

USCIS Response to Coronavirus 2019 (COVID-19)



U.S. Citizenship
and Immigration
Services

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Chapter 5 - Discretion

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Alert

On September 11, 2020, the U.S. District Court for the District of Maryland in *Casa de Maryland et al v. Chad Wolf* provided limited injunctive relief to members of two organizations, CASA de Maryland (CASA) and the Asylum Seeker Advocacy Project (ASAP), in the application of the [Asylum Application, Interview, and Employment Authorization for Applicants Rule](#) to Form I-589s and Form I-765s filed by asylum applicants who are also members of CASA or ASAP. Therefore, while the rule is preliminarily enjoined, we will continue to apply the prior regulatory language and exempt from discretion CASA and ASAP members who file a Form I-765 based on an asylum application.

A. Discretionary Authority and Applicability

While employment authorization for certain aliens is automatic or non-discretionary by virtue of their immigration status, other aliens must affirmatively apply for employment authorization and USCIS may grant employment authorization as a matter of discretion.^[1]

The regulations outlined at [8 CFR 274a.12\(c\)](#) specify categories of aliens who must apply for employment authorization and may be granted employment authorization as a matter of discretion; these aliens are referred to in this chapter as Category C applicants.^[2]

For those Category C applicants seeking both employment authorization and an employment authorization document (EAD), the applicant must generally file an Application for Employment Authorization ([Form I-765](#)) with USCIS with the appropriate fee (unless waived), and in accordance with the form instructions.^[3]

In addition to verifying the applicant's identity and that the applicant meets all other eligibility criteria, USCIS must determine if a favorable exercise of discretion is warranted in granting employment authorization to a Category C applicant. USCIS determines whether to grant discretionary employment authorization on a case-by-case basis by taking into account all factors and considering the totality of the circumstances.

Exercise of Discretion^[4]

The adjudication of Category C applications is generally subject to the discretion of USCIS.^[5] In deciding whether to grant employment authorization, USCIS makes a case-by-case determination considering all relevant information. The ultimate decision to grant discretionary employment authorization for a Category C applicant depends on whether, based on the facts and circumstances of the case, USCIS finds that the positive factors outweigh any negative factors that may be present, and that a favorable exercise of discretion is warranted.^[6] The denial of employment authorization is not subject to administrative appeal.^[7]

Footnotes

^[^ 1] See [INA 274A\(h\)\(3\)](#). See [8 CFR 274a.13\(a\)\(1\)](#).

^[^ 2] See [8 CFR 274a.13\(a\)\(1\)](#). The approval of applications filed under [8 CFR 274a.12\(c\)](#), except for [8 CFR 274a.12\(c\)\(8\)](#), is within the discretion of USCIS.

^[^ 3] See [8 CFR 274a.13](#). See uscis.gov/i-765.

^[^ 4] For more information on the exercise of discretion, see Volume 1, General Policies and Procedures, Part E, Adjudications, Chapter 8, Discretionary Analysis [[1 USCIS-PM E.8](#)].

^[^ 5] See [8 CFR 274a.12\(c\)](#). See [8 CFR 274a.13\(a\)\(1\)](#). See also regulatory provisions that contain EAD eligibility requirements which may limit discretion. Effective August 25, 2020, the Asylum Application, Interview, and Employment Authorization for Applicants Final Rule removed the exemption from discretion outlined in 8 CFR 274a.13(a)(1) for asylum applicants seeking employment authorization under 8 CFR 274a.12(c)(8). See [85 FR 38532](#) (June 26, 2020). Therefore, applications for employment authorization filed on or after August 25, 2020 by applicants for asylum are subject to discretion like other Category C applicants.

^[^ 6] For a full discussion on discretionary analysis, see Volume 1, General Policies and Procedure, Part E, Adjudications, Chapter 8, Discretionary Analysis [[1 USCIS-PM E.8](#)].

^[^ 7] See [8 CFR 274a.13\(c\)](#).

Current as of November 13, 2020

