

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 274a

[CIS No. 2767–24; DHS Docket No. USCIS–2024–0002]

RIN 1615–AC78

#### Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document 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 (EAD application), will be increased from up to 180 days to up to 540 days from the expiration date stated on their EADs. DHS is taking these steps to help prevent renewal applicants from experiencing a lapse in their employment authorization and documentation.

**DATES:**

*Effective dates:* This temporary final rule (TFR) is effective April 8, 2024, through September 20, 2027, except for the amendments to 8 CFR 274a.13(d)(5), which are effective from April 8, 2024 through October 15, 2025.

*Submission of public comments:* Comments must be received on or before June 7, 2024.

**ADDRESSES:** You may submit comments on the entirety of this temporary final rule package, identified by DHS Docket No. USCIS–2024–0002, through the Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the website instructions for submitting comments. The electronic Federal Docket Management System will accept comments before midnight Eastern time on June 7, 2024.

Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to USCIS in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. Comments submitted in a manner other

than as provided above, including emails or letters sent to DHS or U.S. Citizenship and Immigration Services (USCIS) officials, will not be considered comments on the TFR and may not receive a response from DHS. Please note that DHS and 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 also 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:** Charles Nimick, Chief, Business and Foreign Workers 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).

**SUPPLEMENTARY INFORMATION:**

**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. DHS also invites comments that relate to the economic, environmental, or federalism effects that might result from this temporary final rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide 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 in this section, including emails or letters sent to USCIS or DHS officials, will not be considered comments on the TFR and may not receive a response.

In addition to seeking comments on all aspects of this TFR, DHS also invites the public to comment on the following:

- Whether DHS regulations should be revised to permanently lengthen the period of the automatic extension period to up to 540 days for employment authorization and/or EAD validity for eligible renewal applicants;
- Whether a different permanent extension period should be

implemented, for some or all applicants covered by the automatic extension provision on either a temporary or permanent basis; and

- Whether other solutions should be considered to mitigate the risk of expiring employment authorization and/or EAD validity for some or all applicants covered by the automatic extension provision.

DHS also specifically seeks comments on the regulatory alternatives described in section III.C. and V.B. of this preamble.

**Instructions**

All submissions should include the agency name and DHS Docket No. USCIS–2024–0002 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 and Security 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–2024–0002. You may also sign up for email alerts on the online docket to be notified when comments are posted or a subsequent rulemaking is published.

**I. Executive Summary**

*A. Purpose and Summary of the Regulatory Action*

DHS has determined that the up to 180-day automatic extension under 8 CFR 274a.13(d) is currently not enough time for the growing number of renewal EAD applicants. Without this TFR, approximately 800,000 renewal EAD applicants will be in danger of having their applications remain pending beyond the 180-day automatic extension period, resulting in applicants losing employment authorization and/or EAD validity in the approximately 2-year period beginning May 2024 because of USCIS processing delays and through no fault of their own. Such widescale lapses in employment authorization and EAD validity would result in substantial and unnecessary harm to noncitizens

who timely filed for extensions of employment authorization, their families, their employers, and the public at large. To avert these gaps in employment authorization and/or EAD validity for certain renewal EAD applicants, and the resulting harmful effects gaps can cause, DHS is temporarily amending existing DHS regulations to increase the automatic extension period applicable to expiring employment authorization and/or EADs (Form I-766) for certain renewal applicants who have filed EAD applications from up to 180 days to up to 540 days from the expiration date stated on their EADs. The increase will be available to any eligible renewal EAD applicant with an application filed on or after October 27, 2023, and pending on or after April 8, 2024 and any eligible applicant who files a renewal EAD application during the 540-day period beginning on or after April 8, 2024 and ending September 30, 2025. DHS has decided to focus on near-term uncertainty and critical needs of applicants, their families, and their employers by ensuring that, through this TFR, none of them will imminently or in the near-term experience the harmful effects caused by gaps in employment authorization and/or EAD validity due to processing delays. At the same time, this rule provides DHS with an additional window during which it can consider long-term solutions by soliciting public comments, evaluating the effects of ongoing and future policy and operational changes described throughout this rule, and continuing to identify new strategies and efficiencies.

### B. Summary of Legal Authority

The authority for the Secretary of Homeland Security (Secretary) to issue this TFR is found in section 274A(h)(3)(B) of the 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 (HSA), 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." Under section 103(a) of the INA, 8 U.S.C. 1103(a), the Secretary is authorized to administer the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority.

### C. Summary of the TFR Provisions

This rule amends 8 CFR 274a.13(d) as follows:

- New 8 CFR 274a.13(d)(6): DHS is adding a new paragraph 8 CFR 274a.13(d)(6). With this new paragraph, DHS is temporarily increasing the regular automatic extension period for employment authorization and/or EAD validity of up to 180 days under 8 CFR 274a.13(d)(1) to a period of up to 540 days for renewal applicants eligible to receive an automatic extension.
- Amending existing 8 CFR 274a.13(d)(5): To avoid confusion between the automatic extension period granted under new 8 CFR 274a.13(d)(6) and existing 8 CFR 274a.13(d)(5), DHS is revising the heading of existing 8 CFR 274a.13(d)(5). 8 CFR 274a.13(d)(5) only applies to EAD renewal applications properly filed on or before October 26, 2023. The new heading will clearly reflect the date. DHS is neither extending nor otherwise amending 8 CFR 274a.13(d)(5).

### D. Summary of Costs and Benefits

This rule results in stabilization of earnings worth \$29.1 billion to employment-authorized immigrants, cost savings of \$5.2 billion to U.S. employers from avoided labor turnover, and is expected to yield \$3.1 billion in employment tax transfer payments over a 5-year period of analysis using a 2 percent discounting rate (see Table 13 for more information). While the EAD end dates are known to USCIS and can be used to accurately project lapses, there is uncertainty around the monetized, economic impacts due to the timing of EAD renewal filing behavior and the resulting duration of lapses experienced by workers of varying wages in the absence of this rule. The Regulatory Impact Analysis discusses the low end and high end estimates that bound the expected impacts of this regulatory action.

## II. Background

USCIS' ability to process both initial and renewal EAD applications within USCIS' targeted processing times has been adversely impacted by a variety of unforeseeable and dynamic events and circumstances, described in the following sections. As a result, DHS has found it necessary to take actions to reduce the likelihood that certain applicants for renewal EADs experience unnecessary lapses in their employment authorization and/or proof of employment authorization because of USCIS processing delays and through no fault of their own. Such widescale lapses in employment authorization and

EAD validity would result in substantial and unnecessary harm to noncitizens who timely filed for extensions of employment authorization, their families, their employers, and the public at large.

In 2021, a surge in EAD applications, coupled with operational challenges exacerbated by the COVID-19 pandemic, resulted in a significant increase in EAD application processing times. The EAD application processing times increased to such a level that the 180-day automatic extension of employment authorization for certain pending renewal EAD applications<sup>1</sup> was insufficient to prevent many renewal applicants from experiencing a lapse in employment authorization and/or documentation while their renewal applications remained pending with USCIS.

In May 2022, DHS published a temporary final rule ("2022 TFR") that, for certain renewal EAD applications filed during a limited period that ended on October 26, 2023, increased the automatic extension period from up to 180 days to up to 540 days.<sup>2</sup> This measure helped minimize gaps in employment authorization and/or EAD validity for certain renewal EAD applicants, while giving USCIS a window of time to address its backlogs through operational and sub-regulatory measures. Those operational and sub-regulatory measures helped USCIS to work toward its goal of returning to regular processing times.

Although USCIS' efforts since the issuance of the 2022 TFR prevented a substantial number of renewal applicants from experiencing a lapse in their employment authorization and/or documentation, the processing times for renewal EAD applications are currently at such a level that the current 180-day automatic extension period for certain renewal EAD applications remains insufficient to prevent a large number of lapses in the coming months.

Accordingly, DHS is again taking steps to help prevent certain renewal EAD applicants from experiencing a lapse in their employment authorization, valid documentation of their employment authorization, or both, while their renewal applications remain pending. USCIS also continues to implement other solutions to return processing times to target levels, as detailed in section III.B of the preamble.

