processes and plans to plan for backlog reduction.[103]

D. Emergency Temporary Solution to Address Current Backlog

The sudden 2-month increase in Form I-765 renewal filings in March and April of 2021 and sustained overall increase in Form I-765 renewal receipts thereafter prompted USCIS to directly address the growing backlog of Form I-765 filings. Historically, USCIS had sufficient resources to address growing backlogs by allocating additional officers to a particular workload. However, USCIS was unable to do so in the summer of 2021 due to understaffing, including reduced contracting resources resulting from the prior years' fiscal situation; the broad scope of backlogs across numerous benefit types; and competing priorities, as discussed above. USCIS was, however, able to apply overtime funds to the renewal Form I-765 workload in an attempt to control the growing backlog during the last quarter of FY 2021.[104] Indeed, USCIS observed an increase in Form I-765 renewal completions, however, it was not enough to match the increased volume of receipts and therefore USCIS' responsive measures mitigated but did not halt the backlog growth.[105] Considering the operational constraints described above, USCIS also explored programmatic improvement initiatives and updates to its policy and operational guidance in the summer of 2021 to attempt to address prolonged Form I-765

---

[103] One such process or plan is the Model for Operational Planning, which considers the backlog and the outlook of future backlogs based on current and future staffing. The primary way staffing for backlog reduction has taken place is through improved efficiencies to current processes as well as appropriations from Congress.

[104] See Section B.2 for more information on USCIS' use of overtime funds as a tool to manage its workload.

[105] For example, USCIS completed 15,904 Form I-765 C08 renewals in July 2021. After applying overtime funds to Form I-765s, USCIS completed 23,987 and 24,267 Form I-765 C08 renewals in August and September 2021, respectively. However, USCIS returned to its prior completion rate in October 2021 (where USCIS completed 13,932 C08 renewals) due to such overtime funds no longer being available in the new fiscal year. USCIS received additional appropriated funding for overtime in FY 2022 to apply toward backlog reduction efforts, but these funds only became available for operational use in early 2022.

AILA Doc. No. 22050300. (Posted 5/3/22)

processing times and their impact. For example, USCIS launched a backlog reduction effort in September 2021 to assess other options available to the agency to address the severe and growing Form I-765 backlogs.[106] It has become apparent to USCIS, however, that its limited resources are insufficient to appropriately address the growing backlogs, with the incoming volume of Form I-765 renewal filings showing no signs of slowing. Further, USCIS has assessed that the conventional measures USCIS had applied (e.g., overtime) and was continuing to explore (e.g., through the backlog reduction effort) will not be able to timely address the impending loss of employment authorization and EAD validity.

1. Current Measures to Reduce the Backlog and Reduce Processing Times

Addressing Form I-765 processing times is a priority for USCIS. Backlogs in general are a significant concern for the applicants who are applying for benefits with USCIS because, as the backlogs increase, applicants and petitioners experience longer wait times to receive a decision on their benefit requests. This is especially concerning where the backlog involves employment authorization, which is critical to applicants' and their families' livelihoods as well as U.S. employers' continuity of operations. USCIS understands the impact that delays in receiving decisions and documentation have on applicants and petitioners and is striving to address the backlogs and the resulting negative consequences through a number of measures, including but not limited to this TFR.

USCIS continues to recover from the pandemic-related impacts on operations and revenue, leading to a gradually improving fiscal situation, return to stability, and renewed capacity to undertake initiatives to reduce backlogs. USCIS lifted the agency-wide hiring

[106] *See, e.g.,* USCIS Policy Manual, Policy Alert (PA-2022-07), Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Filing Categories (Feb. 7, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220207-EmploymentAuthorizationValidity.pdf.

freeze in March 2021. With the hiring freeze lifted, USCIS was able to begin hiring staff in an attempt to return to pre-pandemic staffing levels.[107] Initial hiring was largely internal in order to fill promotional vacancies, with public job announcements to hire from outside USCIS following. This effort's impact is not realized immediately, as it is lengthy, time-consuming, and ongoing. The hiring process itself is lengthy as it includes posting the job announcement, reviewing resumes, providing qualified candidates' information to the hiring office, assessments, interviews, selections, and background checks prior to a new employee entering on duty. New hires then go through orientation, basic training, duty-specific training and mentoring. The entire process from posting to a new hire reaching full proficiency takes several months.

USCIS is also in the process of developing a new Fee Rule to recoup adjudicatory costs incurred at current levels, and to support the agency's ability to match staffing levels with its workload in a sustainable way. To effect more immediate change with EAD renewals, USCIS reviewed its policies and procedures to update policy guidance,[108] expanded use of overtime hours as funding permitted, and applied innovative approaches

---

[107] Such a long pause in hiring from May 1, 2020, to March 2021 resulted in approximately 2,000 unfilled vacancies, out of approximately 20,000 positions across the agency. As of November 6, 2021, USCIS estimates the number of vacancies had risen to approximately 3,000 due to primarily internal selections following the hiring freeze, although USCIS did also add some positions as well. USCIS estimates it will take the agency to the end of CY 2022 to fill the current level of vacancies. While USCIS did receive $250 million in funding from Congress for application processing, backlog reduction, and the refugee program in late September 2021, it will take time for such funding to translate to a significant increase in additional officers proficient at adjudicating and completing Form I-765 renewal applications. See Extending Government Funding and Delivering Emergency Assistance Act, 2022, Pub. L. 117-43 (Sept. 30, 2021). USCIS has identified Form I-765 as well as Form I-485 and Form I-589 (which represent two of the three major filing categories seeking renewal EADs and eligible for automatic extension of the prior EAD) for inclusion in backlog reduction efforts funded in part by appropriations. The $250 million appropriated through Pub. L. 117-43, however, will only partly fund the 1,316 positions needed for all of USCIS' backlog reduction initiatives; therefore, USCIS continues to seek additional funding as requested in the FY 2022 President's Budget ($345 million).

[108] *See, e.g.,* USCIS Policy Manual, Policy Alert (PA-2021-25), Employment Authorization for Certain H-4, E, and L Nonimmigrant Dependent Spouses (Nov. 12, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211112-EmploymentAuthorization.pdf. *See* USCIS Policy Manual, Policy Alert (PA-2021-10), Employment Authorization for Certain Adjustment Applicants (June 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-EmploymentAuthorization.pdf. *See* USCIS Policy Manual, Policy Alert (PA-2022-07), Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Filing Categories (Feb. 7, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220207-EmploymentAuthorizationValidity.pdf.

to backlog reduction using technology in strategic ways, which initially is showing promising results.[109] In addition, USCIS is focused on addressing prolonged processing times affecting applications and petitions that form the basis of a Form I-765 filing and, therefore, indirectly impact Form I-765 renewal processing times, such as in the case of asylum or adjustment of status applications where a Form I-765 filing is based on the continued pendency of such application.

For example, an applicant seeking asylum is eligible for employment authorization on the basis of the pendency of the asylum application.[110] USCIS currently grants employment authorization based on a pending asylum application in 2-year increments.[111] If an asylum application is pending for up to 5 years or more, as is currently the case for some applications,[112] then an applicant must file to renew employment authorization at least twice. If processing times for asylum applications were reduced to 3 years, the applicant would need only file to renew employment authorization once, saving USCIS adjudicatory resources.

---

[109] Efforts to improve timely processing and remove bureaucratic hurdles are underway. One of the first initiatives is to automatically identify pending applications that are no longer needed (for example, a Form I-765 based on a pending adjustment application is moot upon the applicant's adjustment of status to that of a lawful permanent resident) and close them, thus eliminating the need for an officer to review and allowing other applications to proceed to adjudication more quickly. While initial results of such initiatives are promising, it is too early to tell what the long-term, sustained impacts on processing times will be. USCIS continues to look for additional areas where systems can be used to identify and complete simple functions that free up officer resources for adjudicative work.

[110] An asylee cannot apply for initial employment authorization earlier than 150 calendar days after the date USCIS or the immigration court accepts the asylum application.

[111] This was the maximum time allowed under regulation until February 7, 2022, when the U.S. District Court for the District of Columbia vacated parts of 8 CFR 274a.12(c)(8) ("Employment authorization may be granted according to the provisions of 8 CFR 208.7 of this chapter in increments to be determined by USCIS but not to exceed increments of two years."). *See Asylumworks, et. al. v. Alejandro N. Mayorkas, et. al.*, No. 20-cv-3815, 2022 WL 355213 (D.D.C. Feb. 7, 2022). USCIS is considering what, if any, steps it may take in light of this ruling.

[112] The extended wait time for asylum applications particularly affects many defensive asylum filings in immigration court. (A noncitizen may apply for asylum affirmatively with USCIS or defensively in immigration court.) As of December 31, 2021, there were 628,551 asylum applications pending in immigration courts. *See* Executive Office for Immigration Review Adjudication Statistics, https://www.justice.gov/eoir/page/file/1106366/download (last visited Apr. 14, 2022). This DOJ data also implies that 156,127 and 90,880 cases were completed in FY2020 and 2021, respectively, or an average of 123,504 cases a year. In the first quarter of FY 2022, 42,090 cases were completed. If this rate continues, it would take approximately 4.2 years to complete the adjudication of the total 628,551 asylum cases pending in the courts as of December 31, 2021.

Another area in which USCIS is actively prioritizing its workload is employment-based adjustment of status applications as backlogs in adjudication of these applications also have downstream effects on EAD application adjudications, as described above. While USCIS normally processes approximately 115,000 employment-based adjustment of status applications annually,[113] generally to correspond with the number of available employment-based immigrant visas minus the number typically issued by Department of State annually, USCIS prioritized processing employment-based adjustment applications to maximize available visa usage in FY 2021. By the end of FY 2021, USCIS had processed and approved approximately 172,000 employment-based adjustment of status applications, an increase of approximately 50 percent above the typical baseline;[114] however, approximately 257,000 remained unadjudicated, including approximately 75,000 impacted by priority date retrogressions that may leave them pending for many years, and thereby eligible for C09 EADs over this extended period.[115] To the extent possible, USCIS is committed to prioritizing employment-based adjustment of status applications to utilize the available visa numbers each fiscal year; doing so relieves applicants from filing Forms I-765 to seek renewal EADs while their adjustment of status application remains pending since lawful permanent residents are employment authorized

---

[113] *See* DHS Office of Immigration Statistics, 2019 Yearbook of Immigration Statistics, Table 6, Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2010 2019 (Sep. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yearbook_immigration_statistics_2019.pdf.

[114] *See* News Release, USCIS Announces FY 2021 Accomplishments, (Dec. 15, 2021), https://www.uscis.gov/newsroom/news-releases/uscis-announces-fy-2021-accomplishments.

[115] Applicants from China and India seeking adjustment of status based on the employment-based third preference category experienced visa retrogression in their respective filing categories as of October 1, 2021, impacting approximately 75,000 applicants. For more information on visa retrogression, *see* https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/visa-retrogression (last updated Mar. 8, 2018). Based on a rate of approximately 8,000 visa numbers becoming available for these affected categories per year, as was the case in FY 2019, it may take more than 9 years for visas to become available for these approximately 75,000 applicants. In the interest of reducing the burden on both the agency and the public, on June 9, 2021, USCIS increased the maximum validity period for initial and renewal EADs issued to applicants for adjustment of status under INA 245 from 1 year to 2 years based on average processing times. See USCIS Policy Manual, Policy Alert, Employment Authorization for Certain Adjustment Applicants (Jun 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-EmploymentAuthorization.pdf. USCIS' return to its processing goal of 3 months for Form I-765 renewal applications is critically important for such applicants who may rely on timely renewals multiple times.

AILA Doc. No. 22050300. (Posted 5/3/22)

incident to status.[116] Therefore, the more adjustment of status applications USCIS is able to process, the fewer Form I-765 renewal applications USCIS will receive (based on pending INA 245 adjustment of status applications).

DHS expects that USCIS' backlog reduction efforts in these areas will positively impact Form I-765 backlogs by reducing the volume of Form I-765 filings. However, we anticipate that the impact of these backlog reduction efforts will not be immediately felt by applicants with expiring or expired employment authorization. Therefore, DHS has determined that in the interim, urgent action is needed to address the plight of a growing number of EAD renewal applicants who have experienced or may in the near future experience a gap in their employment authorization and/or EAD because of USCIS' unprecedented processing times.

2. Existing Automatic Extension Period of up to 180 Days Temporarily Not Sufficient

DHS is aware of the importance of employment authorization and EADs as evidence of employment authorization for applicants' and their families' livelihoods, as well as their U.S. employers' continuity of operations and financial health. DHS is also aware of the potential detrimental impact that gaps in employment authorization may have on an applicant's eligibility for future immigration benefits, should the applicant engage in unauthorized employment during the gap,[117] and on the U.S. employer's responsibilities under the INA. DHS also acknowledges that the substantial increase in backlogs and prolonged processing times across USCIS-administered benefit requests are not the fault of applicants but have had and continue to have significant adverse

[116] See 8 CFR 274a.12(a)(1).,

[117] With certain exceptions, if a noncitizen continues to engage in or accepts unauthorized employment, the individual may be barred from adjusting status to that of a lawful permanent resident under INA 245. *See* INA 245(c)(2) and (c)(8), 8 U.S.C. 1255(c)(2) and (c)(8).

consequences for applicants and employers awaiting a USCIS decision on pending Form I-765 renewal applications.

As noted, the current 180-day automatic extension under 8 CFR 274a.13(d)(1) for certain applicants who have properly filed Form I-765 for renewal of their employment authorization and/or EADs is an insufficient time period to ensure against lapses in employment authorization and/or EAD validity.[118] In December 2020, the median processing time for Form I-765 renewal applications eligible for the automatic extension was 3.6 months (close to USCIS' processing goals), ranging from 2.5 months to 5 months.[119] At the end of December 2020, there were approximately 3,300 applicants whose Form I-765 renewal applications were still pending past their 180-day auto-extension period.

However, Form I-765 processing times and Form I-765 renewal applications pending beyond the 180-day period increased rapidly in the second half of CY 2021 and continue to increase in CY 2022 despite backlog mitigation efforts. As of December 31, 2021, the processing time for EAD renewal applications (all categories) completed by USCIS ranged from 6.1 months (median) to 10.1 months (93rd percentile) and there were approximately 66,000 applicants whose Form I-765 renewal applications were still pending past their 180-day automatic extension period. This means that, as of December 31, 2021, approximately 66,000 applicants—at no fault of their own and because of circumstances currently faced by USCIS—were not authorized to work and/or no longer had a valid EAD to evidence their employment authorization,[120] potentially jeopardizing their families' livelihoods.

---

[118] *See* section II, Purpose of this Temporary Final Rule.
[119] *See* section II, Purpose of this Temporary Final Rule, Table 1. Recent Dramatic Growth in 50thth and 93rdrd Percentile Processing Times for Form I-765 Renewal Applications Filed by Top Three Filing Categories.
[120] Of the 66,000 applicants, 63,000 fall into the C08, C09, and C10 categories and, therefore, are facing a gap of employment authorization. The remaining 3,000 applicants fall into the following EAD categories: refugees (A03 under 8 CFR 274a.12(a)(3)), asylees (A05 under 8 CFR 274a.12(a)(5)), and withholding of

Table 6. Number of Form I-765 Renewals Pending Past their 180-day Auto-Extension Period		
Date	**Median Processing Time**	**Renewals Pending Past 180-day Period**
December 31, 2020	3.6 months	3,300 renewal applications (approx.)
December 31, 2021	8.0 months	66,000 renewal applications (approx.)

This also means that a large majority of these workers, and their U.S. employers, would not be able to meet the verification or reverification requirement for completion of Employment Eligibility Verification (Form I-9),[121] resulting in terminations and incurring the costs of finding replacement workers, if possible. If DHS does not immediately increase the 180-day automatic extension period, the total number of applicants with renewal applications pending past the 180-day auto-extension period is expected to increase by approximately 14,500 per month.[122] This estimated monthly increase of 14,500 applicants is based on recent trends.

Although USCIS has been diligently trying to reduce the adjudication backlog and EAD processing times, USCIS is unable to quickly return to its processing goals due to the volume of pending cases, new filings that USCIS continues to receive, and time needed to increase staffing needs to meet existing demands. As of December 31, 2021, USCIS had approximately 520,000 pending EAD renewal requests in automatic

---

deportation or removal beneficiaries (A10 under 8 CFR 274a.12(a)(10)). Such applicants are still authorized for employment incident to status but would no longer have a valid EAD. For purposes of this rule's analysis, DHS has determined that it is appropriate to include the 3,000 applicants who are employment authorized incident to status given their reasonable reliance on USCIS' timely issuance of their renewal EADs. Also, it is unknown how many applicants in this group have in their possession acceptable alternative documentation they can show their employers in order to maintain their employment (e.g., Form I-94 or an unrestricted Social Security card together with an unexpired State-issued driver's license pursuant to 8 CFR 274a.2(b)(1)(v)). Moreover, through its public outreach efforts, DHS has learned that job loss has affected this group on account of the lack of sufficient documentation to present to employers for Form I-9 completion.