Without this 2024 TFR, approximately 800,000 renewal applicants will be in danger of losing their employment authorization and/or

<sup>1</sup> See 8 CFR 274a.13(d).

<sup>2</sup> See 87 FR 26614 (May 4, 2022) (2022 TFR).

documentation in the period beginning May 2024 and ending March 2026.<sup>3</sup> If faced with a disruption of their employment authorization and/or documentation, these renewal applicants may lose their jobs through no fault of their own, and employers may be faced with finding replacement workers, an undue burden that is exacerbated during a time when the U.S. economy is experiencing more job openings than available workers.<sup>4</sup>

Therefore, DHS has determined that it is imperative to increase the automatic extension period of employment authorization and/or EAD validity for eligible renewal EAD applicants for a temporary period. This temporary increase to the automatic extension period will be effective April 8, 2024 and will apply to renewal EAD applications that are properly filed on or after October 27, 2023,<sup>5</sup> and on or before September 30, 2025.

This new temporary increase to the automatic extension period will, in most cases, help avoid the gaps in employment authorization and/or documentation that could otherwise affect eligible renewal EAD applicants, their families, and their U.S. employers in those cases where USCIS is unable to process their renewal applications within the 180-day automatic extension period provided under the current regulation.

#### A. Legal Authority

The Secretary of Homeland Security's (Secretary) authority for the regulatory amendments made in this TFR are found in various sections of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1101 *et seq.*, and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135 (codified in part at 6 U.S.C. 101 *et seq.*). General authority for issuing this

<sup>3</sup> See section V.B.2. Table 7, TFR Future Population Projections by Month, Rounded to Thousands.

<sup>4</sup> Bureau of Labor Statistics data show that, as of December 2023, there were 0.7 unemployed persons per job opening. See U.S. Department of Labor, U.S. Bureau of Labor Statistics, "Number of unemployed persons per job opening, seasonally adjusted," <https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm> (last visited Feb. 6, 2024).

<sup>5</sup> The 2022 TFR increased the automatic extension period from up to 180 days to up to 540 days for certain renewal EAD applications filed on or after May 4, 2022, and on or before October 26, 2023. Beginning on October 27, 2023, the automatic extension period reverted to the original 180-day period for those eligible applicants who timely file Form I–765 renewal applications. For individuals who received an increased automatic extension under the 2022 TFR, the automatic extension generally will end when they receive a final decision on their renewal application or the end of the up to 540-day period, whichever comes earlier.

TFR is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws and establish such regulations as the Secretary deems necessary for carrying out such authority, as well as section 102 of the HSA, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations.<sup>6</sup> Further authority for this TFR is found in:

- Section 208(d)(2) of the INA, 8 U.S.C. 1158(d)(2), which authorizes the Secretary to grant employment authorization to applicants for asylum if 180 days have passed since filing an application for asylum;

- Section 214 of the INA, 8 U.S.C. 1184, including section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe, by regulation, the time and conditions of the admission of nonimmigrants;

- Section 244(a)(1)(B) of the INA, 8 U.S.C. 1254a(a)(1)(B), which states that the Secretary shall authorize employment and provide evidence of employment authorization for noncitizens who have been granted Temporary Protected Status;

- Section 274A(h)(3)(B) of the 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."

#### B. Legal Framework for Employment Authorization

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

Whether 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

<sup>6</sup> Although several provisions of the INA discussed in this TFR refer exclusively to the "Attorney General," such provisions are now to be read as referring to the Secretary of Homeland Security by operation of the HSA. See 6 U.S.C. 202(3), 251, 271(b), 542 note, 557; 8 U.S.C. 1103(a)(1) and (g), 1551 note; *Nielsen v. Preap*, 139 S. Ct. 954, 959 n.2 (2019).

employment in the United States, as follows:<sup>7</sup>

- 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. This means that for certain eligible noncitizens, employment authorization is granted with the underlying immigration status (called "incident to status" employment authorization). Although authorized to work as a condition of their status or circumstances, certain classes of noncitizens must apply to USCIS in order to receive a Form I–766 EAD as evidence of that employment authorization.<sup>8</sup>

- 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 with a specific employer.<sup>9</sup> 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.

- Noncitizens in the third class, described at 8 CFR 274a.12(c), are required to apply for employment authorization and may work only if USCIS, in its discretion, approves their application. They are authorized to work for any employer or engage in self-employment upon approval of their EAD application, subject to certain restrictions, so long as their EAD remains valid.<sup>10</sup>

##### 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 EAD application must be properly filed with USCIS (with fee

<sup>7</sup> 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 (EAD application). Employment-authorized L nonimmigrant spouses are an example. See INA sec. 214(c)(2)(E), 8 U.S.C. 1184(c)(2)(E).

<sup>8</sup> See 8 CFR 274a.12(a).

<sup>9</sup> See 8 CFR 274a.12(b).

<sup>10</sup> 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").

or fee waiver, as applicable) to receive employment authorization and/or an EAD.<sup>11</sup> EADs issued under 8 CFR 274a.12(a) or (c) generally allow these noncitizens to work for any U.S. employer or engage in self-employment, subject to certain restrictions, as applicable. If an EAD application is granted under CFR 274a.12(a), the resultant EAD provides the noncitizen with proof of employment authorization incident to status or circumstance. Certain noncitizens may file EAD applications concurrently with related benefit requests if permitted by the form instructions or as announced by USCIS.<sup>12</sup> In such instances, the underlying benefit requests, if granted, would form the basis for an EAD or eligibility to apply 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.<sup>13</sup>

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

#### a. Renewing Employment Authorization and/or EADs

Employment authorization and EADs generally are not valid indefinitely but instead expire after a specified period of time.<sup>14</sup> Generally, noncitizens within the eligibility categories listed in 8 CFR 274a.12(c) must obtain a renewal of employment authorization and their EADs before the expiration date stated on their current EADs, or they will lose their eligibility to work in the United States (unless, since obtaining their current EADs, the noncitizens have obtained an immigration status or belong to a class of individuals with employment authorization incident to that status or class, or obtain employment authorization based on another category).<sup>15</sup> The same holds true for some classes of noncitizens

authorized to work incident to status whose EAD 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 noncitizens may wish to renew their EAD to have acceptable 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) process. Failure to renew their EADs prior to the expiration date may result in job loss if such noncitizens do not have or cannot present alternate acceptable evidence of employment authorization to show their employers, as employers who continue to employ noncitizens without employment authorization may be subject to criminal penalties and/or civil monetary penalties.<sup>16</sup>

Those seeking to renew previously granted employment authorization or EADs must file renewal EAD applications with USCIS in accordance with the form instructions.<sup>17</sup>

<sup>16</sup> The employee must present the employer with acceptable documents evidencing identity and employment authorization. The lists of acceptable documents can be found on the second page of the Form I-9. See USCIS, DHS, Form I-9, "Employment Eligibility Verification," <https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf> (last visited Feb. 7, 2024). 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 USCIS, DHS, "M-274 Handbook for Employers," "11.8 Penalties for Prohibited Practices," <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/110-unlawful-discrimination-and-penalties-for-prohibited-practices/118-penalties-for-prohibited-practices> (last visited Feb. 7, 2024). In addition, an employer who engages in a "pattern or practice" of employing unauthorized individuals may face criminal penalties under 8 U.S.C. 1324a(f). U.S. Immigration and Customs Enforcement has primary enforcement responsibilities for enforcement of the civil monetary penalties under Section 274A of the INA, 8 U.S.C. 1324a and Section 274C of the INA, 8 U.S.C. 1324c.

<sup>17</sup> See USCIS, DHS, Form I-765, "Instructions for Application for Employment Authorization," <https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf> (last visited Feb. 7, 2024). In reviewing the EAD application, USCIS ensures that the fee was paid, a fee waiver was granted, or a fee exemption applies.