[121] All U.S. employers must properly complete Form I-9 for each individual they hire for employment in the United States. *See* I-9, Employment Eligibility Verification USCIS webpage, https://www.uscis.gov/i-9 (last updated Apr 13, 2021).

[122] As noted elsewhere in this preamble, the number of applicants who face expiration of the up-to-180-day automatic-extension each month is approximately 30,000. However, as some applicants who are already past the 180-day automatic extension period will receive final adjudication of their application each month, the total number of those in the population past the 180-day period is expected to increase by 14,500 each month rather than by 30,000.

extension-eligible categories and continues to receive approximately 55,000 additional Form I-765 applications in automatic extension-eligible categories per month. These additional renewal applications are adding to the current backlog, given that USCIS currently completes approximately 33,000-34,000 such requests per month. Further, as of November 6, 2021, 905 out of 8,721 (or, 10% of) officer positions allocated to the Field Office Directorate (FOD) and the Service Center Operations Directorate (SCOPS) were vacant and USCIS estimates it may take at least until the end of CY 2022 for USCIS to fill such vacancies.[123]

The impact of the prolonged processing times is stark when considering the number of individuals who will lose employment authorization and/or EAD validity each month if immediate action is not taken. As indicated, the total number of renewal applications pending past the 180-day period, which was approximately 66,000 as of December 31, 2021, is expected to increase by approximately 14,500 each month; that monthly figure represents approximately 10,500 asylum applicants, 3,000 adjustment of status applicants, and 1,000 suspension/cancellation applicants per month.

DHS therefore has determined that an automatic extension period of up to 180 days at 8 CFR 274a.13(d) is temporarily no longer sufficient to meet its original purpose and goal for which it was implemented: to prevent and/or mitigate the risk of gaps in employment authorization and documentation for a majority of eligible applicants. Due to the presently insufficient staffing levels, which may take USCIS at least until the end of CY2022 to fill and additional time to train, USCIS may be unable to significantly increase its rate of completion in the immediate term, and therefore, currently may be unable to meaningfully reduce the volume of pending cases while also keeping pace with

[123] As mentioned above in section II.D.1, USCIS had approximately 3,000 vacancies, 905 of which were officer positions in FOD and SCOPS, the two directorates that adjudicate Form I-765 renewal applications filed in categories eligible for automatic extension of EADs. Even after USCIS fills an Immigration Services Officer (ISO) position, there is a delay between the time of hiring and the time the ISO is fully trained and able to complete adjudications to meet productivity targets.

the inflow of Form I-765 filings. While USCIS will continue to explore ways to improve adjudicative efficiencies in the short and long term, USCIS expects Form I-765 backlogs will continue in the immediate future as it works to implement changes to improve Form I-765 processing efficiencies, hire and train new officers, and take additional steps to reduce the backlog and processing times. This temporary and extraordinary circumstance has created an emergent and urgent situation for noncitizens and U.S. employers as gaps in employment authorization and documentation have a highly detrimental impact on noncitizen workers and their U.S. employers. This is taking place at a time when such employers already are facing unprecedented workforce disruptions due to the COVID crisis, which further underscores the importance of immediate action.[124] While the high unemployment rate has declined significantly, the United States is now experiencing high demand for labor as compared to the available supply of workers. As of February 2022, the labor force participation rate was at 62.3 percent, having recovered about 66 percent of what was lost at height of the COVID-19 pandemic compared with the February 2020 rate of 63.4 percent.[125]

---

[124] According to the U.S. Bureau of Labor Statistics (BLS), on the last business day of January 2022, there were 11.3 million job openings and 6.3 million unemployed people. *See* U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Job Openings and Labor Turnover – January 2022* (Mar. 9, 2022), https://www.bls.gov/news.release/pdf/jolts.pdf; U.S. Department of Labor, U.S. Bureau of Labor Statistics, *The Employment Situation – February 2022* (Mar. 4, 2022), https://www.bls.gov/news.release/pdf/empsit.pdf. From June 2021 through January 2022, the ratio of unemployed persons per job opening was below 1.0, meaning that there were more job openings than individuals seeking work. For context, there were roughly 0.8 unemployed persons per job opening in January and February 2020 before COVID. U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Number of unemployed persons per job opening, seasonally adjusted* (Jan. 2007 through Jan. 2022), https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm (last visited Mar. 14, 2022). *See also* Christopher Decker, *Lurking behind lackluster jobs gain are a stagnating labor market and the threat of omicron*, The Conversation, Jan. 7, 2022, 12:50 PM EST, https://theconversation.com/lurking-behind-lackluster-jobs-gain-are-a-stagnating-labor-market-and-the-threat-of-omicron-174534; Ben Casselman, *More quit jobs than ever, but most turnover is in low-wage work*., N.Y. Times, Jan. 4, 2022, https://www.nytimes.com/2022/01/04/business/economy/job-openings-coronavirus.html; Lucia Mutikani, *U.S. labor market recovery gaining steam; unemployment rolls smallest in 52 years*, Reuters, Feb. 24, 2022, 11:48 AM EST, https://www.reuters.com/business/us-labor-market-recovery-gaining-steam-unemployment-rolls-smallest-52-years-2022-02-24/.

[125] *See* U.S. Department of Labor, U.S. Bureau of Labor Statistics, Civilian labor force participation rate (Feb. 2002 through Feb. 2022), https://www.bls.gov/charts/employment-situation/civilian-labor-force-participation-rate.htm (last visited Mar. 8, 2022).

3. Temporary 360-Day Increase Beyond 180 Days Needed for 540-Day Period

DHS has determined that providing additional time beyond the current 180 days during which an eligible applicant's employment authorization and/or EAD are automatically extended is necessary to mitigate the risk to applicants of incurring a lapse in employment authorization or documentation while USCIS works toward reducing processing times.[126] As stated above, USCIS receives approximately 55,000 Form I-765 renewal requests per month and completes approximately 33,000-34,000 requests per month, leading to the growing backlog. Without intervention, this processing rate could result in a median processing time of 14.2 months for all Form I-765 renewals by the end of December 2022. Considering the current range of processing times, a significant number of these renewal applications likely would take longer than the 14.2-month median time, up to 18 months.[127]

Based on the trend USCIS has observed in the growth of processing times for Form I-765 renewal applications in the past year (see section II.A.Table1 for more details), and USCIS' projection of similar growth through the end of CY 2022,[128] DHS calculated that a temporary increase of 360 days (beyond the 180-day period) for a total

---

[126] DHS is applying this rule to all renewal EAD application categories eligible for automatic extension pursuant to 8 CFR 274a.13(d), even though some of these categories currently experience processing times that do not raise a risk of the applicant experiencing a lapse in employment authorization or documentation. As stated earlier, 95 percent of applications fall within the C08, C09, and C10 categories. DHS has made this decision because it has determined that it would not be operationally practical for USCIS to implement a different approach; making distinctions among categories would cause confusion among employers and employees; and backlogs and processing times may yet increase for these other categories.

[127] The estimated processing time is calculated using the current number of pending renewal applications as of December 31, 2021 (520,000), adding in the estimated 55,000 new incoming receipts each month, and subtracting the 34,000 estimated completions each month to estimate the pending inventory at the end of December 2022. Next, the USCIS cycle time methodology is applied to calculate the processing time statistic (*see* "Cycle Time Methodology" on the USCIS processing times website at https://egov.uscis.gov/processing-times/more-info (last visited Apr 19, 2022)). The upper range value of 18 months is estimated by multiplying the cycle time by 1.3 based on the cycle time methodology. Note that individual offices may have higher or lower processing times, but the general USCIS-wide processing times likely would fall in the 14- to 18-month range.

[128] These projections are based on USCIS processes in place as of December 31, 2021, and do not account for other changes USCIS is exploring outside of this TFR and that may be implemented concurrent with this TFR. USCIS is committed to doing everything possible under the law and current resource availability to mitigate the impact of EAD renewal application processing delays on applicants.

AILA Doc. No. 22050300. (Posted 5/3/22)

of 540 days, or approximately 18 months) is an appropriate increase of the automatic extension period. Such period better reflects current and potential processing times for Form I-765 renewals. By extending the automatic extension period, this TFR therefore is intended to reduce the potential for disruptions in employment authorization and EAD validity for those who otherwise qualify for an automatic extension while USCIS continues to work to reduce its processing times to return to its goal of processing Form I-765 within 3 months.

To determine how long DHS should provide this temporary increased automatic extension period, DHS assessed the pending and incoming volume of Form I-765 renewal filings against USCIS' resources. As of December 31, 2021, USCIS had approximately 520,000 pending EAD renewal requests in automatic extension-eligible categories. To achieve USCIS' processing goal of 3 months,[129] USCIS must keep pace with the incoming volume (in other words, complete approximately 55,000 Form I-765 renewal requests in automatic extension-eligible categories per month) in addition to reducing the pending volume of renewal requests from 520,000 to 150,000-200,000.[130] USCIS determined that, as of May 4, 2022, the maximum number of officer hours it can devote to Form I-765 renewal requests in the automatic extension-eligible categories is 217,800 per year, based on its resources and capacity. By comparison, USCIS devoted a total of approximately 432,500 officer hours to *all* Form I-765 adjudications in FY 2021.

USCIS calculated that, if it applied 217,800 officer hours at approximately 15 minutes per Form I-765[131] per month, to keep pace with the incoming flow of 55,000 new

---

[129] USCIS has determined that a processing time of 3 months for Form I-765 renewals would suffice to prevent lapses in employment authorization for most applicants who are eligible for the up to 180-day automatic extension. *See* 80 FR at 81911 (AC21 NPRM). *See* 81 FR at 82398 (AC21 Final Rule).
[130] USCIS estimates that 150,000-200,000 pending requests translates roughly to a 3-month processing time, as the figure reflects 3 months' worth of Form I-765 renewal receipts.
[131] This figure is based on an analysis of historic rates of completion. Between FY 2019 and FY 2021, the total officer hours for all Form I-765 processing (initials and renewals for all categories, including non-automatic extension categories) ranged from approximately 460,000 (FY 2019) to 420,000 (FY 2021), the equivalent of approximately 38,300 to 35,000 officer hours per month to process approximately 153,200 to

renewal requests as well as to reduce the volume of pending requests from 520,000 to 150,000-200,000, it would take USCIS 540 days—or approximately 18 months—to reach its goal of processing Form I-765 renewal applications within 3 months. Therefore, DHS has concluded that the temporary 360-day increase to the automatic extension time period must be in place for 540 days for those with pending renewal applications during this period.

Applicants who file a Form I-765 renewal application after this filing timeframe and who are eligible for an automatic extension of their employment authorization and/or EADs will receive the 180-day automatic extension period currently provided at 8 CFR 274a.13(d)(1). DHS expects that, by the close of the filing timeframe outlined in this temporary final rule, the usual 180-day automatic extension period will be sufficient to prevent applicants filing Forms I-765 renewal applications from incurring a lapse in employment authorization and/or EAD validity, as USCIS expects to have returned to achieving its 3-month processing goal by then.

This temporary final rule applies to three groups of applicants. First, the rule applies to those renewal applicants eligible for the automatic extension who already have filed their renewal Form I-765 application, which remains pending as of the date this rule goes into effect, May 4, 2022, and whose EAD has not expired or whose current up to 180-day auto-extension has not yet lapsed, since this group is at immediate or near term risk of experiencing a gap in employment authorization and/or documentation. Second, the rule applies to new renewal applicants who file Form I-765 during the 18-month period following the rule's publication to avoid a future gap in employment authorization

---

140,000 cases per month. Therefore, each case took an average of 15-minutes to process. Based on the USCIS Volume Projection Committee forecasts, USCIS expects to receive about 2.2 million Form I-765s in FY 2022 and FY 2023. Using the 15-minute per case factor, and based on the 2.2 million projections, USCIS would need to expend approximately 45,800 officer hours a month to meet incoming demand or increase adjudication efficiencies through hiring, resource allocation, and efficiency gains.

and/or documentation.[132] Third, for those renewal applicants who already are experiencing a gap in employment authorization and/or EAD validity, fairness dictates that such renewal applicants also should receive the benefit of the increase in the automatic extension, to enable them to resume an additional period of employment authorization and/or EAD validity, since they were the first group to have been placed in a detrimental position on account of USCIS' long processing times. For these applicants, this TFR provides that employment authorization and/or validity of their EADs will resume beginning on the date the rule is published in the *Federal Register*, May 4, 2022, and continue for a period of up to 540 days from the date their employment authorization and/or EAD expired, as shown on the face of the EAD. However, in recognition of Congress' clear intent in the INA regarding unauthorized employment, including the accountability of employers that employ noncitizens who are not authorized to work in the United States,[133] this TFR does not address periods of unauthorized employment.[134]

---

[132] While USCIS expects to return to its 3-month processing goal by the end of the 18-month period, DHS will continue to provide eligible renewal applicants up to 540 days of automatic extension as outlined in this rule throughout the entirety of the 18-month period for ease of administrability, to mitigate the potential for confusion among the regulated public, and in recognition of the potential that circumstances outside of USCIS's control may frustrate this expectation. Providing a set amount of additional automatic extension time for a set time period is the least administratively burdensome approach, allowing the agency to focus its limited resources on addressing the lengthy processing times themselves. Additionally, DHS anticipates that this approach is the least burdensome for the public, including employees and employers as well, since the temporary solution remains clear, can be relied upon, and can be planned for, and otherwise operates in the same way as the existing automatic extension described in 8 CFR 274a.13(d)(1). DHS acknowledges that the utility of the additional automatic extension time may diminish toward the end of the 18-month period (or sooner, if USCIS achieves its processing goals earlier than anticipated, due in part to backlog reduction efforts discussed in Section II.D.1. or to other factors yet unknown or a combination of the two). However, DHS believes that such consequence is acceptable and appropriately balances competing policy concerns because shorter processing times ultimately mean applicants will receive a decision on their Form I-765 renewal application sooner and, in that event, will rely less on the automatic extension period.

[133] *See* INA sec. 274A, 8 U.S.C. 1324a.

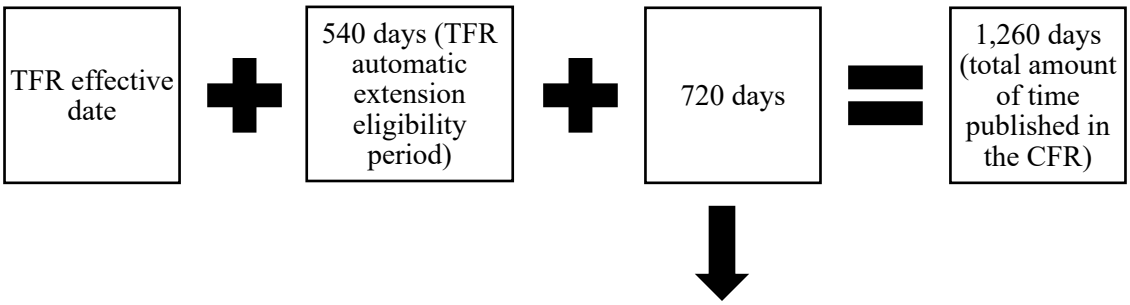
[134] By way of example, if an applicant timely filed a Form I-765 renewal application that is still pending and the expiration date on the front of the applicant's EAD is June 1, 2021, then the applicant's 180-day automatic extension expired November 28, 2021. If the TFR is published on April 1, 2022, then the applicant's EAD automatically becomes valid from April 1, 2022, up to November 23, 2022, which is 540 days after June 1, 2021, the expiration date on the face of the EAD. If the employee in this example worked without authorization between November 29, 2021, and March 31, 2022, however, the employee and employer may be subject to any consequences outlined in the law.