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

If an eligible noncitizen is not able to obtain renewal of their employment authorization and/or EAD before it expires, the noncitizen and the employer could experience adverse consequences. For the noncitizen, the lack of renewal could cause job loss, gaps in employment authorization and/or documentation, and loss of income. 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 authorization or proof thereof create for the noncitizen and the employer, if the noncitizen engages in unauthorized employment, such activity may render a noncitizen removable,<sup>18</sup> render a noncitizen ineligible for future benefits such as adjustment of status,<sup>19</sup> and/or subject the employer to civil and/or criminal penalties.<sup>20</sup>

Before 2016, DHS regulations stated that USCIS would "adjudicate an application [for an EAD] within 90 days" from the date USCIS received the application.<sup>21</sup> If USCIS did not adjudicate the application within that timeframe, the applicant was eligible for 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<sup>22</sup> removing the provision and replacing it with the current 8 CFR 274a.13(d).

To prevent gaps in employment authorization and/or documentation and related consequences for certain renewal applicants,<sup>23</sup> and in light of processing times and possible filing

<sup>18</sup> See, e.g., INA sec. 237(a)(1)(C), 8 U.S.C. 1227(a)(1)(C); 8 CFR 214.1(e).

<sup>19</sup> See INA sec. 245(c), (k); 8 U.S.C. 1255(c), (k).

<sup>20</sup> See INA sec. 274A, 8 U.S.C. 1324a.

<sup>21</sup> See 8 CFR 274a.13(d) (2016).

<sup>22</sup> See 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 80 FR 81899 (Dec. 31, 2015) ("AC21 NPRM").

<sup>23</sup> See 80 FR 81899, 81927 (Dec. 31, 2015) ("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 benefiting them and their employers.").

<sup>11</sup> See 8 CFR 103.2(a) and 8 CFR 274a.13(a). An applicant who is employment authorized incident to status (e.g., asylees, refugees, TPS beneficiaries) may file an EAD application to request an EAD. Applicants who are filing within an eligibility category listed in 8 CFR 274a.12(c) must, by contrast, use the EAD application form to request both employment authorization and an EAD.

<sup>12</sup> See 8 CFR 274a.13(a). For example, the spouse of an H-1B worker may file an EAD application at the same time as their Form I-539, Application to Extend/Change Nonimmigrant Status. See USCIS, DHS, "Employment Authorization for Certain H-4, E Dependent Spouses," <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/employment-authorization-for-certain-h-4-dependent-spouses> (last visited Dec. 4, 2023).

<sup>13</sup> See 8 CFR 274.12(a) and (c).

<sup>14</sup> See 8 CFR 274a.13(b). But see 8 CFR 274a.14 (setting forth the bases for termination or revocation of employment authorization).

<sup>15</sup> See 8 CFR 274a.14(a)(1)(i).

surges,<sup>24</sup> DHS changed its regulations at 8 CFR 274a.13(d) such that under the current provision, and except as otherwise provided by law, certain categories of renewal applicants receive an automatic extension of their EADs (and, if applicable, related employment authorization) for up to 180 days from the expiration date on the EAD.<sup>25</sup> To receive the automatic extension, an eligible renewal applicant must meet the following conditions:

- The renewal applicant timely files an application to renew the employment authorization and/or EAD before the EAD expires;<sup>26</sup>
- The renewal EAD application 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);<sup>27</sup> and
- The renewal applicant'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 may be announced on the USCIS website.<sup>28</sup>

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:<sup>29</sup>

- Noncitizens admitted as refugees (A03);<sup>30</sup>
- Noncitizens granted asylum (A05);<sup>31</sup>

<sup>24</sup> See 80 FR 81899, 81927 (Dec. 31, 2015) (“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’ 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).”).

<sup>25</sup> 8 CFR 274a.13(d); *see also* 81 FR 82398, 82455–82463 (Nov. 18, 2016) (AC21 Final Rule).

<sup>26</sup> 8 CFR 274a.13(d)(1)(i). TPS beneficiaries must file during the designated period in the applicable **Federal Register** notice.

<sup>27</sup> 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 EAD renewal application).

<sup>28</sup> See 8 CFR 274a.13(d)(1)(iii).

<sup>29</sup> See USCIS, DHS, “Automatic Employment Authorization (EAD) Extension,” <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension> (last visited Feb. 7, 2023).

<sup>30</sup> See 8 CFR 274a.12(a)(3).

<sup>31</sup> See 8 CFR 274a.12(a)(5).

- 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);<sup>32</sup>

- Noncitizens admitted to the United States as citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau pursuant to agreements between the United States and the former trust territories (A08);<sup>33</sup>

- Noncitizens granted withholding of deportation or removal (A10);<sup>34</sup>

- Noncitizens granted TPS, regardless of the employment authorization category on their current EADs (A12);<sup>35</sup>

- Noncitizen spouses of E-1/2/3 nonimmigrants (Treaty Trader/Investor/Australian Specialty Worker) (A17);<sup>36</sup>

- Noncitizen spouses of L-1 nonimmigrants (Intracompany Transferees) (A18);<sup>37</sup>

- 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);<sup>38</sup>

- Noncitizens who have properly filed applications for asylum and withholding of deportation or removal (C08);<sup>39</sup>

- 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);<sup>40</sup>

- 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);<sup>41</sup>

<sup>32</sup> See 8 CFR 274a.12(a)(7).

<sup>33</sup> See 8 CFR 274a.12(a)(8).

<sup>34</sup> See 8 CFR 274a.12(a)(10).

<sup>35</sup> See 8 CFR 274a.12(a)(12) or (c)(19).

<sup>36</sup> See INA sec. 214(e)(2), 8 U.S.C. 1184(e)(2).

<sup>37</sup> See INA sec. 214(c)(2)(E), 8 U.S.C. 1184(c)(2)(E).

<sup>38</sup> See 8 CFR 274a.12(c)(19).

<sup>39</sup> See 8 CFR 274a.12(c)(8).

<sup>40</sup> See 8 CFR 274a.12(c)(9). In certain adjustment of status cases, if the applicant seeks an EAD and advance parole (by filing Form I-131, Application for Travel Document), USCIS may issue an employment authorization card combined with an Advance Parole Card (Form I-512). This is also referred to as a “combo card.” If the EAD card is combined with the advance parole authorization (the EAD card has an annotation “SERVES AS I-512 ADVANCE PAROLE”), any automatic extension does not apply to the advance parole part of the combo card.

<sup>41</sup> See 8 CFR 274a.12(c)(10).

- Noncitizens who have filed applications for creation of record of lawful admission for permanent residence (C16);<sup>42</sup>

- Noncitizens who have properly filed legalization applications pursuant to section 210 of the INA, 8 U.S.C. 1160 (C20);<sup>43</sup>

- Noncitizens who have properly filed legalization applications pursuant to section 245A of the INA, 8 U.S.C. 1255a (C22);<sup>44</sup>

- Noncitizens who have filed applications for adjustment of status pursuant to section 1104 of the Legal Immigration Family Equity Act (C24);<sup>45</sup>

- Certain noncitizen spouses (H-4) of H-1B nonimmigrants with an unexpired Form I-94 showing H-4 nonimmigrant status (C26);<sup>46</sup> and

- Noncitizens who are the principal beneficiaries or derivative children of approved Violence Against Women Act (VAWA) self-petitioners,<sup>47</sup> under the employment authorization category “(c)(31)” in the form instructions to the EAD application (C31).<sup>48</sup>

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.<sup>49</sup> An EAD that is expired on its face is considered unexpired when combined with a Form I-797C receipt notice indicating a timely filing of the application to renew the EAD.<sup>50</sup> 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 may present to their employer the Form I-797C receipt notice for the EAD application to show that their EAD has been automatically extended as evidence of continued employment authorization, and the employer must

<sup>42</sup> See 8 CFR 274a.12(c)(16).

<sup>43</sup> See 8 CFR 274a.12(c)(20).

<sup>44</sup> See 8 CFR 274a.12(c)(22).

<sup>45</sup> See 8 CFR 274a.12(c)(24).

<sup>46</sup> See 8 CFR 274a.12(c)(26).

<sup>47</sup> Family based immigration generally requires U.S. citizens and lawful permanent residents to file a petition on behalf of their noncitizen family members. Some petitioners may misuse this process to further abuse their noncitizen family members by threatening to withhold or withdraw sponsorship in order to control, coerce, and intimidate them. With the passage of VAWA and its subsequent reauthorizations, Congress provided noncitizens who have been abused by their U.S. citizen or lawful permanent resident relative the ability to petition for themselves (self-petition) without the abuser's knowledge, consent, or participation in the process. The VAWA provisions allow victims to seek both safety and independence from their abusers.