AILA Doc. No. 22050300. (Posted 5/3/22)

In other words, this rule does not cure any unauthorized employment that may have accrued prior to issuance of the rule.[135]

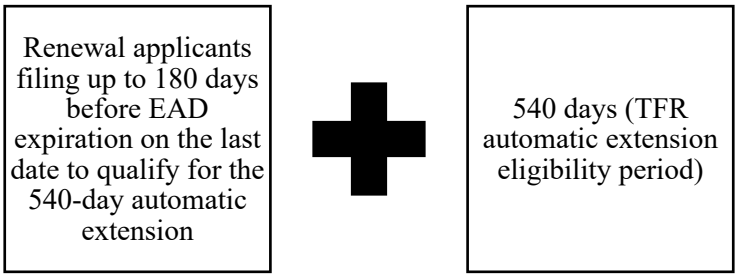
In addition, DHS has determined that the temporary amendment made by this rule should remain in the Code of Federal Regulations (CFR) for an amount of time sufficient to cover the approximately 18-month period during which the up to 540-day automatic extension will be authorized, plus an additional 720 days so that the regulatory provision remains in the CFR for the entire time that applicants may be relying on this temporary increase to the regular automatic extension period.[136] As such, this TFR will take effect on May 4, 2022, and will be removed from the CFR on October 15, 2025; that is, approximately 3 ½ years (or 1,260 days) after the rule takes effect, although no new beneficiaries will receive a 540-day automatic extension after October 26, 2023. Further, as is consistent with current guidance, applicants should file a renewal Form I-765 no earlier than 180 days prior to the expiration date of their EAD.

Figure 1. TFR Process Map



[135] For example, if an applicant timely filed a Form I-765 renewal application that is still pending and the expiration date on the front of the applicant's EAD is June 1, 2021, then the applicant's 180-day automatic extension expired November 28, 2021. If the TFR is published and effective on April 1, 2022, then the applicant's EAD automatically becomes valid from April 1, 2022, up to November 23, 2022, which is 540 days after June 1, 2021, the expiration date on the face of the EAD. If the employee in this example worked without authorization between November 29, 2021, and March 31, 2022, however, the employee and employer would be subject to any consequences outlined in the law.

[136] 720 days is the amount of time needed to cover the up to 540-day automatic extension and to account for the fact that renewal applicants may file their EAD renewal application up to 180 days before their EAD expires.



IV. Temporary Regulatory Change: 8 CFR 274a.13(d)(5)

DHS is amending 8 CFR 274a.13(d) to add a new paragraph (5) that will be in effect temporarily until October 15, 2025.[137] Under the new paragraph, DHS is increasing the automatic extension period for employment authorization and/or EAD validity of up to 180 days (described in 8 CFR 274a.13(d)(1)) to a period of up to 540 days for renewal applicants eligible to receive an automatic extension who have a timely filed Form I-765 renewal application pending during the 18-month[138] period beginning May 4, 2022, and ending October 26, 2023. After the 18-month period, automatic extensions of employment authorization and EAD validity will revert to the up to 180-day period for those eligible applicants who timely file renewal Form I-765 applications after October 26, 2023. The increased automatic extension period will apply to eligible renewal applicants who timely file their Forms I-765 on or before the last day of the 18-month period, even if filed prior to May 4, 2022. In addition, for renewal applicants whose Forms I-765 remain pending but who are no longer within the up to 180-day automatic extension period on or before May 4, 2022, DHS has determined that, in the interest of fairness, such renewal applicants automatically will resume employment authorization and/or the validity of their EADs beginning on the effective date of this

[137] The rule will be in effect for approximately 3 ½ years, after which paragraph (d)(5) will terminate automatically. As explained earlier in the preamble, this effective date period, while lengthy, is necessary so that those eligible who file a Form I-765 renewal application on the last available day of the 18-month period during which the increased automatic extension period is available and who qualify for an automatic extension will have the full benefit of the up to 540-day extension period.

[138] For ease of reference, DHS sometimes refers to the approximate time period of 18 months. However, the precise number of days is 540.

TFR, May 4, 2022, and up to 540 days from the expiration of their employment authorization and/or EAD.[139]

Similar to the 180-day automatic extension period provided by 8 CFR 274a.13(d)(1), the increased automatic extension period of up to 540 days established by this TFR generally will automatically terminate the earlier of up to 540 days after the expiration date of the EAD, or upon issuance of notification of a denial on the Form I-765 renewal request even if this date is after October 26, 2023.

Moreover, 8 CFR 274a.13(d)(5) will remain in the CFR for an additional 720 days after this 540-day period, until October 15, 2025, to ensure that renewal applicants who are already within their up to 540-day automatic extension period as of October 26, 2023, will not get cut off from any remaining employment authorization and/or EAD validity that is over 180 days (the normal automatic extension period under 8 CFR 274a.13(d)(1) but instead will be able to take full advantage of the 540-day period.

Similar to 8 CFR 274a.13(d)(4), this TFR provides that an EAD that appears on its face to be expired is considered unexpired under this rule for up to 540 days from the expiration date on the front of the EAD when combined with a Notice of Action (Form I-797C) indicating timely filing of the EAD renewal application and the same employment eligibility category as stated on the facially expired EAD (or in the case of an EAD and I-797C notice that each contains either an A12 or C19 TPS category code, the category codes need not match). While the current provision at 8 CFR 274a.13(d)(4), and, likewise, the provision in this TFR, do not require that qualifying Notices of Action specify the automatic extension period, in practice, USCIS issues a Form I-797C Notice of Action to all renewal applicants with general information regarding who is eligible for

[139] If a renewal applicant whose employment authorization and/or EAD validity has lapsed on or before the date this rule goes into effect, May 4, 2022, and the lapse is 540 days or more, then such applicant will not receive any additional employment authorization and/or EAD validity under this rule. DHS anticipates that very few applicants will be in this situation.

an automatic extension and currently includes an explanation of the up to 180-day automatic extension period. On and after May 4, 2022, USCIS plans to issue Form I-797C Notices of Action with an explanation of the up to 540-day automatic extension period. USCIS does not plan to issue updated Form I-797C notices to eligible applicants who filed their Form I-765 renewal application before May 4, 2022. However, even Form I-797C notices that refer to a 180-day automatic extension still meet the regulatory requirements. Therefore, individuals who show Form I-797C notices that refer to a 180-day extension, along with their qualifying EADs, still receive the up to 540-day extension under this rule. USCIS will update the web page on the USCIS website that is referenced in the current Form I-797C notice to reflect the change in the automatic extension period. The public should refer to this webpage when determining whether a Form I-797C Notice of Action, if presented with the expired EAD, is acceptable for Form I-9 or other purposes, such as to obtain benefits. Employers should attach a copy of the webpage with the employee's Form I-9 to document the extension of employment authorization and/or EAD validity. USCIS will also update I-9 Central on the USCIS website to provide employees and employers with specific guidance on Form I-9 completion, including any required notations indicating the above-described extension of employment authorization and/or EAD validity, in such cases. If a benefit-granting agency accepts EADs, then the agency should accept the EADs that are automatically extended under this rule. The up to 540-day extension under this rule applies even if a Form I-797C notice refers to a 180-day extension.

This rule does not modify the current requirements an employer must follow for Form I-9 at 8 CFR 274a.2(b)(1)(vii) that apply to automatic extensions, except that this rule temporarily replaces "180" with "540" in its reference to the maximum number of days for the automatic extension period. Therefore, when an employee chooses to use an

EAD and Form I-797C receipt notice as provided under this rule to complete Form I-9 for new employment, the employee and employer should use the extended expiration date to complete Section 1 (if applicable) and Section 2 of the Form I-9 and reverify no later than the date that the automatic extension period expires.[140] For current employment, the employer should update the previously completed Form I-9 to reflect the extended expiration date based on the automatic EAD extension while the renewal is pending and reverify no later than the date that the automatic extension expires.[141] For renewal applicants with pending Forms I-765 who experienced a lapse in employment authorization and/or EAD validity prior to the effective date of this rule, May 4, 2022, yet resume a period of employment authorization and/or EAD validity under this rule, and are rehired by the same employer, their employers must complete Form I-9 by treating the individual's employment authorization as having previously expired pursuant to 8 CFR 274a.2(c)(1)(ii) but have a choice of either reverifying employment authorization on the employee's Form I-9 or completing a new Form I-9.[142]

Under this Temporary Final Rule, just as under existing 8 CFR 274a.13(d)(3), DHS will retain the ability to otherwise terminate any employment authorization or EAD, or extension period for such employment authorization or document, by written notice to the applicant, by notice to a class of noncitizens published in the *Federal Register*, or as provided by statute or regulation, including 8 CFR 274a.14.[143]

V. Regulatory Requirements

A. Administrative Procedure Act

---

[140] *See* 8 CFR 274a.2(b)(1)(vii). *See also* https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/40-completing-section-2-of-form-i-9/44-automatic-extensions-of-employment-authorization-documents-eads-in-certain-circumstances (last updated Nov. 16, 2021).
[141] *Id.*
[142] *See* 8 CFR 274a.2(c).
[143] Therefore, for example, in situations where the underlying status that provides employment authorization would expire prior to 540 days, USCIS may include specific information on the applicant's Form I-797C receipt notice as to how long the automatic extension of the individual's EAD will last. More specifically, in the case of a TPS beneficiary who files a Form I-765 for a renewal EAD, such TPS beneficiary would not receive the full 540 days of EAD auto-extension where the relevant TPS country designation expires prior to that 540-day point.

DHS is issuing this rule without prior notice and an opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act's (APA's) "good cause" exception. 5 U.S.C. 553(b)(B) and (d)(3). Agencies may forgo notice-and-comment rulemaking and a delayed effective date when a rulemaking is published in the *Federal Register*, because the APA provides an exception from those requirements when an agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B); *see also* 5 U.S.C. 553(d)(3). Additionally, on multiple occasions, agencies have relied on this exception to promulgate both communicable disease-related[144] and immigration-related[145] interim rules. The good cause exception for forgoing notice-and-comment rulemaking "excuses notice and comment in emergency situations, or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004); *Am. Fed. of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir.1981) ("As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not 'escape clauses' that may be arbitrarily utilized at the agency's whim. Rather, use of these exceptions by administrative agencies should be limited to emergency situations . . . ."). Furthermore, notice and comment is impracticable under the APA, when an agency finds that due and timely execution of its functions would be impeded by the notice

---

[144] HHS Control of Communicable Diseases; Foreign Quarantine, 85 FR 7874 (Feb. 12, 2020) (interim final rule to enable the CDC "to require airlines to collect, and provide to CDC, certain data regarding passengers and crew arriving from foreign countries for the purposes of health education, treatment, prophylaxis, or other appropriate public health interventions, including travel restrictions"); Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals, 68 FR 62353 (Nov. 4, 2003) (interim final rule to modify restrictions to "prevent the spread of monkeypox, a communicable disease, in the United States").

[145] *See*, *e.g.*, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (interim rule citing good cause to immediately require a passport and visa from certain H-2A Caribbean agricultural workers to avoid "an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule"); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 2, 2003) (interim rule claiming the good cause exception for suspending certain automatic registration requirements for nonimmigrants because "without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews" over a 6-month period).

requirement under the APA, and for example, an investigation into the facts shows that a new rule must be put in place immediately to avert some type of emergency.[146] Courts have held that impracticability "is inevitably fact- or context-dependent."[147] Although the good cause exception is "narrowly construed and only reluctantly countenanced," *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141 (D.C. Cir. 1992), DHS has invoked the exception appropriately in this case given the totality of the circumstances in which this TFR is implemented:[148] Providing advance notice and comment would be impracticable because doing so would result in serious harm, for the reasons set forth below.

As discussed earlier in this preamble, the untenable situation that applicants and their employers are facing is the result of several converging factors affecting USCIS operations that were compounded by the COVID-19 national health emergency. USCIS faced an overall higher level of adjudicatory workload, coupled with insufficient resources to complete the work, which resulted in the significant increase in USCIS processing times for Form I-765 applications (initials and renewals). Staffing shortfalls mean that the workforce cannot keep pace with these operational strains at present, and staffing issues cannot immediately be remedied.[149] While the agency had hoped to

---

[146] *See Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754–55 (D.C. Cir. 2001)(citations omitted) (the Attorney General's Manual explains "that a situation is 'impracticable' when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553], as when a safety investigation shows that a new safety rule must be put in place immediately.)

[147] *Mid-Tex Electric Coop. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). Examples where courts have found notice-and-comment rulemaking impracticable include: where air travel security agencies would be unable to address threats posing "a possible imminent hazard to aircraft, persons, and property within the United States," *Jifry v. FAA*, 370 F.3d 1174,1179 (D.C. Cir. 2004); if "a safety investigation shows that a new safety rule must be put in place immediately," *Util.* Solid Waste *Activities Grp. v. EPA*, 236 F.3d, 749, 755 (D.C. Cir. 2001)(ultimately finding that not to be the case and rejecting the agency's argument); or if a rule was of "life-saving importance" to mine workers in the event of a mine explosion*, Council of the S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981) (describing that circumstance as "a special, possibly unique, case"). This prong sets a high bar for the agency to meet.

[148] See *National Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Service*, 416 F. Supp. 2d 92, 108 (D.D.C. 2006) ("[H]aving examined the totality of circumstances in which the interim rule was promulgated, the Court finds that the FNS' invocation of the good cause exception is justified.").

[149] As explained in the preamble, increasing staffing levels and the agency's capacity are closely tied to the agency's ability to recoup adjudicatory costs through a fee rule, overcoming the effects of the hiring freeze and pandemic related consequences, and backlog reduction efforts. However, none of the efforts undertaken by the agency are realized immediately as these processes are lengthy, time-consuming, and ongoing.

overcome the effects of the factors adversely affecting processing times by using operational and other measures, these measures did not produce effects as fast as the agency had hoped, as some of the corrective measures are lengthy, time-consuming, and ongoing. Unfortunately, USCIS' previous financial strains, including a preliminarily enjoined 2020 Fee Rule, continuing workforce shortfalls due to a previously threatened furlough, attrition, a hiring freeze, and an unusual spike and sustained increase in filings at a rate above that which USCIS can match continue to impact processing times for renewal Forms I-765.

USCIS has been diligently taking steps, many of which had generally been effective in the past, to address these factors and improve adjudicative efficiency after the surge in EAD renewal applications in March and April of 2021, while, at the same time also attending to emergent and other critical demanding obligations of the agency. These steps included applying overtime funds to the Form I-765 renewal workload in an attempt to control the growing backlog, and exploring programmatic improvement initiatives for the adjudication of Form I-765 applications overall. However, although these measures initially showed some success, it has become apparent that USCIS' limited resources are insufficient to address the immediate situation. With the incoming volumes of Form I-765 renewal filings showing no sign of slowing, USCIS assesses that it will not be able to avert the impending crisis of more renewal applicants experiencing gaps in employment authorization and/or documentation, and that such gaps' length in time are growing. As a result, USCIS has determined that until processing times can be reduced significantly, an increase in the automatic extension period is needed as soon as possible to avert imminent harm. This rule is imperative to provide an interim measure for thousands of renewal applicants who are facing imminent job loss through no fault of their own, and thousands who have already experienced a lapse in employment authorization and/or

EAD validity despite USCIS' best efforts to employ operational measures to avoid this result.

As explained throughout this preamble, and as of December 31, 2021, the impact is significant. USCIS data show that approximately 66,000 renewal applications remained unadjudicated beyond the automatic extension period of 180 days under 8 CFR 274a.13(d)(1). Therefore, the individuals who filed those renewal applications and relied on the automatic extension to maintain employment already would have experienced job loss as a result of the lack of employment authorization and/or EAD validity. Of the approximately 66,000 renewal applicants in this situation, 58 percent are asylum applicants, a particularly vulnerable population. Continuous employment authorization during the pendency of an asylum application is vital for asylum seekers in the United States, given that they need employment authorization not just to work but also to access services and other resources required to pursue their asylum applications before USCIS or EOIR, which are often costly. Therefore, this entire group of renewal applicants needs immediate help via this rulemaking so these applicants can regain employment authorization and/or EAD validity and rejoin the workforce in order to continue to make a living to sustain their families.

Given that renewal applications continue to be filed—USCIS receives about 55,000 new renewal Forms I-765 in automatic extension-eligible categories per month—the backlog is expected to increase and, with it, the number of renewal applicants who could lose their ability to be employed and to support themselves and their families.[150] DHS estimates that approximately 14,500 renewal applicants per month will join the group of approximately 66,000 renewal applications who faced a lapse in employment

[150] As explained in the preamble, certain applicants within the affected population, including those who are employment authorized incident to status or non-working adults and children, may not necessarily lose their employment authorization after the 180-day automatic extension period is exhausted, but their EADs become invalid so that they can no longer use them for other purposes, such as an identification document or as proof for receiving State or local public benefits to the extent eligible, in addition to not having proof of employment authorization for Form I-9 purposes.

AILA Doc. No. 22050300. (Posted 5/3/22)

authorization and/or EAD validity as of December 2021.[151] Furthermore, data estimates show that an estimated 266,841 to 375,545 renewal applicants could lose their employment authorization and/or EAD validity over the next 18 months if this rule is not promulgated immediately.