<sup>48</sup> INA sec. 204(a)(1)(D)(i)(II), (IV), (a)(1)(K), 8 U.S.C. 1154(a)(1)(D)(i)(II), (IV), (a)(1)(K).

<sup>49</sup> See 8 CFR 274a.13(d)(3).

<sup>50</sup> See 8 CFR 274a.13(d)(4).

update the previously completed Form I-9 to reflect the extended EAD 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 and the employer in the first instance. In either case, the reverification of employment authorization or the EAD occurs when the automatic extension period terminates.<sup>51</sup>

USCIS generally recommends the filing of a renewal EAD application up to 180 days before the current EAD expires.<sup>52</sup> 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 automatically extended employment authorization and/or EAD generally is terminated on the day of the denial.<sup>53</sup> If the renewal application was timely and properly filed, but remains pending beyond the 180-day automatic extension period, the applicant must stop working upon the expiration of the automatically extended validity period and the employer must remove the employee from the payroll if the applicant/employee cannot provide other acceptable evidence of current employment authorization.<sup>54</sup> As a result, both the employee and the employer may 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.

### C. 2022 Temporary Final Rule

#### 1. Overview

In 2022, processing times for EAD applications had increased due to operational challenges that were

<sup>51</sup> See USCIS, DHS, “Completing Supplement B, Reverification and Rehires (formerly Section 3),” <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-supplement-b-reverification-and-rehires-formerly-section-3> (last visited Nov. 3, 2023); see also USCIS, DHS, “M-274 Handbook for Employers,” “5.2 Temporary Increase of Automatic Extension of EADs from 180 Days to 540 Days” (last visited Dec. 7, 2023).

<sup>52</sup> See USCIS, DHS, “I-765, Application for Employment Authorization,” <https://www.uscis.gov/i-765> (last visited Jan. 19, 2024); USCIS, DHS, “Employment Authorization Document,” <https://www.uscis.gov/green-card/green-card-processes-and-procedures/employment-authorization-document> (last visited Dec. 7, 2023); see also 81 FR at 82456 (“AC21 Final Rule”).

<sup>53</sup> See 8 CFR 274a.13(d)(3).

<sup>54</sup> See 8 CFR 274a.2(b)(vii) (reverification provision).

exacerbated by the emergency measures USCIS employed to maintain its operations through the height of the COVID-19 pandemic in 2020, combined with a sudden increase in EAD application filings. The up to 180-day automatic extension period for renewal EAD applicants’ employment authorization and/or EADs was no longer sufficient to prevent lapses in employment authorization for these applicants.

To mitigate the impact of these operational challenges, on May 4, 2022, DHS published a TFR titled “Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Renewal Applicants” (2022 TFR) in the **Federal Register**.<sup>55</sup> The rule temporarily amended DHS regulations at 8 CFR 274a.13(d) by adding a new paragraph 8 CFR 274a.13(d)(5), which lengthened the automatic extension period provided in that section from up to 180 days to up to 540 days for those categories described in the TFR, upon timely filing of an EAD renewal application.<sup>56</sup> That increase was available to eligible renewal applicants whose EAD applications were pending as of May 4, 2022, including those applicants whose employment authorization had already lapsed following the initial 180-day extension period, and to eligible applicants who filed a renewal EAD application during the 540-day period beginning on or after May 4, 2022, and ending October 26, 2023.<sup>57</sup> On October 27, 2023, the automatic extension renewal period reverted to 180 days (the automatic extension period under 8 CFR 274a.13(d)(1)) for eligible renewal EAD applications filed on or after October 27, 2023.<sup>58</sup>

#### 2. Public Comments

In promulgating the 2022 TFR, DHS invited the public to participate in the rulemaking by submitting comments and written data. In response to the request for comments, the Department received a total of 190 public comment submissions. Of the 190 submissions, 117 are unique submissions, 61 are copies of form letters associated with mass mail campaigns, 6 are duplicate submissions, and 6 are not germane to the 2022 TFR.<sup>59</sup>

Of the comments listed above, one submission expressed opposition, 94

<sup>55</sup> 87 FR 26614 (May 4, 2022).

<sup>56</sup> See 8 CFR 274a.13(d); see also 87 FR 26614, 26651 (May 4, 2022).

<sup>57</sup> See *id.*

<sup>58</sup> See 87 FR 26614, 26631 (May 4, 2022).

<sup>59</sup> The agency has not previously responded to the public comments received from the 2022 TFR.

submissions expressed support, and 83 expressed a mixed opinion (*e.g.*, general support with a request for further changes). Many expressed their appreciation for the rule and commented on the positive impacts the rule had not only on applicants, their families, and their support systems, but also on employers and the economy. Many who supported the rule overall also expressed that DHS should have applied the rule more broadly by expanding certain aspects of the rule (*e.g.*, to cover all classes of noncitizens) or requested revisions to the rule (*e.g.*, that the effective period of the rule be longer, or that it be issued as a final rule that would make the increased extension permanent, not temporary). A comment submitted by an advocacy group noted that USCIS should make permanent the 540-day automatic extension because it was unlikely that USCIS would fully eliminate USCIS’ backlog owing to circumstances beyond USCIS’ control, including a lack of funding and adequate staffing. The group added that USCIS could publish a final rule to make the 540-day automatic extension period permanent as an appropriate exercise of USCIS’ rulemaking authority under the Administrative Procedure Act (APA) because USCIS requested comments in connection with the 2022 TFR.<sup>60</sup> Another advocacy group noted that making permanent the automatic extension period of 540 days would be more efficient and promote predictability. Some commenters suggested that DHS consider alternative regulatory or sub-regulatory actions. Some addressed other concerns, including clarity, outreach, and coordination with other departments.

While DHS reviewed and considered the comments submitted in response to the 2022 TFR, DHS did not make changes to the 2022 TFR in response to the comments because DHS considered the rulemaking to be sufficient at that time to address the issues facing the affected population of renewal EAD applicants and their U.S. employers. DHS also considered some comments, such as commenters’ suggestions to eliminate employment authorization for certain groups entirely, to be beyond the scope of the 2022 TFR, which was intended to be a temporary solution to the potential disruption facing certain renewal applicants and their U.S. employers resulting from USCIS

<sup>60</sup> The group cited *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2384–85 (2020) (holding that an interim final rule’s “request for comments readily satisfied the APA notice requirements.”).

processing delays. DHS also took various sub-regulatory actions, as described in section III.B of this preamble, to further address USCIS processing delays and minimize the risk of potential gaps in employment authorization and/or documentation.

Lastly, DHS considered the comment in opposition to the rule that asserted that DHS only provided a cursory justification for the TFR and questioned DHS's authority to issue the TFR, its consideration of the impact on U.S. workers, and its justification for claiming good cause to issue the rule without the notice and comment procedure required under the APA. DHS disagrees with these various assertions, as the preamble to the 2022 TFR included a detailed explanation of the legal authority and justification for the rulemaking, as well as the basis for foregoing notice and comment based on the good cause exception.<sup>61</sup> Nevertheless, DHS included additional details in this rule to further clarify the legal authority for this TFR and has provided additional explanation regarding the consideration of U.S. workers and potential impacts, if any, of this TFR on U.S. workers. Specifically, as explained in this preamble, this TFR is limited to certain renewal EAD applicants—*i.e.*, those who have already been authorized for employment—and automatically extending their employment authorization and/or EAD, so that they may continue to perform the services they are already doing will have minimal adverse impact, if any, on other U.S. workers.<sup>62</sup> Moreover, in

<sup>61</sup> Among other things, the commenter asserted that section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B) was “merely definitional” and did not confer authority on DHS to grant or extend employment authorization to certain classes of noncitizens covered by the rule. DHS disagrees with the commenter's assertion. DHS further discusses the relevant authorities earlier in section II of this preamble. *See also, e.g., Washington Alliance of Technology Workers v. DHS*, 50 F.4th 164, 191–192 (D.C. Cir. 2022) (“What matters is that section 1324a(h)(3) expressly acknowledges that employment authorization need not be specifically conferred by statute; it can also be granted by regulation.”).