Considering the total population potentially impacted by this rule, DHS estimates that, with the implementation of this rule, approximately $3,098 million in labor earnings for renewal applicants would be stabilized and not forgone.[152] In other words, this rule will preserve an estimated total of $3,098.0 million in labor earnings for the estimated 266,841 to 375,545 affected renewal applicants. Any delay in action such as by providing notice and comment, therefore, would raise the imminent threat and create severe adverse consequences to labor earnings and the financial well-being of applicants and their families. DHS believes that with the immediate implementation of this rulemaking, the potential for additional gaps in employment authorization and/or EAD validity, job loss, and financial uncertainty will be reduced significantly for Form I-765 renewal applicants and their families while USCIS works toward implementing its backlog reduction plan to return processing times to the pre-emergency 3-month average.

DHS believes that the imminent and continuing impact on employers' business continuity and related effects caused by gaps in employment authorization and/or EAD validity additionally justify that DHS issue this temporary final rule. The imminent or ongoing gaps in employment authorization and/or EAD validity being experienced by renewal applicants through no fault of their own adversely affect not only applicants and their families, but also employers, which experienced difficulties in maintaining their workforce as a result of the pandemic, and continue to face a variety of challenges as the

---

[151] *See* USCIS' analysis outlined in the preamble at section IV.B, "Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)," regarding the affected population.

[152] Labor earnings includes wages and salaries as well as benefits (e.g., paid leave, supplemental pay, insurance). Amount shown as total present value at a 7 percent discount rate.

AILA Doc. No. 22050300. (Posted 5/3/22)

United States progresses on its path to recovery from the pandemic, such as more job openings than available workers.[153] To ensure continuity of operations, businesses and entities may have made decisions in reliance on the possibility that eligible renewal Form I-765 applicants may receive renewals of employment authorization and documentation (for example, by establishing business contracts, applying for grants, signing leases, and commencing development of product lines). As DHS predicts that it will take approximately 18 months to return to normal processing levels, DHS seeks to mitigate the potential that additional businesses and entities may temporarily be adversely impacted by required terminations as a result of gaps in employment authorization or documentation.

Such adverse impacts on employers and businesses, who have already experienced significant economic harm on account of the pandemic, gives cause to address an emergency situation as quickly as possible to prevent further imminent harm to an increased number of renewal applicants and their employers. While the number of businesses affected is unknown, DHS's analysis suggests that, if this rule were not implemented immediately, businesses that employ affected EAD holders would incur approximately $4,037.6 million in labor turnover costs for the separation and replacement these employees.[154] This amount represents significant cost savings to businesses under this rule. The longer this rule is delayed, the greater the costs to business because of applicants' gaps in employment authorization and/or documentation and the resulting disruptions in business continuity that employers will experience, defeating the very purpose 8 CFR 274a.13(d) and this rulemaking, creating 8 CFR 274a.13(d)(5), seek to prevent.[155] That is, because of the serious harm that would be caused to applicants and

---

[153] *See* FN 124.

[154] Turnover costs are calculated as a percent of annual salary. Amount shown as total present value, using a 7 percent discount rate.

[155] As explained elsewhere in this preamble, 8 CFR 274.13(d) was proposed in 2016 to mitigate the risk of gaps in employment authorization and required documentation, and its related consequences for eligible

employers described throughout this rulemaking, providing notice and comment, as well as a 60-day effective date delay,[156] would expose the public to the harm that 8 CFR 274a.13(d) and this rulemaking are trying to prevent, and would thereby defeat the very purpose of rulemaking.

Furthermore, DHS believes that given the imminent and continuing impact of gaps in employment authorization and/or EAD validity on renewal applicants, their families, employers, and employers' business continuity make following ordinary notice and timing impracticable. As a DHS component agency, one of USCIS' primary missions is to administer immigration benefits, including adjudicating requests for and issuing employment authorization and/or EADs.[157] Under the INA, the Secretary is authorized to take necessary regulatory action to carry out this mission effectively. As established above, the current situation is untenable for renewal applicants and their employers. Given the current processing backlogs and delays, USCIS also predicts that it will take approximately 18 months to revert to normal processing timeframes, a significant portion of which would be taken up by notice and comment rulemaking and the 60-day publication requirement. Thus, given the immediate harm that these backlogs create for

---

renewal applicants and their employers. *See* AC21 NPRM, 80 FR 81899, 81927. In the AC21 NPRM, DHS explained that it believed the 180-day auto extension to be a reasonable and effective amount of time to mitigate that risk. *See* 80 FR at 81927 ("DHS believes that this time period [of up to 180 days] is reasonable and provides more than ample time for USCIS to complete the adjudication process based on USCIS's current 3-month average processing time for Applications for Employment Authorization."). After having received and carefully considered public comments, DHS published the final rule. Thus, the concept of the up to 180-day automatic extension has been tested in the public sphere already and gone through proper rulemaking. This TFR is merely a temporary 18-month deviation from the 180-day timeframe, warranted by this untenable situation.

[156] While the effective date for a substantive rule under the APA is not less than 30 days, 5 U.S.C. 553(d), this rule is a major rule subject to the Congressional Review Act, codified at 5 U.S.C. 801 through 808. Under 5 U.S.C. 801, a major rule's effective date generally is delayed for at least 60 days. Under the APA and the Congressional Review Act, however, the agency is exempt from the delayed effective date requirements of both acts if the agency provides good cause. *See* 5 U.S.C. 553(d) and 808(2).

[157] As of March 1, 2003, the former INS ceased to exist as an agency within the United States Department of Justice, and its functions respecting applications for immigration benefits (such as the adjudication of requests for employment authorization and/or EADs) were transferred to United States Citizenship and Immigration Services in the United States Department of Homeland Security. *See* Homeland Security Act of 2002, Pub.L.107-296, sec. 471(a), (Nov. 25, 2002); 68 FR10922 (Mar. 6, 2003). Additionally, under the Homeland Security Act sec. 101(b)(1)(F), 6 U.S.C. 111(b)(1)(F), USCIS, as a DHS component, should exercise this function in a manner that ensures that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.

renewal applicants and employers alike, the notice and comment requirement, and associated time requirements, would not allow USCIS to timely avert the harms discussed in this rule. Providing notice and comment rulemaking and complying with the 60-day publication requirement is therefore simply impracticable as it would impede USCIS functions, and has a significant impact on applicants and employers.

Additionally, DHS believes that issuing this temporary rule is a reasonable approach to implement this temporary measure, which will be effective for only a finite period. Specifically, the up to 360-day increase of the current 180-day automatic extension period via the amendments to DHS regulations made by this rule are limited to individuals who are seeking a Form I-765 renewal application within the next 18 months from the rule's publication, while the amendments to DHS regulations will only remain in place for a total of 1,260 days (i.e., 3 ½ years). These time periods are suitable to avert imminent harm to a specific class of individuals and their employers.[158] As demonstrated in the preamble, extending the automatic extension provision temporarily by up to an additional 360 days for a period of 540 days (i.e., approximately 18 months) directly corresponds to USCIS' data-driven estimates on how long USCIS will need to reduce the processing times of backlogged Form I-765 renewal applications. In addition, DHS has determined that the rule will need to remain in the Code of Federal Regulations for another 720 days so that eligible prior renewal applicants can take advantage of the full up to 360-day increase if necessary, even after the 18-month window for the increase

[158] Courts have been more inclined to finding good cause for issuance of TFRs if the effect is limited in scope and duration. *See, e.g., San Diego Navy Broadway Complex Coalition v. U.S. Coast Guard*, 2011 WL 1212888, *6 (S.D. Cal. 2011) (finding good cause for issuance of a TFR because agency limited its effect for several months and also explicitly indicated its intent to initiate notice-and-comment rulemaking); *Nat'l Fed'n Emps v. Divine*, 671 F.2d 607 (D.C. Cir. 1982) (finding that OPM's emergency action was within the scope of the "good cause" exception as the agency's action of postponing the open benefits season was required by events and circumstances beyond its control and necessary because not delaying would have been not only impracticable but also potentially harmful); *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981) (upholding Mine Safety and Health Administration rule delaying the effective date without notice and comment).

AILA Doc. No. 22050300. (Posted 5/3/22)

closes.[159] After this period, the amendments made by this rule will expire automatically. Therefore, this rulemaking is limited in time and scope in order to prevent harm to the public.

Bypassing the ordinary APA procedures will allow USCIS immediately to reduce the dire impact the current circumstances create for affected noncitizens and their employers—circumstances that were and continue to be beyond the control of renewal applicants and their U.S. employers. As described above and throughout this preamble, while USCIS has been taking active measures to reduce the backlog and return to its processing goal of an average of 3 months as soon as possible,[160] backlogs and processing times grew to such an extent due to the COVID-19 pandemic's impacts on agency operations and finances, in combination with other factors such as filing surges, staffing shortages, and a sustained increase in the number of filings in other benefit request types such as adjustment of status and asylum that impact EAD receipts, that those measures were insufficient to avoid the current circumstances.

USCIS expects that its backlog reduction efforts will allow the agency to return to its 90-day processing goal before this TFR expires. In the meantime, this TFR will mitigate harm to individuals, families, and businesses while USCIS works to rebound from the adverse impacts of COVID-19, staffing shortages, and financial strains. A subsequent, extraordinary surge and sustained increase in Form I-765 submissions further undermined those efforts such that the only practicable solution to avoid placing thousands of renewal applicants in the untenable situation of losing employment

---

[159] DHS believes that 720 days is the amount of time needed to cover the up to 540-day automatic extension and to account for the fact that renewal applicants may file their EAD renewal application up to 180 days before their EAD expires.

[160] These measures include staffing increases and reallocations to focus on Form I-765, backlog reduction initiatives that apply technology in strategic ways to more efficiently adjudicate Forms I-765, new monthly completion goals, and policy changes to improve efficiency for the agency and eliminate unnecessary hurdles for applicants. In addition, USCIS is focused on addressing prolonged processing times in other areas impacting Form I-765 overall processing times also, for example, in cases where a Form I-765 filing is based on an underlying benefit request, such as an application for asylum or to adjust to lawful permanent resident status.

authorization and/or EAD validity and experiencing employment termination is this time-limited and narrowly drawn rule. Data show that if this rule is implemented without notice and comment, DHS will have mitigated gaps in employment authorizations for virtually all the affected population.[161]

This temporary measure is consistent with the intent of current 8 CFR 274a.13(d). In this rule, DHS is simply temporarily increasing the 180-day timeframe for those already eligible for an automatic extension. DHS neither makes additional categories eligible nor alters existing procedures through this TFR. Therefore, the increase in the automatic extension of employment authorization and/or EAD is not just highly effective but also limited in scope and application. For this additional reason, DHS believes that the good cause exception is properly invoked in this rulemaking.

In sum, for the reasons stated, including the need to be responsive to the operational demands and challenges facing USCIS to reduce its processing times, renewal applicants' needs to avoid gaps in employment and/or documentation, and employers' need to maintain their workforce, DHS believes that, based on the totality of the circumstances in which this TFR is issued, it has good cause to bypass ordinary notice-and-comment procedure for this temporary action, and that moving expeditiously to make this change effective immediately upon publication is in the best interest of the public.

DHS has concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this TFR. Delaying implementation of this rule until the conclusion of notice-and-comment procedures of section 553(b) and the delayed effective date provided by section 553(d)(3) would be impracticable due to the need to prevent renewal applicants, otherwise eligible for the up to 180-day automatic extension, from

---

[161] *See* USCIS' analysis outlined in the preamble at section IV.B, "Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)."

experiencing the immediate harm caused by gaps in employment authorization and/or documentation, which would in turn cause imminent harm to their U.S. employers and their ability to maintain their workforce, while USCIS works to reduce adjudicatory processing times and otherwise address the Form I-765 backlogs through various measures.

B. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and to the extent permitted by law, to proceed if the benefits justify the costs. They also direct agencies to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). In particular, E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget (OMB), has designated this final rule a significant regulatory action that is economically significant under section 3(f)(1) of E.O. 12866. Accordingly, OIRA has reviewed this regulation.

1. Introduction

As fully detailed in the preamble, this TFR temporarily amends existing DHS regulations to provide that the automatic extension period applicable to expiring employment authorization and/or Employment Authorization Documents (Forms I-766 or "EADs") for certain renewal applicants who have filed Form I-765, Application for Employment Authorization, will be increased from up to 180 days to up to 540 days for a period of 540 days (i.e., approximately 18 months). For those renewal applicants whose 180-day automatic extension of employment authorization and/or EADs (hereinafter may be referred to collectively as "EADs" for ease of reference) have expired by the date this

rule goes into effect, this rule provides for an additional period of employment authorization and EAD validity, beginning on the date the rule goes into effect and up to 540 days from the date their EADs expired as shown on the face of the card. The purpose of this TFR is to reduce the likelihood that certain eligible applicants who qualify for automatic extensions of their expiring EADs will experience gaps in employment authorization and/or EAD validity, and therefore allow earnings stability for individuals and continuity of business operations for their employers.

DHS determines that the population impacted by this TFR consists of three components applicable to the pool of applicants who have renewal Form I-765 applications pending. The first component consists of the pool whose EADs and 180-day auto-extensions have lapsed, and renewal Form I-765 applications still have not been approved as of December 31, 2021—we refer to this group as the "current" population segment. The second component consists of the pool for whom coverage by the current 180-day auto-extension has prevented the lapse of their EADs to date but who would experience a lapse due to expiration of their 180-day auto-extensions in the 120-day period between the date of the analysis and the TFR taking effect.[162] This second group is referred to as "near-term," in context. The third group consists of the "future" population that, without this rule, could experience a lapse in employment during the 18-month period in which the TFR is effective. Because we cannot forecast the future population with precision, we present a range. The baseline population comprising the current, near-term, and future components could range from 301,463 to 423,863. After applying several adjustments described in the "Background and Population" section, we arrive at an adjusted population that could range from 266,841 to 375,545.

[162] The near-term captures the dates of January 1, 2022, to mid-April, 2022, when the TFR is expected to take effect.

Our analysis suggests that virtually all eligible applicants with pending Form I-765 renewal applications who are otherwise eligible for the automatic extension would be covered by the TFR, though we cannot rule out the possibility that some automatically extended EADs might still lapse, as our analysis reveals that over recent months a miniscule share had lapsed for more than 540 days. We expect that the monetized estimates will be beneficial to individuals, and that they will also generate beneficial cost-savings to businesses.

DHS has prepared quantified estimates of the impacts that could be generated by this TFR applicable to the adjusted population. This rule will prevent EAD holders from incurring a loss of earnings ("stabilized earnings"), as under this rule there will be no disruption to their earnings due to a lapsed EAD. Additionally, this rule will generate labor turnover cost savings to businesses that employ the EAD holders, as under this rule there will be no disruption to EAD holders' employment authorization. However, we are unable to ascertain how many individual businesses could be impacted. Additionally, to the extent this rule prevents affected EAD holders' jobs from going unfilled, there will be less impacts to tax transfers from businesses and employees to the Federal Government.

Due to substantial variation in the inputs utilized to estimate the impacts, there is a very wide range in which they could fluctuate. These impacts are summarized in Table 7, where the monetized figures represent the forecast expected value (which is the mean of trial-based simulations) discounted at 7 percent rate of discount for a range based on simulations that account for variations in the components of the impacts. The figures represent the total cost over two years.

Table 7. Summary of Impacts (FY 2020 values)
Module A. EAD Holder Earnings Preserved ("Stabilized Earnings") • Entities directly affected: Individual EAD holders. • Population: 266,841 to 375,545 individuals with EAD renewals. • Monetized present value estimate (7 percent): $3,098.0 million.

Table 7. Summary of Impacts (FY 2020 values)	
	• Type: Stabilized labor income to affected EAD renewal applications; this labor income is a proxy for either prevented transfers from EAD holders to others in the workforce or cost savings to employers for preserved productivity, depending on if employers would have been able to easily find replacement labor for affected EAD holders without this rule. • Summary: Individuals would benefit from being able to maintain their employment without disruption; DHS estimated these savings based on data from recently lapsed EADs and labor earnings, both of which vary within a range. • Potential preserved employment taxes = $326.9 million (Present Value, 7 percent discount rate); actual amount will depend on how easily businesses would have been able to find replacement labor for affected EAD holders without this rule.
Module B.	**Employer Labor Turnover Cost Savings** • Entities directly affected: businesses that employ the EAD holders. • Population: Unknown number of businesses; impacts based on 265,987 to 374,343 individuals with EAD renewals. • Monetized present value estimate (7 percent): $4,037.6 million. • Type: Cost-savings. • Summary: There would be cost savings to employers in terms of continuity of business operations due to the worker not being separated; DHS estimated these savings based on information applicable to turnover costs relevant to the annual earnings, both of which vary within a range.
Module C.	**Other Impacts Considered** • Individuals impacted would likely benefit from cost-savings accruing to not having to incur the direct costs associated with searching for and obtaining a new job once their renewal EAD that lapsed is eventually approved. • The estimates of stabilized earnings understate the true impact because they do not factor in the time it would take affected EAD holders to find employment beyond when the lapsed EAD is finally renewed. • To the extent that individuals' earnings will be maintained, burdens to their support network would be prevented. • DHS does not expect labor market impacts from this TFR, as the total maximum population that could be impacted is a very small share of the national labor force. • Avoid opportunity costs to businesses for having to choose the next best alternative to employment of the affected EAD renewal applicant. We do not know if the replacement hire in a next best alternative scenario would have been a comparable substitute (i.e., a productivity or profit charge to employers).