<sup>62</sup> *See* section V.B.3.d., Module D. Other Impacts. As explained, this rule extends current employment authorization for individuals who are at risk of losing such authorization solely because of USCIS processing delays; it does not grant new work authorization to additional persons. *See id.* According to the most recent data (applicable to October 2023), the U.S. labor force stands at 167,728,000. The maximum population of about 824,000 represents 0.50 percent of the national labor force, approximately 554,000 of which would potentially not lapse as a result of the action being taken. *See id.* Additionally, according to the Bureau of Labor Statistics data, and as of December 2023, there were 0.7 unemployed persons per job opening. *See* U.S. Department of Labor, U.S. Bureau of Labor Statistics, “Number of unemployed persons per job opening, seasonally adjusted,”

providing benefits for renewal applicants and their U.S. employers, this rule indirectly benefits U.S. workers by protecting the financial stability and continuity of operations for affected U.S. employers. DHS also provides a detailed explanation, including citation to cases cited by the commenter, regarding the APA's good cause exception and its application to this TFR.

All comments submitted in response to the 2022 TFR have been reviewed and considered by DHS in the development of this 2024 TFR.

### 3. Impact of the 2022 TFR

The 2022 TFR proved to be very successful at minimizing disruption to renewal EAD applicants and their U.S. employers that would have otherwise resulted from USCIS processing delays. Not only did the 2022 TFR immediately restore employment authorization for approximately 70,000 renewal EAD applicants who were already beyond the up to 180-day automatic extension period when the 2022 TFR published, but the 2022 TFR also helped nearly 280,000 renewal EAD applicants avoid a gap in employment authorization or employment authorization documentation based on applications filed on or after May 4, 2022, and on or before October 26, 2023.

### III. Purpose of This Temporary Final Rule

DHS has determined that the up to 180-day automatic extension under 8 CFR 274a.13(d) is currently not enough time for the growing number of renewal EAD applicants. Without this TFR, hundreds of thousands of renewal EAD applications will remain pending beyond the 180-day automatic extension period, resulting in applicants losing employment authorization and/or EAD validity. The grave situation that many renewal applicants (and their families) and their employers will imminently or soon face without this action is not the result of the applicants' actions but is instead the result of several converging factors affecting USCIS operations. These factors, as described in detail later in this section, have resulted in a significant increase in USCIS processing

<https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm> (last visited Feb. 6, 2024). Thus, data indicates that there are currently more jobs than available employees. As such, DHS believes, based on the nature of this rulemaking as well as current economic conditions, that the hypothetical possibility of some U.S. workers replacing workers who would temporarily lose employment authorization in the absence of this rulemaking is not a compelling reason to allow widespread losses of employment authorization due to USCIS processing delays.

times for several categories of renewal EAD applications.

Based on these factors, DHS has determined that the 180-day automatic extension provision is currently insufficient to protect applicants, their families, and their employers as was originally intended. If USCIS does not take immediate action, approximately 800,000 EAD renewal applicants will be in danger of experiencing a gap in employment authorization and/or EAD validity in the approximately 2-year period beginning May 2024.<sup>63</sup> Such widescale lapses in employment authorization and EAD validity would result in substantial and unnecessary harm to noncitizens who timely filed for extensions of employment authorization, their families, their employers, and the public at large. Approximately 80 percent of those renewal applications will be pending asylum applicant (C08) EADs. The remaining 20 percent will primarily be adjustment applicant (C09) and cancellation of removal (C10) EADs.<sup>64</sup> Therefore, to avert gaps in employment authorization and/or EAD validity for certain renewal EAD applicants and the harmful effects caused by such lapses, DHS is temporarily amending existing DHS regulations to increase the automatic extension period from up to 540 days from the expiration date stated on their EADs.

DHS is applying this rule to all renewal EAD application categories eligible for automatic extension pursuant to 8 CFR 274a.13(d), not just to C08, C09, and C10 EAD renewal categories, 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. While nearly all renewal applications eligible for automatic extension 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.

<sup>63</sup> *See* section V.B.2. Table 6 of the Regulatory Impact Analysis.

<sup>64</sup> *See* section V.B.2. Table 6 of the Regulatory Impact Analysis for how the renewal categories will be affected under this TFR.

*A. Sudden Increase in EAD Applications and Associated Operational Challenges*

1. Comparing Fiscal Year (FY) 2023 Receipts to FY 2022 Receipts

The most recent and significant contributing factor to the severe backlog and increased processing times for renewal EAD applications is the substantial increase in the number of initial EAD applications based on pending asylum applications (C08) that began in March 2023. This surge and sustained increase in receipts during FY 2023<sup>65</sup> substantially increased processing times for renewal EAD applications because USCIS was required to prioritize adjudication of certain initial EAD applications over other applications such as renewal EAD applications.<sup>66</sup>

As shown in Tables 1A. through C. below, in FY 2023, USCIS received approximately 3.49 million EAD applications, which was 50 percent higher than the volume received in FY 2022 (approximately 2.33 million). USCIS received approximately 2.37 million initial EAD applications in FY

2023, which was 77 percent higher than the volume of initial EAD applications received in FY 2022 (approximately 1.34 million). USCIS received approximately 1.12 million renewal EAD applications in FY 2023, which was 13 percent higher than the volume received in FY 2022 (approximately 990,000).

TABLE 1A—INITIAL AND RENEWAL EAD APPLICATIONS

Fiscal year	EAD applications	Difference
2022 ...	2,330,000	
2023 ...	3,490,000	50 percent higher than 2022.

TABLE 1B—INITIAL EAD APPLICATIONS

Fiscal year	EAD applications	Difference
2022 ...	1,340,000	
2023 ...	2,370,000	77 percent higher than 2022.

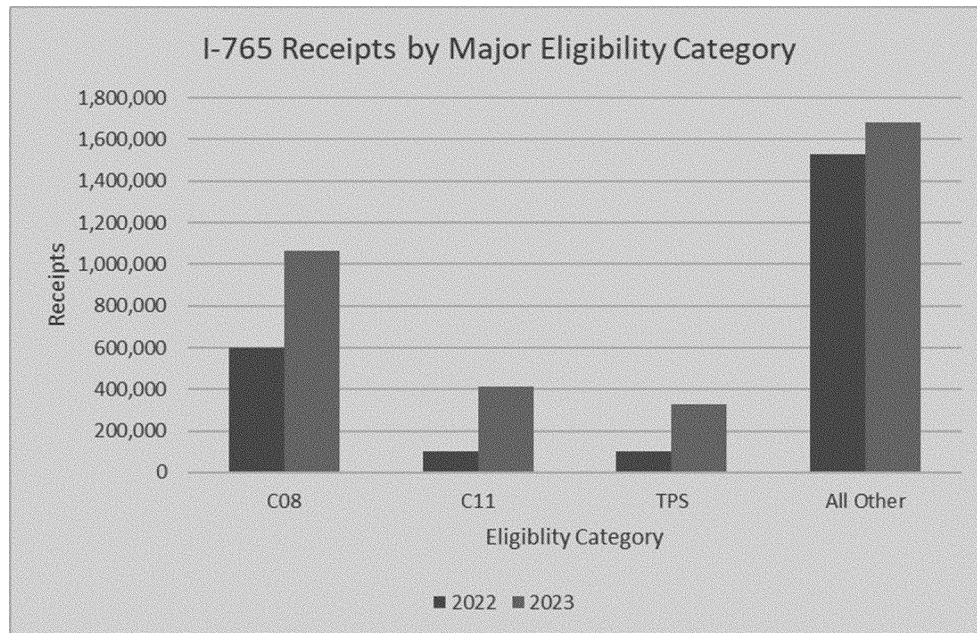
TABLE 1C—RENEWAL EAD APPLICATIONS

Fiscal year	EAD applications	Difference
2022 ...	990,000	
2023 ...	1,120,000	13 percent higher than 2022.

While overall EAD application filings increased in FY 2023, USCIS received a substantial increase in filings in the second half of the fiscal year. USCIS received a spike of nearly 100,000 EAD application filings in March 2023, resulting in a monthly total well over 300,000. However, USCIS received approximately 61,000 fewer EAD applications the following month in April 2023, underscoring the dynamic and variable nature of EAD filings at that time.

As shown in Figure 1 below, the primary drivers in the growth of EAD applications in FY 2023 (both initials and renewals) were EAD applications based on pending asylum applications (C08), TPS (A12/C19), and parole (C11).

Figure 1. I-765 Receipts by Major Eligibility Category



The higher volume receipts, particularly initial C08 EAD applications, led to increased processing times for renewal EAD applications

because, as explained in section III.A.2.a., USCIS had to prioritize adjudicative resources on C08 initial EAD applications to comply with court-

ordered deadlines for processing these case types and to address other priorities.<sup>67</sup> Consequently, the efforts USCIS undertook to improve its

<sup>65</sup> For the beginning of FY 2023 until March 2023, USCIS averaged 160,000 initial EAD application receipts per month. In March 2023, initial EAD application receipts spiked to over 250,000. For the remainder of FY 2023, USCIS averaged 220,000 initial EAD application receipts per month. The EAD category with the largest growth of initial

receipts in the second half of FY 2023 was C08 (pending asylum applications).

<sup>66</sup> See section III.A.2.a of this preamble for more information on this requirement to prioritize initial EAD applications in the C08 category (pending asylum applications).

<sup>67</sup> See section III.A.2.a of this preamble for more information on the court-imposed requirement to prioritize initial EAD applications in the C08 category. For more information on EAD application processing times resulting from increased filings, see section III.C of this preamble.



processing times for renewal EAD applications—including increasing its staffing levels—were insufficient to keep up with the substantial and unanticipated increase in EAD application filings.

To address the unexpectedly high volume of incoming receipts, USCIS increased officer hours expended on initial C08 EAD applications from 116,000 in FY 2022 to 361,000 in FY 2023, an increase of approximately 245,000 hours. The increase in officer hours was comprised of straight time<sup>68</sup> (95,000 hours in FY 2022 to 268,000 hours in FY 2023, an increase of 173,000 hours or 282 percent) and overtime (21,000 hours in FY 2022 to 93,000 hours in FY 2023, an increase of 72,000 hours or 443 percent). To achieve this increase in hours, USCIS reassigned officers from other workloads and hired new staff.

For staff transfers from other product lines to initial C08 EAD applications, USCIS first utilized staff that previously worked on C08 renewals because they were already trained on C08 EAD processing. When this was insufficient to meet the court-ordered 30-day processing requirement for C08 EAD initial applications, USCIS reassigned personnel from other product lines and trained them to work on C08 EAD processing.

This court-ordered prioritization of initial C08 EAD applications over other applications has negatively affected renewal EAD processing times because USCIS was unable to dedicate sufficient officer hours to keep pace with renewal EAD applications. To help address this issue, USCIS increased officer hours from 92,000 in FY 2022 to 113,000 in FY 2023 for renewal C08 EAD applications. Despite this increase of 21,000 officer hours, USCIS has been unable to keep up with its volume of renewal C08 EAD applications. As of February 2024, the 80th percentile processing time<sup>69</sup> for renewal C08 EAD applications was 16 months. USCIS is also behind in its target for adjudications of other automatic extension categories, including C09

<sup>68</sup> Straight time is the regular wage an employee receives for working a regular schedule and does not include overtime pay.

<sup>69</sup> The processing times displayed on the USCIS website is the amount of time it took USCIS to complete 80 percent of adjudicated cases over the last 6 months. “Processing time is defined as the number of days (or months) that have elapsed between the date USCIS received an application, petition, or request and the date USCIS completed the application, petition, or request (that is, approved or denied it) in a given six-month period.” See USCIS, DHS, “Case Processing Times,” <https://egov.uscis.gov/processing-times/more-info> (last visited January 19, 2024).

(pending adjustment of status application, 7.5 months), C10 (suspension of deportation, 16.3 months), A12 (TPS, 11.2 months), A5 (asylee, 4.8 months), and A10 (granted withholding of deportation or removal, 6.6 months).

As is explained in this preamble, EAD application processing times and the number of pending EAD applications have not sufficiently improved, and despite USCIS’ multiple operational and sub-regulatory efforts to reduce the backlog, ongoing and dynamic circumstances, which are outside of USCIS’ control, have prevented USCIS from keeping up with the adjudicatory workload.

USCIS has continued to closely monitor the automatic-extension eligible renewal EAD caseloads and processing times. Despite USCIS’ best efforts, such improvements have not yet provided the desired impact. Table 2 shows that the number of pending EAD applications has not materially improved since the end of FY 2023. The total number of pending EAD applications at the end of February of 2024 is approximately 1.40 million applications, which continues to pose a challenge for USCIS and also impacts processing times for renewal EAD applications eligible for automatic extensions because of the limited amount of USCIS resources that can be allocated to those case types. The total number of pending auto-extension EAD renewal applications at the end of February 2024 was approximately 439,000. While some progress has been made in addressing the backlog, the progress has not yet achieved sufficient gains to reduce EAD renewal processing times and avoid imminent and near-term lapses in employment authorization for EAD renewal applicants.

TABLE 2—PENDING EAD APPLICATIONS BY MONTH

Month	All EAD applications	Auto-extension renewals
Sep 2023 .....	1,490,000	534,000
Oct 2023 .....	1,510,000	504,000
Nov 2023 .....	1,500,000	474,000
Dec 2023 .....	1,470,000	448,000
Jan 2024 .....	1,440,000	457,000
Feb 2024 .....	1,400,000	439,000

Source: DHS, USCIS, OPQ, CLAIMS3, ELIS, retrieved March 15, 2024.

2. Effect of Operational Challenges on EAD Application Adjudications

a. Operational Challenges Associated With Initial EAD Application Filings by Pending Asylum Applicants (C08)

The operational challenges associated with the recent surge in EAD applications has primarily<sup>70</sup> been driven by initial EAD applications by individuals with pending asylum applications (C08).<sup>71</sup> In FY 2022, USCIS received 266,036 initial C08 applications. In FY 2023, receipts dramatically increased to 802,284. The increase in initial C08 EAD applications placed a substantial strain on USCIS’ adjudicative resources due to the high volume of cases and, as discussed in this section, the stringent 30-day timeline in which USCIS must, by regulation and court order, adjudicate these applications.

In addition to increased EAD filings, EAD processing overall also has been affected by litigation regarding two rules, published in 2020, that amended the regulations governing EAD applications associated with asylum applications.

The regulation at 8 CFR 208.7(a)(1), which was originally promulgated in 1994,<sup>72</sup> requires USCIS to adjudicate initial C08 EAD applications within 30 days of filing.<sup>73</sup> However, on June 22, 2020, DHS published a final rule titled “Removal of 30-day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications”, which amended 8 CFR 208.7(a)(1) to remove the 30-day

<sup>70</sup> Other factors related to EAD processing have affected USCIS’ workload and personnel, such as processing EADs for noncitizens who were paroled after scheduling an appointment through CBP One or through the Cuban, Haitian, Nicaraguan, and Venezuelan parole processes. However, these processes have not significantly compounded the pressures on EAD renewal processing, and they do not alter USCIS’ determination that the primary factor leading to longer processing times for renewal EAD applications is the sudden and sustained increase in initial applications for EADs in the C08 category, which must be adjudicated within 30 days. See section III.A.2 of this preamble for a detailed discussion of the operational effects of the C08 initial applications.

<sup>71</sup> Currently, pending asylum applicants may not be granted employment authorization until 180 days after the filing of the application for asylum. INA sec. 208(d)(2), 8 U.S.C. 1158(d)(2). Pending asylum applicants requesting employment authorization under the C08 category may file their EAD applications once the asylum application has been pending for 150 days. 8 CFR 208.7(a)(1).

<sup>72</sup> See 59 FR 62284 (Dec. 5, 1994).