Some of the impacts of this rule will depend on whether businesses would have been able to find replacement labor for the positions the affected EAD renewal applicants

would have lost if they had experienced a gap in employment without this rule. If businesses would have been able to find replacement labor from the pool of the unemployed, the only monetized cost savings of the rule to society is for preventing costs resulting from labor turnover. If businesses would not have been able to find replacement labor, the monetized cost savings of the rule would also include prevented lost productivity due to a lack of available labor. However, the impacts of this rule to the affected EAD renewal applicants do not depend on whether their employer can find replacement labor. This rule will prevent affected EAD renewal applicants from incurring a loss of earnings.

DHS estimates that stabilized earnings to EAD renewal applicants ranges from $81.3 million to $6,388.6 million with a primary estimate of $1,713.5 million (annualized, 7 percent), depending on the wages the EAD renewal applicants earn, the number of EAD renewal applicants affected, and the duration of the gap in employment authorization that would occur without this rule. DHS uses estimates of the stabilized earnings as a measure of either 1) prevented transfers of these wages from the affected population to others in the labor market, or 2) a proxy for businesses' cost savings from prevented lost productivity, depending on whether businesses would have been able to find replacement labor for affected EAD renewal applicants without this rule.

DHS does not know what the next best labor alternative would have been for businesses without this rule. Accordingly, DHS does not know the portion of the overall effects of this rule that are transfers or costs savings. To begin, DHS describes the two extreme scenarios, which provide the bounds for the range of effects.

Scenario 1: If, in the absence of this rule, all businesses would have been able to easily find reasonable labor substitutes for the positions the EAD renewal applicants would have lost, businesses would have lost little or no productivity. Accordingly, this rule prevents $1,713.5 million (primary estimate annualized, 7 percent) from being

transferred from affected EAD renewal applicants to workers currently in the labor force (whom are not presently employed full time) or induced back into the labor force and this rule would result in $0 cost savings to businesses for prevented productivity losses.

Scenario 2: Conversely, if all businesses would have been unable to immediately find reasonable labor substitutes for the position the EAD holder filled, then businesses would have lost productivity. Accordingly, $1,713.5 million is the estimated monetized cost savings from this rule for prevented productivity losses and this rule will result in preventing $0 from being transferred from affected EAD renewal applicants to replacement labor. Because under this scenario businesses would not have been able to find replacement labor, the rule may also result in additional cost savings to employers for prevented profit losses; and further, may also prevent a reduction in tax transfer payments from businesses and employees to the government. DHS has not estimated all potential tax effects but notes that stabilized earnings of $1,713.5 million would have resulted in employment tax losses to the Federal Government (i.e., Medicare and Social Security) of $180.8 million (annualized, 7 percent).

In both scenarios, whether without this rule employers would have been able to find replacement labor or not, DHS assumes that businesses would have incurred labor turnover costs for having to replace affected EAD renewal applicants. Accordingly, DHS estimates the rule will also result in additional labor turnover cost savings to businesses ranging from $232.2 million to $6,666.8 million, with a primary estimate of $2,233.1 million (annualized, 7 percent) depending on the wages the EAD renewal applicants earn, the number of EAD renewal applicants affected, and the replacement cost to employers.

Table 8 below summarizes these two scenarios and the primary estimate of this rule (Tables 8A and 8B capture the impacts at 3 and 7 percent rates of discount, respectively). Because DHS does not know the overall proportion of businesses that would have been able to easily find replacement labor in the absence of this rule, for

DHS's primary estimate we assume that replacement labor would have been found for half of all EAD renewal applicants and not found for the other half (i.e., an average of the two extreme scenarios described above). However, as noted previously, December 2021 unemployment and job openings data indicate there are more jobs available than people looking for jobs.[163] Accordingly, we believe the impacts of this rule will most likely skew towards Scenario 2, with the rule resulting in mostly cost savings for employers who would have been unable to fill the jobs of affected EAD renewal applicants without this rule.

Table 8A. Primary Estimate - Monetized Annualized Impacts at 3% (millions)				
Category	**Description**	**Scenario 1: Replacement Labor Found for ALL Affected EAD Holders**	**Scenario 2: NO Replacement Labor Found for Affected EAD Holders**	**Primary Estimate:** Replacement Labor Found for HALF of Affected EAD Holders
Transfers				
Stabilized Earnings	Prevented compensation transfers from EAD renewal applicants to other workers	$1,693.0	$0	**$846.5**
Employment Taxes	Prevented reduction in employment taxes paid to the Federal Government	$0	$178.6	**$89.3**
Cost Savings				
Labor Turnover	Prevented labor turnover costs to businesses	$2,206.5	$2,206.5	**$2,206.5**
Productivity	Prevented lost productivity to businesses (stabilized earnings used as a proxy)	$0	$1,693.0	**$846.5**
Total Cost Savings		**$2,206.5**	**$3,899.5**	**$3,053.0**
Table 8B. Primary Estimate - Monetized Annualized Impacts at 7% (millions)				

[163] Bureau of Labor Statistics data show that as of December 2021, there were 0.6 unemployed persons per job opening. U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Number of Unemployed Persons per Job Opening, Seasonally Adjusted* (Jan. 2007 through Jan. 2022), https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm (last visited Mar. 14, 2022).

Category	Description	Scenario 1: Replacement Labor Found for ALL Affected EAD	Scenario 2: NO Replacement Labor Found for Affected EAD	Primary Estimate: Replacement Labor Found for HALF of Affected EAD Holders
Transfers				
Stabilized Earnings	Prevented compensation transfers from EAD renewal applicants to other workers	$1,713.5	$0	**$856.7**
Employment Taxes	Prevented reduction in employment taxes paid to the Federal Government	$0	$180.8	**$90.4**
Cost Savings				
Labor Turnover	Prevented labor turnover costs to businesses	$2,233.1	$2,233.1	**$2,233.1**
Productivity	Prevented lost productivity to businesses (stabilized earnings used as a proxy)	$0	$1,713.5	**$856.7**
Total Cost Savings		**$2,233.1**	**$3,946.6**	**$3,089.9**

There are two important caveats to the monetized estimates. First, as the pending caseload evolves over the course of time that this TFR applies to, the pending count and therefore the total number of EADs and individuals associated with them will change. A resultant effect of the caseload changes is that as USCIS works through this backlog, the number of affected EAD renewal applicants and the durations for which EAD renewal applicants may have experienced a lapse in employment without this rule will likely vary from the durations modeled, which was those experienced in December 2021. As a result, DHS acknowledges the uncertainty in the above monetized impacts.

Second, DHS recognizes that non-work time performed in the absence of employment authorization has a positive value, which is not accounted for in the above monetized estimates.[164] For example, if someone performs childcare, housework, home

[164] Boardman et al., *Cost-Benefit Analysis Concepts and Practice* (2018), p.152

AILA Doc. No. 22050300. (Posted 5/3/22)

improvement, or other productive or non-work activities that do not require employment authorization, that time still has value. In assessing the burden of regulations to unemployed populations, DHS routinely assumes the time of unemployed individuals has some value.[165] The monetized estimates of the wages this rule preserves are measured relative to a baseline in which individuals lose EADs and the associated income as a result of the problem this rule seeks to address. The monetary value of the wages this rule preserves are savings to the individual, but DHS has considered whether net societal savings may be lower than the sum of the preserved wages to the individuals and whether a more accurate estimate of the net impact to society from losing employment authorization in the absence of this rule might take into account the value of individuals' non-work time, even though this population has lost their authorization to sell their time as labor. Due to the variety of values placed on non-work time, and the additional fact that this non-work time is involuntary, it is difficult to estimate the appropriate adjustment that DHS should make to preserved wages in order to account for the social value of non-work time. Accordingly, DHS recognizes that the net societal savings of this rule may be somewhat lower than those reported below, but they are a reasonable estimate of the impacts to avoiding the costs of lapsed EADs.

Pursuant to OMB Circular A-4, DHS has prepared an A-4 Accounting Statement for this rule.

Table 9. OMB A-4 Accounting Statement ($ millions, 2020)
Period of analysis: 2022-2023

Category	Primary Estimate		Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS					
Monetized Benefits	7%	N/A	N/A	N/A	RIA
	3%	N/A	N/A	N/A	

[165] For regulatory analysis purposes, DHS generally assumes the value of time for unemployed individuals is at least the value of the Federal minimum wage.

AILA Doc. No. 22050300. (Posted 5/3/22)

Annualized quantified, but un-monetized, benefits	N/A		N/A	N/A	RIA
Unquantified Benefits	Without this rule, affected EAD renewal applicants who remain eligible for employment authorization would encounter delays in EAD renewals and be unauthorized to work for periods of time. This rule will ensure that these EAD renewal applicants do not experience gaps in employment authorization as a result of USCIS processing delays and can continue to make a living to sustain their families. Accordingly, stabilized earnings for these EAD renewal applicants may also prevent any monetary or other support that would have been necessary from the support network of affected EAD holders during such a period of unemployment. It will also ensure other benefits of holding an EAD or job will continue, such as valid identity documents, or health insurance obtained through an employer. Additionally, this rule will prevent adverse impacts on businesses that would result from required terminations for affected EAD renewal applicants.				RIA
COSTS					
Annualized monetized costs	7%	-$3,089.9	-$232.2	-$13,055.4	RIA
	3%	-$3,053.0	-$229.4	-$13,131.0	RIA
Annualized quantified, but un-monetized, costs	N/A		N/A	N/A	RIA
Qualitative (unquantified) costs	In cases where, in the absence of this rule, companies cannot find reasonable substitutes for the labor the affected EAD renewal applicants have provided, affected businesses would also save profits from the productivity that would have been lost. In all cases, companies would avoid opportunity costs from having to choose the next best alternative to employment of the affected EAD renewal applicant.				RIA
TRANSFERS					
Annualized monetized transfers: "on budget"	7%	$0	$0	$0	RIA
	3%	$0	$0	$0	
From whom to whom?	N/A				N/A
Annualized monetized transfers: stabilized earnings	7%	$856.7	$0	$6,388.6	RIA
	3%	$846.5	$0	$6,312.4	
From whom to whom?	This rule will prevent compensation from transferring from affected EAD renewal applicants to other workers.				RIA
Annualized monetized transfers: taxes	7%	$90.4	$0	$674.1	RIA
	3%	$89.3	$0	$666.1	
From whom to whom?	This rule will prevent a reduction in employment taxes from companies and employees to the Federal Government (quantified). It would also prevent the transfer of additional Federal, State, and local income tax revenue (unquantified).				RIA

Category	*Effects*	*Source Citation (RIA, preamble, etc.)*
Effects on State, local, and/or tribal governments	This rule will prevent a reduction in State and local tax revenue (unquantified). It will also prevent potential reliance on State or local government-funded support services that may have been necessary with a gap in employment authorization (unquantified).	RIA
Effects on small businesses	This rule does not directly regulate small entities but has indirect cost-saving to small entities that may employ affected EAD renewal applicants. Such businesses will avoid the costs for labor turnover and loss of productivity and profits had they not been able to immediately fill the labor performed by the affected EAD renewal applicant.	RIA, RFA
Effects on wages	Preserve access to wages for EAD renewal applicants.	RIA
Effects on growth	None.	RIA

2. Background and Population

Backlogs across USCIS-administered benefit requests, including employment authorization, have been increasing steadily since FY 2010, due to factors discussed in the preamble. Unforeseen obstacles driven by the COVID-19 pandemic that exacerbated existing financial problems within USCIS, staffing issues, and a surge in FY 2021 EAD filings, have aggravated the situation and caused a recent spike in USCIS processing times. This is especially concerning where the backlog involves employment authorization and documentation, which is critical to applicants' livelihoods and the financial well-being of their families, as well as U.S. employers' continuity of operations. USCIS understands the potential impact that delays in receiving final decisions have on applicants and tackling the backlog and reducing processing times is a priority for DHS.

Currently, applicants in specific categories who are seeking to renew their expiring EADs are eligible for an automatic extension of that employment authorization and/or EAD for up to 180 days if they meet certain requirements. Because of the recent spike in processing times, however, DHS has determined that 180 days is no longer sufficient to prevent gaps in employment authorization and documentation for most

eligible applicants. Therefore, DHS will provide an additional 360 days of employment authorization to the existing 180 days (for a total of up to 540 days from the EAD expiration date), automatically provided to certain applicants seeking a renewal of their EADs under 8 CFR 274a.13(d)(1).

In developing the populations examined for this analysis, it is useful to discuss four categories. First, there are applicants whose auto-extended EADs under the relevant categories have lapsed and whose renewal Forms I-765 have since been approved, providing them with a new grant of employment authorization and/or new documentation. Second, there are applicants whose auto-extended EADs have lapsed but renewal Forms I-765 have not yet been approved as of the date of the most recent data applicable to this analysis (December 31, 2021). Third, there are applicants whose EADs are still valid, including being within the 180-day auto-extension period, but whose auto-extension period will expire over the next 120 days, in the timespan leading up to the TFR taking effect (the near-term period captures the date of the analysis, which is January 1, 2022, through mid-April 2022). Fourth are the applicants whose EAD would lapse after the TFR becomes effective if it were not for the TFR. These population components will be considered "past," "current," "near-term," and "future."

In this specific case, we think it is most appropriate to attribute the impacts to the population that is current in terms of being impacted, or that could be impacted in the near-term timespan leading up to the TFR, and the future, when the TFR is in effect. Hence, while we draw on data and information from the pool of applicants whose auto-extended EADs lapsed but whose renewal Forms I-765 applications were subsequently approved, they are not part of the population affected by the rule.

DHS analyzed pending renewal Form I-765 filing and processing information and determined that the current pool of relevant-category Form I-765 renewals that have expired and are pending in a lapse-state of the current analysis stands at 66,077.

Furthermore, the near-term population (120-day period starting on January 1, 2022) is 96,786. For the future population, USCIS estimates with about 30,000 additional EADs per month are at risk of lapse without additional adjudication efforts. For the future, we also relied on certain projections about USCIS's efforts to reduce backlogs to make initial estimates. If current adjudication trends hold steady, about 14,500 EADs (10,500 per month for the C08, 3,000 per month C09, and 1,000 for the rest automatic extension-eligible categories) per month would lapse for the duration of the rule's effective timeframe. Over 18 months, that would be 261,000 new applicants who would lose at least one day of employment authorization without this rule. If, however, we assume a linear decrease in processing times such that by the end of the 18 months they were back to more reasonable levels, then about 138,600 individuals would lose employment authorization during the 18-month time frame (500 per month C08, 300 per month C09, and 100 per month for all others at the end of the period) without this rule. Hence, as depicted in Table 10, a range for the future population would be 138,600 to 261,000.

Table 10. TFR Future Population Projections

Approx. days	Month	Additional EADs facing lapse each month without additional efforts to reduce lapses (A)	Future Low Bound		Future Upper Bound	
			USCIS efforts to reduce lapses, outside of this rule: *linear improvement of 800 each month* (B)	Sum of lapsed EADs (A - B)	USCIS efforts to reduce lapses, outside of this rule: *no improvement over 18 months* (C)	Sum of lapsed EADs (A - C)
30	**1**	30,000	15,500	14,500	15,500	14,500
60	**2**	30,000	16,300	13,700	15,500	14,500
90	**3**	30,000	17,100	12,900	15,500	14,500
120	**4**	30,000	17,900	12,100	15,500	14,500
150	**5**	30,000	18,700	11,300	15,500	14,500
180	**6**	30,000	19,500	10,500	15,500	14,500
210	**7**	30,000	20,300	9,700	15,500	14,500
240	**8**	30,000	21,100	8,900	15,500	14,500
270	**9**	30,000	21,900	8,100	15,500	14,500
300	**10**	30,000	22,700	7,300	15,500	14,500
330	**11**	30,000	23,500	6,500	15,500	14,500
360	**12**	30,000	24,300	5,700	15,500	14,500

390	**13**	30,000	25,100	4,900	15,500	14,500
420	**14**	30,000	25,900	4,100	15,500	14,500
450	**15**	30,000	26,700	3,300	15,500	14,500
480	**16**	30,000	27,500	2,500	15,500	14,500
510	**17**	30,000	28,300	1,700	15,500	14,500
540	**18**	30,000	29,100	900	15,500	14,500
Cumulative Total				138,600		261,000
Note: A linear reduction in the monthly shortfall of 14,500, over 18 months is 805.6, rounded to 800 in these projections for simplicity.						