<sup>73</sup> On July 26, 2018, in *Rosario v. USCIS*, the U.S. District Court for the Western District of Washington granted summary judgment against the government and issued an order requiring USCIS to comply with the 30-day regulatory timeline at 8 CFR 208.7. See 365 F. Supp. 3d 1156 (W.D. Wash. 2018).

processing requirement.<sup>74</sup> Several days later, DHS published another final rule titled “Asylum Application, Interview, and Employment Authorization for Applicants,” which made further changes to DHS’s regulations governing eligibility for employment authorization based on a pending asylum application, including extending the waiting period before asylum applicants could apply for an EAD from 180 days to 365 days (not including delays caused or requested by an applicant) and imposing other restrictions and requirements.<sup>75</sup>

Litigation followed the publication of these two rules (“2020 Asylum EAD Rules”), including *CASA*<sup>76</sup> in the U.S. District Court for the District of Maryland, and *Asylumworks*<sup>77</sup> in the U.S. District Court for the District of Columbia. On September 11, 2020, the court in *CASA* imposed a preliminary injunction requiring that USCIS not apply the 2020 Asylum EAD Rules to members of *CASA* and Asylum Seeker Advocacy Project organizations. On February 7, 2022, the U.S. District Court for the District of Columbia issued an order in *Asylumworks* vacating the 2020 Asylum EAD Rules in their entirety.<sup>78</sup> On September 22, 2022, DHS published a final rule titled “Asylum Application, and Employment Authorization for Applicants; Implementation of Vacatur”<sup>79</sup> that removed the changes made by the 2020 Asylum EAD Rules, restoring the regulatory text that predated the 2020 Asylum EAD Rules and thus implementing the court order in *Asylumworks*.

As a result of the *Asylumworks* court order, since February 7, 2022, USCIS has been required to process initial EAD applications for all asylum applicants within 30 days of filing. While the court order required a return to a regulatory requirement that existed until 2020, the burden created by the court’s order was

significant and continues to affect overall EAD processing today.

Following the *Asylumworks* vacatur, at the end of February 2022, there were 93,639 pending cases to which the 30-day processing requirement applied. To address the backlog of cases and comply with the court’s order, USCIS worked to increase resources for the entire initial C08 EAD application workload, including adding staff (pulling from other workloads as well as new hires) and offering overtime.<sup>80</sup>

In particular, USCIS has added staff dedicated to the adjudication of C08 initial EAD applications by reassigning and training experienced officers from other portfolios and assigning new hires to this portfolio. In addition, USCIS offered overtime to all officers working C08 initial EAD applications.<sup>81</sup> As a result of these efforts, USCIS maintained higher levels of completions than have occurred since 2017, resulting in the significant reduction of total C08 initial EAD applications pending over 30 days. USCIS expended 68,000 hours on C08 initial EAD applications in FY 2021, 116,000 hours in FY 2022, and 361,000 hours in FY 2023. USCIS expended 245,000 more officer hours in FY 2023 than FY 2022 adjudicating C08 initial EAD applications. Some of these hours could have gone to other workloads, including renewal EAD applications.

#### b. Impact of the Significant Increase in Referrals to USCIS for Credible Fear Assessments

As DHS noted in 2023, economic and political instability around the world has been fueling high levels of global migration, including in the Western Hemisphere.<sup>82</sup> For example, in

December 2022, U.S. Border Patrol (USBP)<sup>83</sup> encountered approximately 222,000 noncitizens between ports of entry, then second only to May 2022 (approximately 224,000 encounters). Daily encounters averaged 7,152 in that month (as compared to the daily average of 1,265 in the immediate pre-pandemic period, 2014–2019).<sup>84</sup> The Department estimated, based on April 2023 projections and planning models, that the number of daily encounters could rise to approximately 11,000 per day.<sup>85</sup> The Department announced sweeping new measures to address the anticipated further increase in migration, including a new rule that introduced a rebuttable presumption of asylum ineligibility for certain noncitizens<sup>86</sup> and a surge in resources to expeditiously process and remove individuals who arrive at the southwest border without a lawful basis to remain.<sup>87</sup>

These new measures have helped DHS to better manage migratory flows, but require USCIS resources to implement in the face of historically high levels of encounters at the southwest land border between the ports of entry. Although such encounters dropped between April 2023 (183,921) and May 2023 (171,382), and dropped again in June 2023 (99,538), encounters began to increase in July 2023 (132,642) and then remained higher than May 2023 levels through December 2023 (249,735), before falling again in January 2024 (176,205).<sup>88</sup> With this increase in encounters at the southwest border, there has also been an increase in referrals to USCIS for credible fear screenings<sup>89</sup> of individuals

which persons were traveling, created a serious danger of the introduction of such disease into the United States. See 85 FR 17060 (Mar. 26, 2020). The processes usually applicable under the INA, Title 8 of the U.S.C., generally did not apply to cover noncitizens while the Order was in effect.

<sup>83</sup> USBP is the component of U.S. Customs and Border Protection (CBP) within DHS responsible for U.S. border security between ports of entry. USBP’s mission is to detect and prevent the illegal entry of individuals into the United States. See CBP, DHS, “Along the U.S. Borders,” <https://www.cbp.gov/border-security/along-us-borders> (last visited Mar. 7, 2024).

<sup>84</sup> See 88 FR 31314, 31315 (May 16, 2023).

<sup>85</sup> See 88 FR 31314, 31316 (May 16, 2023).

<sup>86</sup> See 88 FR 31314, 31314 (May 16, 2023).

<sup>87</sup> See DHS, Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration (Apr. 27, 2023), <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration> (last visited Mar. 11, 2024).

<sup>88</sup> See Southwest Land Border Encounters at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited Mar. 7, 2024).

<sup>89</sup> Under the INA, certain noncitizens arriving in the United States who are found to be inadmissible under either section 212(a)(6)(C) of the INA, 8

<sup>74</sup> See 85 FR 37502 (June 22, 2020). DHS issued this final rule after having issued a proposed rule, seeking public comments. See 84 FR 47148 (Sept. 9, 2019).

<sup>75</sup> See 85 FR 38532 (June 26, 2020). This final rule was promulgated after publishing a notice of proposed rulemaking. See 84 FR 62374 (Nov. 14, 2019).

<sup>76</sup> See *CASA de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928 (D. Md. 2020).

<sup>77</sup> See *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11 (D.D.C. Feb. 7, 2022).

<sup>78</sup> *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11 (D.D.C. Feb. 7, 2022) (“*Asylumworks* vacatur”). The vacatur decision in *Asylumworks* effectively mooted the *CASA* case. The *CASA* court eventually acknowledged the case had become moot on May 18, 2023, when it granted the government’s motion to dismiss. See *CASA de Maryland, Inc. v. Mayorkas*, No. 8:20–CV–2118–PX, 2023 WL 3547497 (D. Md. May 18, 2023).

<sup>79</sup> See 87 FR 57795 (Sept. 22, 2022).

<sup>80</sup> Receipts of initial C08 EAD applications for the first half of FY 2022 averaged 16,900 per month, and for the second half of FY 2022, 27,500 receipts per month. Average monthly receipts of initial C08 EAD applications for the first half of FY 2023 was 55,000, and it increased to 78,700 in the second half of FY 2023.

<sup>81</sup> From October 2020 to February 2022, USCIS officers collectively averaged 250 overtime hours per month processing C08 initial EAD applications. From March 2022 until February 2023, USCIS officers collectively averaged 3,800 overtime hours per month on C08 initial EAD applications. From March 2023 until October 2023, USCIS officers collectively averaged 9,900 overtime hours per month on C08 initial EAD applications.