We stress that these estimates were not made via a formal modelling or time series analysis approach, as variables could affect the population over time via changes in volumes, processing times, and other factors that are not possible to predict. As such, DHS acknowledges the uncertainties in these estimates, but they represent the potential population for the impact estimates using the best available information at the time of this analysis.

We thus define the broad population baseline (denoted generally as "P_B") as the sum of the three components, which, given the range for the future, would lie between 301,463 and 423,863.[166] We next proceed to make a few adjustments to P_B. First, for the current population, we parsed out late filers (who are not eligible for the 180-day automatic extension) and some applications that may have lapsed for other reasons not exclusive to the context of the TFR to obtain a narrower population of 65,000.[167]

An assumption that is implicit in the populations developed below is that every individual with a lapsed EAD would be unauthorized to work. In reality, some of the individuals may be authorized to work—or become authorized to work—incident to status and merely relying upon the EAD to evidence that employment authorization. Others may be relying upon the EAD as a government-issued identity document and not

[166] 66,077 "current" + 96,786 "near-term" + 138,600 "future" = 301,463 total (low end of the range)
66,077 "current" + 96,786 "near-term" + 261,000 "future" = 423,863 total (high end of the range)
[167] Data provided by DHS, USCIS Office of Performance and Quality (OPQ); Claims 3 and SAS PME; obtained on January 17, 2022.

using it to obtain employment. In either instance, USCIS does not know, and is unable to reasonably estimate, how many individuals or what percentages of the populations may be separately employment authorized or otherwise not relying on the EAD to document their employment authorization. It is possible, therefore, that the lower bound estimate of population is overstated.

All the impacts that we estimate quantitatively rely on labor earnings by the relevant individuals with EADs. The assessments of possible impacts rely on the assumption that everyone who was approved for an EAD under the relevant categories entered the labor force. DHS believes this assumption is justifiable because applicants would generally not have expended the direct filing (for the pertinent EAD categories in which there is a filing fee) and time-related opportunity costs associated with applying for an EAD if they did not expect to recoup an economic benefit. Realistically, however, individuals might not be employed for any number of other reasons not specifically relevant to this action. The national unemployment rate ("U_R") as of November 2021, is 4.2 percent.[168] There is constant and considerable job turnover in the labor market even when the unemployment rate is low. Individuals could be unemployed due to this normal turnover or from any number of case-specific factors and conditions. As such, we believe it is reasonable to scale the population to account for unemployment. In addition, not all Form I-765 renewal applications are approved. DHS calculated the applicable Form I-765 renewal approval rate ("R_A") for FY 2020 through 2021 filings, which was 92.7 percent.[169] To obtain the adjusted population ("P_A") we use the formula: $P_B x (1-U_R) x$

[168] Source: BLS, The Employment Situation—November 2021, https://www.bls.gov/news.release/archives/empsit_12032021.pdf (last visited Dec. 10, 2021).
[169] Calculation was made from EAD filing data, Form I-765, Application for Employment Authorization, Eligibility Category and Filing Type FY 2003 through 2021, https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-21.pdf (last updated Oct. 2021). Due to the increase in backlogs, the approval rate was calculated as the number of approvals divided by the sum of approvals and denials, rather than the receipts basis.

AILA Doc. No. 22050300. (Posted 5/3/22)

(R_A), which yields a population that could range from 266,841 to 375,545. These population data and associated shares of the totals are presented in Table 11.

Table 11. Estimated TFR Population.				
Module A. Baseline	**Low Bound**		**Upper Bound**	
Component	**Number**	**Share**	**Number**	**Share**
i. Current	66,077	21.9%	66,077	15.6%
ii. Near-term	96,786	32.1%	96,786	22.8%
iii. Future	138,600	46.0%	261,000	61.6%
Total	301,863	100.0%	423,863	100.0%
Module B. Adjusted	**Low Bound**		**Upper Bound**	
Component	**Number**	**Share**	**Number**	**Share**
i. Current	57,795	21.7%	57,795	15.4%
ii. Near term	85,956	32.2%	85,956	22.9%
iii. Future	123,091	46.1%	231,794	61.7%
Total	266,841	100.0%	375,545	100.0%
Source: USCIS analysis of EAD renewal filing data, provided by DHS, USCIS Office of Performance and Quality (OPQ); data provided 1-1-2022. Estimate for the future population provided by OPQ on 2-3-2022.				

The adjusted population captures the population that will incur impacts applicable to both labor earnings for individuals and labor turnover costs to employers. While some information on employment is available through E-Verify (discussed below) we cannot determine how many individual employers would be impacted. The high population bound would represent the maximum number of businesses impacted under a scenario in which each business hired one and only one individual from the population.

There is an important caveat to the adjusted populations upon which DHS will base our estimated impacts. Over time, the backlog and pending pool will evolve according to multiple factors. While we have attempted to account for future changes in the backlog based on the information we have available to us at this time, it is possible that other factors may change that we have been unable to capture such as future surges in renewal applications. Therefore, DHS acknowledges the uncertainty in the above

estimated ranges of affected populations and that the number of individuals impacted over the course of time may differ from our adjusted population.

3. Impact Analysis

This section is organized into modules as follows: In Module A, DHS develops earnings levels for the EAD renewal filers.

Module B focuses on labor earnings impacts and is divided into two sections. First, the analytical procedures and results applicable to durations for auto-extended EADs that lapsed but where renewal Form I-765 applications were since approved are detailed; as described in the preceding section, this portion is not part of the adjusted population affected by this rule, but metrics and data derived from it are vital to the subsequent estimation procedures. Second, the requisite impact simulations for the impacted populations are calibrated, run, and the results presented.

Module C addresses labor turnover cost savings from the rule. Module D collates the monetized impacts and reports the discounted terms, since the TFR will stretch past one year. Module E discusses the impacts from an economic and business perspective, and Module F concludes with consideration of other possible effects.

Since we are dealing with multiple variables, we use abbreviations where possible, as in the above discussion of the population.

Module A. Earnings of EAD Renewal Applicants

We expect two broad types of impacts from this TFR that are estimated and quantified. First, there will be impacts to eligible individual EAD holders in terms of their ability to maintain labor earnings. Second, impacts will accrue to businesses that employ the EAD holders in maintaining continuity of employment and thus avoiding labor turnover costs. A central component of both impacts is the earnings of the EAD renewal filers, which figure prominently into the monetized estimates. An important

factor in the estimation procedure requires establishing a range bounded by a lower and upper level.

The Federal minimum wage is $7.25 per hour; however, in this rulemaking, we rely on the national "effective minimum wage" of $11.80 for the forthcoming estimation procedures, which considers the diverse lower wage bounds practiced across U.S. States.[170]

Because the individuals renewing EADs would be relatively new entrants to the labor force, we would not expect most of them to earn high wages. However, it is likely that some earn wages above the minimum. Because the EADs impacted do not include or require, at the initial or renewal stage, any data regarding wages, DHS has no information from the associated forms concerning earnings, occupations, industries, positions, or businesses that may employ such workers. DHS can add some robustness to the estimates by incorporating actual data concerning the employment of the EAD holders to draw inference on their earnings.

DHS obtained FY 2020 E-Verify ("EV") records for the EAD categories potentially impacted, which yielded 4.71 million records.[171] These records neither distinguish between an EV case for an initial EAD, a renewal EAD, or the EV case result, but they do provide information that we can draw from regarding employment. The data record the North American Industry Classification System (NAICS) code, which is utilized by Federal statistical agencies in classifying business establishments. The EV data does not provide information on job type or occupation, but it does substantiate the NAICS code pursuant to the 3-digit "subsector" level (with a few exceptions).

---

[170] See Ernie Tedeschi, *Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)*, N. Y. Times (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html. We note that with the wage level applies to 2019, but we do not make an inflationary adjustment because not all minimum wage levels are set to adjust with inflation.
[171] Data were provided by DHS, USCIS Immigration Records and Identity Services Directorate (IRIS), Verification Division; obtained on December 23, 2021.

AILA Doc. No. 22050300. (Posted 5/3/22)

Analysis of the EV records shows that they disproportionately accrued to a small subset of subsectors. Of one hundred represented subsectors, only four exhibited shares higher than 10 percent— Professional, Scientific, & Technical Services (22.7 percent), Other Information Services (13.3 percent), Administrative and Support Services (13.0 percent), and Internet Service Providers, Web Search Portals, and Data Processing Services (11.6 percent). Moreover, the upper quartile is reached with just eleven subsectors. The average individual share across these eleven subsectors was 6.9 percent, while for the entire remainder the individual average was 0.3 percent. Given this concentration, we will center the analysis on these eleven subsectors.

We rescaled the shares of the subsectors according to the total number of records for these eleven subsectors (3.55 million) and obtained the average hourly wage for all occupations within the relevant NAICS codes from BLS. We then calculated a weighting factor input, which is the product of the wage and the rescaled share, and then summed across all rows to obtain a weighted average of $36.78.[172] We applied this figure as the upper earnings bound, noting that it is more than one-third (35.9 percent) higher than the current national average wage weighted across all occupations, of $27.07.[173]

Module B. Impacts that Could Accrue to Labor Earnings

1. Duration Analysis for Previously Lapsed EAD Renewals

To estimate the impacts that could accrue to labor earnings, DHS extracted a filing sample size and adjudication records on 31,676 auto-extended EADs for the relevant categories which had lapsed and where the renewal Form I-765 applications were subsequently approved from June-December 31, 2021. This time frame was chosen

[172] Additional details are available in the Appendix, which is located in the Docket for this rulemaking on www.regulations.gov.
[173] The earnings information for the NAICS codes are found in the "May 2020 National Industry-Specific Occupational Employment and Wage Estimates" in the BLS Occupational Employment and Wage Statistics (OEWS) portal, https://www.bls.gov/oes/2020/may/oessrci.htm (last updated Mar. 31, 2021). The national average wage is also found in the above OEWS suite, https://www.bls.gov/oes/2020/may/oes_nat.htm (last updated Mar. 31, 2021).

to draw recent data in context of the problem set being addressed. For each record, we calculated the duration in calendar days ("D_L") applicable to the end of the initial EAD validity date and the eventual approval of the renewal Form I-765 application in cases where the auto-extended EAD had lapsed. The analysis of the lapse-data shows that the durations are not normally distributed and in fact display a strong positive skew; this is because the majority of the pending EADs are resolved within the first 50 days after lapsing. Less than 10 percent of the pending EADs take more than 115 days to be approved. Please see Table 12 below for a breakout of the number of days the EADs have lapsed.

We utilized the Oracle Crystal Ball® Modelling and Simulation Software ("OCB") to analyze the data. OCB indicates that the Gamma density function provides the best fit.[174] The Gamma distribution is a member of the exponential distributions and is applicable in situations where the data displays considerable variance, is restricted to positive values, and is skewed to the right (positively skewed). It is frequently utilized in analyses to predict durations and wait times until future events occur. Overall, the range of the lapse-durations is very high. However, values of more than 360 days have a very small probability, 0.32 percent, of being realized.

To illustrate the feature of the lapse-durations, we provide the associated probability plot in the Appendix (Figure A.2). The value bars are overlayed with the gamma curve, which visually displays a very good fit. In addition, we can see that as the values get to about 180 or so, they asymptotically converge to zero. We have also marked the plot with the mode (the most frequently observed value, of 7), the median, (40.0), and the mean (52.5). The larger mean compared to the median confirms the

[174] OCB ranks density fit according to internal routines that evaluate the appropriateness of several tests according to the sample size/population. In this case, the Gamma density function fits the data best based on all continuous distributions subject to a scoring method applicable to the test statistic of the Anderson-Darling (A-D) test, which in this case is 40.84 (it is not however, based on a test of significance. For sample sizes and populations that are large, exact tests of significance based on *p*-values are generally unreliable in terms of providing evidence in support of the null hypothesis for any distribution).

positive skew, as it is generally indicative that unusually high individual values tend to pull the mean above the median, the latter of which is not significantly impacted by the skew. Figure A.2 is trimmed to 540 days, and shows a marker for 360 days, as the latter is the maximum lapse duration this rule can prevent as it provides a temporary increase of 360 days beyond the existing 180-day auto-extension period (for a total automatic extension period of 540 days). The value of 360 is at the 99.8th percentile. At this level, there is still almost a zero probability of a lapse in an EAD occurring with this rule's temporary increase to the auto-extension period. The percentiles presented in Table 12 represent the fitted values under the Gamma density curve for D_L up to 360 days.

Table 12. Percentiles for The Number of Calendar Days Between When Auto-Extended EADs Expired and Renewal Forms I-765 Were Subsequently Approved in Recent Months ("Lapse Duration" in calendar days).

Percentile	Gamma Distribution (Calendar Days)
0%	1
10%	7
20%	13
30%	19
40%	28
50%	40
60%	53
70%	69
80%	88
90%	114
100%	358+

Source: USCIS analysis of EAD data; provided by DHS, USCIS, OPQ, Claims 3 database; obtained on 12-17-2021. Analysis conducted with OCB and SAS VIYA PME

As the percentiles increase, the durations increase at a consistent rate; however, the upper percentile exhibits a significant jump. This data therefore corresponds to the

probability graph in showing that once the 90th percentile is reached, the lapse-durations begin to diverge from the distribution to that point and gravitate to almost zero.

2. Simulation and Impact Estimation

The adjusted population ("P_A") of 266,841 to 375,545 individuals could incur impacts that would result in stabilized earnings, as there would be no disruption to their earnings under the TFR. For the estimation procedure we account for worker benefits by calculating a benefits-to-wage multiplier using the most recent BLS information detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS relies on a benefits-to-wage multiplier ("B_M") of 1.45 and, therefore estimates the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, retirement, and other benefits.[175] The total rate of compensation for the effective minimum hourly wage is $17.11 ($11.80 x benefits burden of 1.45), which is 62.8 percent higher than the basic Federal minimum wage of $7.25. Burdened for benefits, the weighted average hourly wage (derived from the EV analysis) is $53.33 ($36.78 x benefits burden of 1.45). An hourly benefits-burdened earnings bound of $17.11-$53.33 provides a range that we think is realistic to estimate the impacts for this TFR.

DHS is interested in estimating the mean and a range for the impacts that is likely to be realized. Since the population, earnings, and lapse-durations all vary within a range, and noting especially high variance of the latter, we employ via OCB a simulation approach. For the earnings and population, we rely on the uniform distribution. This is a discreet distribution which essentially means that any value in the range has the same probability as being selected as any other value. This structure is chosen because we

[175]The benefits-to-wage multiplier is applicable to civilian workers and is calculated as follows: ($38.91 Total Employee Compensation per hour) / ($26.85 Wages and Salaries per hour) = 1.44916 = 1.45 (rounded). *See* BLS, Economic News Release, *Employer Cost for Employee Compensation (June 2021), Table 1, Employer Costs for Employee Compensation by ownership* (dated September 16, 2021, reissued Dec. 17, 2021), https://www.bls.gov/news.release/archives/ecec_09162021.htm (last visited Feb. 23, 2022).

have no evidence or data to suggest that the earnings or population would tend to cluster at either the low or high end of the range. The minimum and maximum level are pursuant to the relative figures in preceding paragraph.

The Gamma distribution is generally continuous in the upper tail. However, because the software is utilized extensively for scenario-specific and risk management simulations, we can calibrate the forthcoming simulation to exclude choosing values above a certain level, which we tune to the value of 360, as that is the maximum day-lapse duration this rule can prevent.

In addition, we introduce a time scalar ("T_S") to account for a typical 8-hour workday and 5-day workweek; the product of *8 x (5/7)* is 5.714.[176] Denoting hourly earnings ("E_H"), under the "define forecast" toolkit we entered the program: $P_A x\ E_H x\ B_M\ x\ T_s x\ D_L$ and tuned the Gamma distribution for the produced parameters.[177] The tuning features for the system are listed in Table 13, which includes the three-parameters OCB produced for the distribution:

Table 13: Calibration for Stabilized Earnings Estimation

	Minimum	Maximum	Distribution
Population (P_A)	266,841	375,545	Uniform
Fully-loaded Earnings ($E_H x\ B_M$)	$17.33	$53.33	Uniform
Durations (D_L)	1	360	Gamma: Location: .0017 Scale: 44.57 Shape: 1.16

Source: USCIS Analysis.

[176] DHS assumes that all EAD renewal applicants are employed full-time; DHS recognizes that some employees may be employed only part-time. DHS recognizes this may result in an overestimate of the below stabilized earnings estimates.

[177] $P_A x\ E_H x\ B_M x\ T_s x\ D_L$ = 266,841 to 375,545 Adjusted Population x $11.80 to $36.78 Hourly Earnings x 1.45 Benefits Multiplier x 5.714 Time Scalar x Gamma Distributed Lapse Duration in Calendar Days.

OCB repeatedly calculates results using a different set of random values from the range of values and probability distributions described in Table 13 above to build a model of possible results. We ran 100,000 randomized seed trials, which is sufficient to generate a 95 percent level of precision in the results. Based on the simulation, the expected value (which is the mean of probabilistic-based forecast values) for stabilized earnings is $3,354.3 million.[178] We also generated a 95 percent certainty range, which reports $159.2 million to $12,506.4 million, noting that the extreme range is due to the high variation in the inputs.[179] A sensitivity analysis that scores the inputs in terms of how much variation in each contributes to fluctuation in the forecasted values reveals that the vast majority, 90.7 percent, of the variation was driven by variation in the lapse duration-days.

If, without this rule, businesses would not have been able to find replacement labor for the position the affected EAD renewal applicant filled, then the unperformed labor would have resulted in a reduction in taxes from employers and employees to governments. Accordingly, the stabilized earnings derived from this rule, and estimated above, will prevent such a reduction in taxes. It is challenging to quantify Federal and State income tax impacts of employment in the labor market scenario because individual and household tax situations vary widely as do the various State income tax rates.[180] But DHS is able to estimate the potential contributory effects on employment taxes, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2

---

[178] The certainty level is based on the entire range of forecast values, so the 95 percent certainty range is the range between which 95 percent of forecasted values are expected to fall, regardless of proximity to the mean. Roughly speaking, the 95 percent certainty bound would generally capture the distribution-specific forecast values lying between the 2.5th and 97.5th percentiles.

[179] In one sense, the stabilized earnings impacts are overstated a bit. For some portion of the near-term population, the effective date of the TFR would interrupt their EAD lapse such that the lapse would not be as long as it otherwise would. It would be extremely difficult to attempt to estimate this reality quantitatively, as, over the course of the near-term, EADs would lapse at different points in time and some would be approved prior to the TFR while others would have their lapse interrupted by it.

[180] https://www.cnbc.com/2021/08/18/61percent-of-americans-paid-no-federal-income-taxes-in-2020-tax-policy-center-says.html (last updated Aug. 20, 2021) and for varying State income tax rates see, https://www.thebalance.com/state-income-tax-rates-3193320 (last updated Jan. 3, 2022).

percent and 1.45 percent, respectively).[181] With both the employee and employer paying their respective portion of Medicare and Social Security taxes, the total estimated level of tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent.

We estimate the tax impacts on the unburdened earnings basis. Denoting the tax impact "T_I" and stabilized earnings "E_S," for the three values reported the tax impact is derived as: $(T_I \text{ x } E_S) / B_M$.[182] If, without this rule, all employers would have been unable to find replacement labor for the position the EAD renewal applicant filled, this rule will prevent a reduction in employment taxes from employers and employees to the Federal Government of $353.9 million, but could range from $16.8 million to $1,319.5 million. The actual value of tax impacts will depend on the number of affected EAD holders that businesses would have been able to easily find reasonable labor substitutes for in the absence of this rule.

Module C. Labor Turnover Cost Impacts

This TFR is expected to generate a labor turnover cost savings to employers of affected EAD holders. DHS bases the assessment of these costs on the assumption that every EAD applicable to the adjusted population that would have lapsed without this rule would have generated an involuntary separation from an employer, and that the separation is due to no other factors. While DHS cannot estimate how many actual employers would be impacted because DHS does not have employer information for all

[181] The various employment taxes are discussed in more detail, seehttps://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes (last updated Mar. 14, 2022). *See* IRS Publication 15, Circular E, Employer's Tax Guide for specific information on employment tax rates (Dec. 16, 2021). https://www.irs.gov/pub/irs-pdf/p15.pdf. Relevant calculation: (6.2 percent Social Security + 1.45 percent Medicare) x 2 employee and employer losses = 15.3 percent total estimated public tax impact.
[182] We divide by the 1.45 benefits multiplier to account for the fact that employment taxes are calculated based upon wages paid, not including fringe benefits.

affected EAD holders, DHS can make an informed estimate of the aggregate scope of the impact, embodied in a cost-savings to the employers.[183]

Employment separations can generate substantial labor turnover costs to employers that can be divided into several components. First are the direct or "hard" costs that involve separation and replacement costs. The separation costs include exit interviews, severance pay, and costs of temporarily covering the employee's duties and functions with other employees, which may require overtime or temporary staffing. The replacement costs typically include expenses of advertising positions, search and agency fees, screening applicants, interviews, background verification, employment testing, hiring bonuses, and possible travel and relocation costs. Once hired, employers face additional training, orientation, and assessment costs.

Second, direct costs involve loss of productivity and possibly profitability due to operational and production disruptions, which can include errors from other employees that may temporally fill the position. Some analysts have identified a third cost segment, which is a type of indirect cost, which encompasses loss of institutional knowledge, networking, and impacts to work-culture, morale, and interpersonal relationships. This last type of cost is almost impossible to measure quantitatively.[184]

There are numerous studies and reports concerning labor turnover costs ("LTC") available from Human Resource entities which are cited across correspondent literature. Some focus on specific occupations, industries, salary levels, and often measure LTC in slightly different ways. LTC is generally reported as a share (percentage, "L_C") of the annual earnings ("E_A") or an actual cost per employee for which a percentage can be

---

[183] We have no basis to say how many employers will be impacted, because any individual employer could have hired more than one of the EAD holders in the population. Therefore, if each individual was hired by one and only one business, the number of employers impacted would converge to the maximum population.

[184] For additional descriptions of the components of labor turnover costs, see "Employee retention: The Real Cost of Losing an Employee," by Gabrielle Smith, PeopleKeep (September 17, 2021), https://www.peoplekeep.com/blog/employee-retention-the-real-cost-of-losing-an-employee.

calculated. Many reports cite a 2012 report published by the Center for American Progress (CAP) that surveyed more than 30 studies that considered both direct (e.g., separation and replacement) and indirect (e.g., loss of institutional knowledge) costs. In Module B above, DHS captures preserved productivity savings had employers not been able to immediately find replacement labor for EAD renewal applicants without this rule. DHS requests comment on how, or if, that measure of productivity may overlap with the types of productivity covered in the CAP report captured here, such as from the substitutability of replacement labor.

The CAP and other reports that we reviewed confirm three central aspects of LTC: (i) that they vary substantially across industries and jobs; (ii) that they tend to grow (in absolute and percentage terms) according to skill level and earnings; and (iii) that they are higher for salaried workers compared to hourly-wage earners.[185] The reporting notes that specialized technical jobs and highly paid jobs in line with senior or executive levels, which involve high levels of education, credentials, and stringent hiring criteria, can generate disproportionately high LTC that can reach more than 100 percent of the salary—compared to jobs with low educational and technical requirements.[186] However, the CAP survey found that costs tend to range within a bound of 10 percent to around 40 percent of the salary. For example, CAP found despite wide variation and range, for workers earning $50,000 or less, and for workers earning $75,000 or less, which, at the time of the study in 2012 corresponded to, the 75th and 90th percentiles of typical earnings, LTC ranged typically from 10 to 30 percent of the salary, clustering at about 21

---

[185] See "There Are Significant Business Costs to Replacing Employees," By Heather Boushey and Sarah Jane Glynn (Nov. 16, 2012), Center for American Progress, https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/.

[186] *See* "This Fixable Problem Costs U.S. Businesses $1 Trillion," by Shane Mcfeely and Ben Wigert, Workplace (March 13, 2019): https://www.gallup.com/workplace/247391/fixable-problem-costs-businesses-trillion.aspx. See also "Dangers of Turnover: Battling Hidden Costs," by Kate Heinz (last updated: March 25, 2020), Built in, https://builtin.com/recruiting/cost-of-turnover.

percent. More recent reports indicate that the typical cost is about one-third of the salary.[187]

DHS could nest the information above into an estimation procedure, but it would be beneficial to examine granular data to hone the estimates for two reasons. First, it would be valuable to quantify the correlation between annual earnings and labor turnover costs and incorporate it in the forecast procedure. Second, it is desirable to obtain a distribution for the data—an average and median could be gathered from the referenced reporting, but there would be a gap in terms of other metrics needed to calibrate a certain distribution. DHS examined a 2020 report by the Washington Center for Equitable Growth, which updated the earlier CAP study results to provide information on about thirty studies on LTC.[188] We selected data points that captured both the annual earnings salary (which the study benchmarked to 2019 levels) and turnover costs. We then culled the data applicable to salary levels more than the maximum in our earnings bound. At 2,080 annual work hours, the unburdened weighted average E_A is $76,502 (the higher earnings levels also corresponded generally to very high LTC that are outside what we think is the reasonable range).[189] We note that we are assuming that the individuals are employed full time, as 2,080 annual work hours corresponds to a five-day work week and 8-hour work-day. We welcome public input on this assumption. Twenty-seven resulting data points were employed for the analysis.[190] While this may be relatively few

---

[187] See "The Real Cost of Employee Turnover in 2021," Terra Staffing Group (Nov. 4, 2020), https://www.terrastaffinggroup.com/resources/blog/cost-of-employee-turnover. See also "112 Employee Turnover Statistics: 2021 Causes, Cost & Prevention Data," by Louie Andre, Finances Online, https://financesonline.com/employee-turnover-statistics/#cost.

[188] *See* "Improving U.S. Labor Standards and the Quality of Jobs to Reduce the Costs of Employee Turnover to U.S. Companies," By Kate Bahn and Carmen Sanchez Cumming (December 2020), Washington Center for Equitable Growth, at: https://equitablegrowth.org/wp-content/uploads/2020/12/122120-turnover-costs-ib.pdf. The data is found in the methodological appendix, located in the Docket for this rulemaking.

[189] $36.78 x 2,080 = $76,502. DHS assumes that all EAD renewal applicants are employed full-time; DHS recognizes that some employees may work only part-time. However, the $76,502 represents the maximum of the range and employees who earn less wages, such as those who work part-time, are captured by the lower salaries included in the range for LTC estimates.

[190] For the specific data points used, see the Technical Appendix, located in the Docket for this rulemaking.

AILA Doc. No. 22050300. (Posted 5/3/22)

observations, OCB nevertheless was able to fit a Beta density function to the data, and we are confident in relying on the results. Foremost, the mean of 24.3 percent and the median of 19.8 percent are very similar to the information reported in the studies referenced above and fall within a substantial range, from 4.1 percent to 68.7 percent. Second, on qualitative grounds the Beta distribution is well-suited as a setup. The Beta distribution is also a family member of the exponential distributions and closely resembles the gamma function. It is utilized in situations where there is substantial variance and is discrete at the lower end minimum, further restricted to positive values. First, negative values can be ruled out in context—there cannot be zero cost to an employee separation—and thus a lower tail cutoff to bound to the cost percentage is appropriate. Second, we can reasonably conjecture that the costs would tend to cluster near the lower tail of the distribution (as outlined in the CAP report), which is amenable to the positive skew of the distribution, reinforced by the data resultant mean being larger than the median.[191] Additionally, the scatterplot (see Appendix, Table A.3) with the fitted least squares line clearly reveals that L_C is an increasing function of the earnings, with a correlation coefficient of 0.661. The Ordinary Least Squares regression indicates that a $1,000 increase in annual earnings leads to a .63 percentage point increase in labor turnover costs (L_C).

DHS notes that the studies utilized to develop the turnover cost percentage range are based on diverse studies across a range of industries and that they that measure these costs different ways. DHS welcomes public input concerning the range we rely on as well as the way in which turnover costs are tabulated in terms of direct and indirect costs, including productivity effects.

[191] OCB indicates that the multiple continuous distributions are appropriate for the data but ranks the Beta distribution highest in terms of goodness of fit with an A-D test statistic of 0.1336. The four produced parameters are as follows: minimum= 0.0314, maximum = .987, alpha = 1.214, Beta = 4.267.

Based on an average of 2,080 annual work hours, the unburdened effective minimum $11.80 hourly wage maps to annual earnings (E_A) of $24,544. We have made an additional adjustment regarding the population. This rule will provide EAD renewal applicants with stabilized earnings for an additional 360 days and will prevent turnover costs for employers of applicants whose EADs will be adjudicated within the 360-day timeframe of the rule. However, for the 0.32 percent of the population whose EAD renewal application could still be pending after 360 days, this rule will delay the turnover costs, not prevent them. Accordingly, we have scaled the population to exclude 0.32 percent of the population whose EAD could still lapse. DHS also recognizes that a certain number of individuals may have been terminated or chosen to leave irrespective of this rule and, accordingly, this rule won't prevent such turnover. DHS does not have data on the number of EAD renewal applicants that would have been terminated from or left their jobs had they not lost employment authorization. DHS requests comment on data that could be used to make such an adjustment.

We calibrated the Beta distribution for the four parameters produced and under the "define forecast" function, entered the program: P_A x E_A x L_C with correlation tuned to 0.661.[192] Nesting the correlation essentially means that if a randomly chosen earnings value is high, there is a higher probability that a high turnover cost percentage will be selected as well and vice versa for lower cost percentages. The tuning features for the system are listed in Table 14, which includes the four parameters for the distribution.

Table 14: Calibration for Turnover Cost Estimation

	Minimum	Maximum	Distribution
Population (P_A)	265,987	374,343	Uniform
Earnings (annual, E_A)	$24,544.0	76,502.4	Uniform
Turnover cost % (L_C)	4.1%	68.7%	Beta[193]: Minimum: .031

[192] Adjusted Population x (1-0.32%) of the population whose EAD would be adjudicated after the 540-day auto-extension window x $11.80 to $36.78 Hourly Earnings x Beta Distributed Labor Turnover Cost

[193] The beta distribution includes two parameters, alpha (α) and beta (β), which control the shape of distribution and thus influence the minimum and maximum values.

			Maximum: .987 Alpha: 1.214 Beta: 4.27
Correlation: Turnover Cost % and Earnings	.661		
Source: USCIS Analysis.			

We ran 100,000 randomized seed trials, which is sufficient to generate a 95 percent level of precision in the results and tuned the simulation to cutoff trials with an L_C greater than the maximum in our sample, of 68.7 percent. Based on the simulation, the expected value is $4,371.6 million, and the 95 percent precision bound results in a range of forecasts from $454.5.0 million to $ 13,509.3 million.[194]

Module D. Monetized Impacts for the TFR

In Table 15 we collate the undiscounted monetized impacts derived from the above sections.

Table 15. Summary of Monetized Impact Estimates Applicable to Labor Earnings and Labor Turnover (undiscounted, in millions)

	Labor Earnings			**Tax Impacts***		
	Min	**Mean**	**Max**	**Min**	**Mean**	**Max**
Stabilized earnings	$159.2	$3,354.3	$12,506.4	$16.8	$353.9	$1,319.6
Labor turnover	$454.5	$4,371.6	$13,509.3	$0.0	$0.0	$0.0
Total	**$613.7**	**$7,725.9**	**$26,015.7**	**$16.8**	**$353.9**	**$1,319.6**

* If, without this rule, businesses could not find replacement labor for any of the affected EAD holders, the tax impacts shown represent the loss in employment taxes this rule would prevent. The actual amount will depend on how easily businesses would have been able to find replacement labor in the absence of this rule.

Because the TFR will apply to more than one full fiscal year, we also apply a discounting framework to the impacts. Since there is a one-to-one mapping from the

[194] When there are correlated assumptions, OCB does not provide sensitivity for the uncorrelated input, which, in this case, is the population. As a result, the sensitivity analysis indicates that the variation in the forecasts was contributed somewhat equally by the cost percentage (56.7 percent) and the annual earnings (42.7 percent).

population to the impacts, we can derive the yearly allocations directly from the population figures. The approach, encapsulated in Table 16 in step-by step fashion, builds off the population data in Tables 10 and 11. By grouping the current and near-term populations into year one, and then calculating the portion of the future population attributable to year one, we can logically calculate the year two allocation.

Table 16. Worksheet for Impact Allocation Across Two Years

Population segment	Low population	High population
A. Current	57,795	57,795
B. Near-term	85,956	85,956
C. Year 1 initial (A+B)	143,751	143,751
D. Future	123,091	231,794
E. Total TFR months	18	18
F. Future by month (D/E)	6,838	12,877
G. Year 1 months	12	12
H. Year 2 months (E-G)	6	6
I. Year 1 addition (G*F)	82,060	154,529
J. Year 1 total (C+I)	225,811	298,280
K. Year 2 (H*F)	41,030	77,265
L. Total (check: J+K)	**266,841**	**375,545**
M. Year 1 allocation (J/L)	**84.6%**	**79.4%**
N. Year 2 allocation (K/L)	**15.4%**	**20.6%**
O. Average share: year 1	**82.0%**	
P. Average share: year 2	**18.0%**	

As can be gathered from rows M and N, the allocations are different according to the high and low population. However, the impact estimates already have incorporated the population variation, meaning that we need to rely on a single percentage for the share allocations. Since the shares are close across the population bounds, we average them and apply the resulting figures, of 82.0 percent and 18.0 percent, in order (Rows O and P).

Table 17 provides the allocated impacts according to the allocation derived above, incorporating sub-tables A-C, to account for the average, and low and high ends of the certainty bound in order. Each sub-table is organized into three additional sections, to

account for undiscounted terms, and those at 3 percent rate of discount, and a 7 percent rate of discount, in order. We parsed out the stabilized earnings and labor turnover impacts separately, as they will embody different types of impacts.

Table 17. Monetized Expected Value Impacts for the TFR (millions).				
A. Average (expected Value)				
Undiscounted	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes***
Year 1	$2,751.4	$3,585.8	$6,337.2	$290.3
Year 2	$602.9	$785.8	$1,388.7	$63.6
Total	$3,354.3	$4,371.6	$7,725.9	$353.9
3% discount	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes**
Year 1	$2,671.2	$3,481.4	$6,152.6	$281.9
Year 2	$568.3	$740.7	$1,309.0	$60.0
Total	$3,239.6	$4,222.1	$7,461.6	$341.8
Annualized	$1,693.0	$2,206.5	$3,899.5	$178.64
7% discount	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes**
Year 1	$2,571.4	$3,351.2	$5,922.6	$271.3
Year 2	$526.6	$686.3	$1,213.0	$55.6
Total	$3,098.0	$4,037.6	$7,135.6	$326.9
Annualized	$1,713.5	$2,233.1	$3,946.6	$180.8
B. Low end of certainty range				
undiscounted	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes***
Year 1	$130.6	$372.8	$503.4	$13.8
Year 2	$28.6	$81.7	$110.3	$3.0
Total	$159.2	$454.5	$613.7	$16.8
average	$79.6	$227.3	$306.9	$8.4
3% discount	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes**
Year 1	$126.8	$361.9	$488.7	$13.4
Year 2	$27.0	$77.0	$104.0	$2.8
Total	$153.8	$439.0	$592.7	$16.2
Annualized	$80.35	$229.4	$309.8	$8.5
7% discount	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes**
Year 1	$122.0	$348.4	$470.5	$12.9
Year 2	$25.0	$71.4	$96.4	$2.6
Total	$147.0	$419.8	$566.8	$15.5
Annualized	$81.3	$232.2	$313.5	$8.6
C. High end of certainty range				
undiscounted	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes***
Year 1	$10,258.4	$11,081.0	$21,339.3	$1,082.4
Year 2	$2,248.0	$2,428.3	$4,676.4	$237.2
Total	$12,506.4	$13,509.3	$26,015.7	$1,319.6

average	$6,253.2	$6,754.7	$13,007.9	$659.8
3% discount	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes**
Year 1	$9,959.6	$10,758.2	$20,717.8	$1,050.9
Year 2	$2,119.0	$2,288.9	$4,407.9	$223.6
Total	$12,078.6	$13,047.2	$25,125.7	$1,274.5
Annualized	$6,312.39	$6,818.6	$13,131.0	$666.1
7% discount	**Stabilized Earnings**	**Labor Turnover**	**Total**	**Taxes**
Year 1	$9,587.2	$10,054.4	$19,943.3	$1,011.6
Year 2	$1,963.5	$1,999.2	$4,084.5	$207.2
Total	$11,550.8	$12,053.7	$24,027.8	$1,218.8
Annualized	$6,388.6	$6,666.8	$13,289.6	$674.1

* If, without this rule, businesses could not find replacement labor for any of the affected EAD holders, the tax impacts shown represent the loss in employment taxes this rule would prevent. The actual amount will depend on how easily businesses would have been able to find replacement labor in the absence of this rule.

For the discounted figures, the annualized amounts are the average annual equivalence basis. Since the inputs are different for each year, the annualized terms differ across discount rates.

Module E. Economic and Business Impacts

As explained previously, DHS does not know what the next best alternative would have been for businesses without this rule. Accordingly, DHS does not know the proportion of the stabilized labor earnings estimates developed above that would represent cost savings to businesses for prevented lost productivity or are prevented transfer payments from affected EAD holders to replacement labor.[195] These effects are very difficult to quantify and could be influenced by multiple factors, but we will address the possibilities at a conceptual level.

In the cases where, in the absence of this rule, businesses would have been able to easily find reasonable labor substitutes for the EAD renewal applicants, then the impact of this rule is preventing a distributional impact where the earnings of affected EAD holders would be transferred to others, who might fill in for (and presumably replace) the

[195] Transfer payments are monetary payments from one group to another that do not affect total resources available to society. *See* OMB Circular A-4 pages 14 and 38 for further discussion of transfer payments and distributional effects. Circular A-4 (Sept. 17, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.

EAD renewal applicants during their earnings lapse. The portion of the total estimate of stabilized income that would represent this prevented transfer payment will depend on the ability of businesses to have found replacement labor in the absence of this rule.

In the cases where, in the absence of this rule, businesses would not have been able to easily find reasonable labor substitutes for the EAD renewal applicants, then the impact of this rule is preventing an associated loss of productivity for employers. Therefore, the portion of the total estimate of stabilized income that would represent cost savings to employers for prevented productivity losses will depend on the ability of businesses to have found replacement labor in the absence of this rule. In this case, the rule may also result in additional cost savings to employers for prevented profit losses and having to choose the next best alternative to the EAD holder.

DHS does not know what this next-best alternative may be for those companies. However, if the replacement candidate would have been substitutable for the affected EAD renewal applicant to a high degree, the labor performed by the new candidate would not have resulted in changes to profits or productivity. Accordingly, if the replacement labor is highly substitutable, we wouldn't expect this rule to result in cost savings for productivity loss as a result of employing the next available alternative for labor. If, however, the replacement labor is a poor substitute and would have decreased productivity, then this rule will preserve that lost productivity.

The above discussion involves two important points: If employers replaced individuals who faced a lapse in their EAD after the automatic extension with others in the labor force, then once the EAD was eventually reauthorized the EAD holder would need to conduct a new search for a new job. They would thus incur direct costs associated with seeking new employment. In addition, it can take time to establish new employment. According to the Bureau of Labor Statistics, in November 2021 the average duration of unemployment was 28.9 weeks (about 7 months) and the median duration

was 12.7 weeks (about 3 months).[196] This has varied historically, according to factors such as the overall strength of the economy, employment conditions in specific industries, individual search effort, and geographical considerations.[197]

Based on this average search time, in cases where affected EAD renewal applicants would not be able to immediately return to their previous jobs once their EAD is approved, the duration of lapsed earnings this TFR is addressing is likely higher than that we have relied on from the analysis of the data. As a result, search costs and the potential for earnings to continue to lapse even when the individuals affected are able to return to work probably makes our estimated impacts of the amount in stabilized earnings to affected EAD holders smaller than the actual impacts. However, we do not have a method to allocate the job search time to a portion that could be conducted while the EAD was in lapse mode and a portion that would need to be held off until the Form I-765 renewal application was approved and a new EAD issued. Therefore, it would be speculative to try to incorporate these additional factors into a cohesive model and thus we have not quantified them.

Module F. Other Impacts

DHS does not expect material impacts to the U.S. labor market from this TFR. According to the most recent data (applicable to November 2021), the U.S. labor force stands at 162,052,000.[198] The maximum population impacted by the TFR is 375,545, which is only 0.23 percent of the national labor force.

Without this rule, EAD holders who remain eligible for employment authorization would encounter delays in EAD renewals and either be unauthorized to work for periods

---

[196] Bureau of Labor Statistics, Employment Situation News Release (November 2021), Table A-12, https://www.bls.gov/news.release/archives/empsit_12032021.htm.
[197] Bureau of Labor Statistics, Duration of Unemployment, Seasonally Adjusted, https://www.bls.gov/charts/employment-situation/duration-of-unemployment.htm (last visited Mar. 9, 2022).
[198] BLS, Employment Situation, Table A-1. Employment status of the civilian population by sex and age. The figure applies to the civilian labor force, seasonally adjusted, https://www.bls.gov/news.release/archives/empsit_12032021.htm (last visited Dec. 14, 2021).

AILA Doc. No. 22050300. (Posted 5/3/22)

of time, or lack documentation reflecting their employment authorization. This rule is not making additional categories eligible for employment authorization; it simply temporarily increases the 180-day timeframe for those already eligible for an automatic extension. It will ensure that these EAD holders do not experience gaps in employment as a result of USCIS processing delays. Accordingly, stabilized earnings for these EAD holders may also relieve the support network of the applicants for any monetary or other support that would have been necessary during such a period of unemployment. This network could include public and private entities, and it may comprise family and personal friends, legal services providers and advisors, religious and charity organizations, State and local public institutions, educational providers, and non-governmental organizations. DHS believes these impacts would accrue as benefits to the noncitizen EAD holders and their families.

Finally, we have already noted that the goal of this TFR is to prevent EADs from lapsing, and that the 540-day benchmark would cover almost every case. For the small portion that lapsed for more than 540 days, we have already noted that these would embody extreme outliers and may be skewed by data errors. Nevertheless, for purposes of transparency we provide Table 18, which shows the share of EADs that would lapse under several alternatives to the 360-day extension to the existing 180-day benchmark.

Table 18. Percentage of EADs that Would Lapse Under Alternative Extension-day Scenarios

The number of extension days added to the existing 180	Share that would lapse
30	57.7%
60	35.3%
90	19.0%
120	8.41%
180	1.44%
360	0.32%
540+	0.10%

It is important to note that our analysis was based on data from June through December of 2021. If processing times and resultant backlogs are higher now, than lapse-durations would potentially also be higher, and the shares affected may be larger than those shown in Table 16.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The RFA's regulatory flexibility analysis requirements apply only to those rules for which an agency is required to publish a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b) or any other law. *See* 5 U.S.C. 604(a). As discussed previously, USCIS did not issue a notice of proposed rulemaking for this action. Therefore, a regulatory flexibility analysis is not required for this rule.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

The Congressional Review Act (CRA) was included as part of SBREFA by section 804 of SBREFA, Public Law 104-121, 110 Stat. 847, 868, et seq. OIRA has determined that this TFR is a major rule as defined by the CRA because it will result in a major increase in costs or prices.[199] DHS has complied with the CRA's reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1). As stated in section IV.A of this preamble, DHS has found that there is good cause to conclude that notice, the opportunity for advanced

[199] *See* 5 U.S.C 804(2).

AILA Doc. No. 22050300. (Posted 5/3/22)

public participation, and a delay in the effective date are impracticable and contrary to the public interest. Accordingly, this rule is effective immediately upon publication.[200]

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, that includes any Federal mandate that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[201] This rule is exempt from the written statement requirement, because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not contain a Federal mandate as the term is defined under UMRA.[202] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

F. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

---

[200] *See* 5 U.S.C. 808(2).
[201] *See* 2 U.S.C. 1532(a).
[202] The term "Federal mandate" means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1) and 658(6).

This rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This rule was written to provide a clear legal standard for affected conduct and was reviewed carefully to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this rule meets the applicable standards provided in section 3 of E.O. 12988.

H. National Environmental Policy Act

DHS Directive 023-01 Rev. 01 and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual)[203] establish the policies and procedures that DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA.[204]

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions ("categorical exclusions") that experience has shown do not have a significant effect on the human environment and, therefore, do not require an environmental assessment or environmental impact statement.[205]

The Instruction Manual establishes categorical exclusions that DHS has found to have no such effect.[206] Under DHS NEPA implementing procedures, for an action to be categorically excluded it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.[207]

This rule amends 8 CFR 274a.13(d) to temporarily increase the period of time that the employment authorization and/or EADs of certain eligible Form I-765 renewal

---

[203] The Instruction Manual contains the Department's procedures for implementing NEPA and was issued November 6, 2014. Instruction Manual, *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex* (last updated Nov. 12, 2021).
[204] 40 CFR parts 1500 through 1508.
[205] 40 CFR 1507.3(e)(2)(ii) and 1501.4.
[206] *See* Appendix A, Table 1.
[207] *See* Instruction Manual section V.B(2)(a) through (c).

AILA Doc. No. 22050300. (Posted 5/3/22)

applicants are automatically extended while their renewal applications remain pending with USCIS. More specifically, this rule provides that the automatic extension period applicable to expiring EADs for certain renewal applicants who have filed Form I-765 will be increased from up to 180 days to up to 540 days.

Amending the current rule to increase the automatic extension period for employment authorization and/or EADs' validity from 180 days to 540 days will not result in any meaningful, calculable change in environmental effect with respect to the number of individuals affected by current EAD renewal requirements. Furthermore, this rule's amendment will not alter immigration eligibility criteria or result in an increase in the number of individuals who will be eligible for employment authorization and/or EADs. Therefore, DHS has determined that the temporary amendment to 8 CFR 274a.13 clearly fits within Categorical Exclusion A3(d) contained in the Instruction Manual because it amends a regulation without changing its environmental effect. Furthermore, DHS has determined that this rule fits within Categorical Exclusion A3(a) contained in the Instruction Manual because DHS considers temporarily increasing the automatic extension period for employment authorizations and/or EADs for certain renewal applicants to be an action of a strictly administrative or procedural nature.

The temporary amendment to 8 CFR 274a.13 is a standalone action to increase an automatic extension period. It is not part of a larger action. This amendment will not result in any major Federal action that will significantly impact the human environment. Furthermore, USCIS has determined that no extraordinary circumstances exist that would create the potential for significant environmental effects. Therefore, this rule amendment is categorically excluded from further NEPA review.

I. Family Assessment

DHS has reviewed this rule in line with the requirements of section 654 of the Treasury and General Government Appropriations Act, 1999,[208] enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[209] DHS has systematically reviewed the criteria specified in section 654(c)(1), by evaluating whether this regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) only financially impacts families, if at all, to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; or (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the agency determines a regulation may negatively affect family well-being, then the agency must provide an adequate rationale for its implementation.

DHS has determined that the implementation of this regulation will not negatively affect family well-being and will not have any impact on the autonomy or integrity of the family as an institution.

J. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, "collection[s] of information" as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. As this is a TFR that only will increase the duration of an automatic extension of employment authorization and EAD, USCIS does not anticipate a need to update the

---

[208] *See* 5 U.S.C. 601 note.
[209] Pub. L. 105-277, 112 Stat. 2681 (1998).

AILA Doc. No. 22050300. (Posted 5/3/22)

Form I-765 or to collect additional information beyond that already collected on Form I-765.

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 274a as follows:

PART 274a CONTROL OF EMPLOYMENT OF ALIENS

1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 114-74, 129 Stat. 599.

2. Effective May 4, 2022, through October 15, 2025, amend § 274a.13 by adding paragraph (d)(5) to read as follows:

§ 274a.13 Application for employment authorization.

* * * * *

(d) * * *

(5) *Temporary increase in the automatic extension period.* The authorized extension period stated in paragraph (d)(1) of this section, 8 CFR 274a.2(b)(1)(vii), and referred to in paragraphs (d)(3) and (4) of this section is increased to up to 540 days for all eligible classes of aliens as described in paragraph (d)(1) who properly filed their renewal application on or before October 26, 2023. Such automatic extension period will automatically terminate the earlier of up to 540 days after the expiration date of the Employment Authorization Document (Form I-766, or successor form) or upon issuance of notification of a denial on the renewal request, even if such date is after October 26, 2023. Aliens whose automatic extension under paragraph (d)(1) expired before May 4, 2022, will receive an automatic resumption of employment authorization and the validity of their Employment Authorization Document, as applicable, for an additional period

beginning from May 4, 2022, and up to 540 days from the expiration of their employment authorization and/or Employment Authorization Document as shown on the face of such document. An Employment Authorization Document that has expired on its face is considered unexpired when combined with a Notice of Action (Form I-797C), which demonstrates that the requirements of paragraph (d)(1) of this section and this paragraph (d)(5) have been met, notwithstanding any notations on such notice indicating an automatic extension of up to 180 days. Nothing in this paragraph (d)(5) will affect DHS's ability to otherwise terminate any employment authorization or Employment Authorization Document, or extension period for such employment authorization or document, by written notice to the applicant, by notice to a class of aliens published in the *Federal Register*, or as provided by statute or regulation, including 8 CFR 274a.14.

_____

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

[FR Doc. 2022-09539 Filed: 5/3/2022 8:45 am; Publication Date: 5/4/2022]