<sup>82</sup> See 88 FR 31314, 31314–31315 (May 16, 2023). Analysis by the DHS Office of Immigration Statistics (OIS) found that even while the Centers for Disease Control and Prevention’s (CDC) Title 42 public health Order had been in place, encounters with noncitizens attempting to cross the United States’ southwest border without authorization has been high. See 88 FR at 31315. The “Title 42 public health Order” issued by CDC under 42 U.S.C. 265, was in effect from March 20, 2020 until May 11, 2023 and suspended the introduction into the United States of certain persons who, due to the existence of COVID–19 in countries or places from

who express an intention to apply for asylum or who express a fear of persecution, torture, or returning to their home country. In FY 2023, USCIS received a historic high of 149,700 credible fear referrals.<sup>90</sup>

The Directorate at USCIS that processes these claims, the Refugee, Asylum and International Operations Directorate (“RAIO”), had insufficient staff to accommodate such increased volume. To address the impact of these high numbers of credible fear referrals from the southwest border on existing asylum and credible fear procedures, USCIS has been detailing USCIS personnel, including officers who adjudicate EAD applications, to the USCIS RAIO directorate for up to 120 days to conduct credible fear screenings.<sup>91</sup> However, because only an immigration officer who is also an “asylum officer,” as defined at section

U.S.C. 1182(a)(6)(C) (misrepresentation) or section 212(a)(7) of the INA, 8 U.S.C. 1182(a)(7) (for failure to meet documentation requirements for admission), may be removed from the United States without a further hearing or review (expedited removal) unless the noncitizen indicates either an intention to apply for asylum under section 208 of the INA, 8 U.S.C. 1158, or expresses a fear of persecution or torture. See INA sec. 235(b)(1)(A)(i), (iii), 8 U.S.C. 1225(b)(1)(A)(i), (iii); 8 CFR 235.3(b)(4). If such a noncitizen indicates an intention to apply for asylum or expresses a fear of persecution, torture, or of returning to their home country, the immigration officer refers the noncitizen for an interview with a USCIS asylum officer, who will determine if the noncitizen has a credible fear of persecution in his or her country of nationality or last habitual residence. See INA sec. 235(b)(1)(A), 8 U.S.C. 1225(b)(1)(A). If the USCIS asylum officer determines the noncitizen has a credible fear of persecution or torture, the noncitizen may apply for asylum and remain in the United States until a final determination is made on the asylum application by an immigration judge or, in some cases, by an asylum officer. See generally INA sec. 235(b), 240, 8 U.S.C. 1225(b), 1229a; see also 8 CFR 208.2, 208.30 and 1208.30. The HSA grants to DHS the authority to adjudicate affirmative asylum applications—i.e., applications for asylum filed with DHS for individuals not in removal proceedings—and authority to conduct credible fear interviews, make credible fear determinations in the context of expedited removal, and establish procedures for further consideration of asylum applications after an individual is found to have a credible fear. See 6 U.S.C. 271(b)(3); INA sec. 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B).

<sup>90</sup> See USCIS, DHS, Asylum Division Monthly Statistics Report, Fiscal year 2023, October 2022 to September 2023, [https://www.uscis.gov/sites/default/files/document/data/asylumfiscalyear2023todatstats\\_230930.xlsx](https://www.uscis.gov/sites/default/files/document/data/asylumfiscalyear2023todatstats_230930.xlsx) (last visited Nov. 27, 2023).

<sup>91</sup> See DHS, “Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration,” <https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration> (last updated May 11, 2023) (“DHS and the Department of Justice (DOJ) are also surging asylum officers and immigration judges, respectively, to complete immigration proceedings at the border more quickly.”). Approximately 157 immigration officer FTEs participated in a credible fear detail in FY 2023, and approximately 212 FTEs participated from May 2023 to January 2024.

235(b)(1)(E) of the Act, 8 U.S.C. 1225(b)(1)(E), may conduct credible fear screenings, USCIS had to ensure that any non-asylum officers received the necessary asylum officer training before they could start on the detail.<sup>92</sup> Thus, many USCIS detailees were required to take a full-time asylum officer training course lasting several weeks. Having had to divert adjudicatory resources by having adjudicators detailed to the credible fear process created a significant operational strain in the renewal EAD adjudication resulting in an increase of processing times.<sup>93</sup> Due to the ongoing need for additional asylum officers and credible fear interviews, USCIS continues to solicit for detailees across all USCIS components.

Positive credible fear determinations also create a downstream increase in applications for employment authorization, as these individuals may apply for asylum before the Executive Office for Immigration Review, which renders them eligible to apply for employment authorization after the asylum application has been pending for 150 days.

### c. Impact of Affirmative and Defensive Asylum Filing Surges and Backlogs and the Effect on C08 Renewals

As noted above, the recent surge in EAD applications has primarily been driven by initial EAD applications filed by individuals with pending asylum applications (C08). USCIS received historic levels of affirmative asylum applications in FY 2022 and FY 2023. In FY 2022, USCIS received more than 240,600 affirmative asylum applications.<sup>94</sup> In FY 2023, USCIS received more than 454,300 affirmative asylum applications.<sup>95</sup> Despite efforts to

<sup>92</sup> See INA sec. 235(b)(1)(B)(i) and (b)(1)(e), 8 U.S.C. 1225(b)(1)(B)(i) and (b)(1)(e); 8 CFR 208.1(b). As required by law, asylum officers receive special training, including training on international human rights law, non-adversarial interview techniques, and country conditions information.

<sup>93</sup> On October 20, 2023, the Administration requested \$755 million in supplemental funding from Congress for USCIS to hire additional officers to adjudicate an increase in asylum filings and address the backlog in processing employment authorization applications and immigration benefit requests. See Letter regarding critical national security funding needs for FY 2024, <https://www.whitehouse.gov/wp-content/uploads/2023/10/Letter-regarding-critical-national-security-funding-needs-for-FY-2024.pdf>. Congress has not fulfilled that request as of March 11, 2024.

<sup>94</sup> See USCIS, DHS, Asylum Division Monthly Statistics Report, Fiscal Year 2022, October 2021 to September 2022, <https://www.uscis.gov/sites/default/files/document/data/AsylumFiscalYear2022ToDateStats.xlsx> (last visited Nov. 27, 2023).

<sup>95</sup> See USCIS, DHS, Asylum Division Monthly Statistics Report, Fiscal year 2023, October 2022 to September 2023, <https://www.uscis.gov/sites/default/files/document/data/>

adjudicate these pending applications, backlogs for both affirmative (filed with USCIS) and defensive (filed with the Executive Office for Immigration Review (EOIR)) asylum applications have grown. Specifically, as of September 30, 2023, over 1.062 million affirmative asylum applications were pending with USCIS and 937,000 total asylum applications were pending before EOIR, respectively. Owing to these backlogs, USCIS has seen an increase in C08 renewal EAD applications. Because initial C08 EADs issued prior to September 2023 were valid for a period of 2 years, the backlog in asylum applications at USCIS and EOIR is projected to result in over 770,000 C08 renewal EAD application filings during the effective period of this TFR.<sup>96</sup>

### 3. Additional Designations for Temporary Protected Status

Over the course of FY 2022 and FY 2023, the Secretary of Homeland Security, following consideration of relevant country conditions and other appropriate factors and in consultation with interagency partners, designated, redesignated, and extended the designation of several foreign countries for TPS under section 244 of the INA, 8 U.S.C. 1254a. There are currently 16 foreign countries with active TPS designations.<sup>97</sup> TPS provides temporary protection from removal and employment authorization to eligible nationals of designated countries present in the United States. The Secretary may designate a country for TPS if the conditions in a country prevent the country’s nationals from returning safely due to ongoing armed conflict or extraordinary and temporary conditions or render the country temporarily unable to handle adequately the return of its nationals due to an environmental disaster that has resulted in a substantial but temporary disruption in living conditions.<sup>98</sup> USCIS is the designated entity within DHS to administer the TPS program.

Once a country is designated, eligible nationals of that country may apply for TPS by filing Form I-821, Application for Temporary Protected Status (TPS application). Applicants may also request an EAD by filing an EAD application with their TPS application, while their TPS application is pending

[asylumfiscalyear2023todatstats\\_230930.xlsx](https://www.uscis.gov/sites/default/files/document/data/asylumfiscalyear2023todatstats_230930.xlsx) (last visited Nov. 27, 2023).

<sup>96</sup> See TFR Modeling Methodology.

<sup>97</sup> For a list of designated countries, see <https://www.uscis.gov/humanitarian/temporary-protected-status> (last visited Nov. 7, 2023).

<sup>98</sup> See INA secs. 244(b)(1)(A)–(C); 8 U.S.C. 1254a(b)(1)(A)–(C).

or after their TPS application is approved.<sup>99</sup> TPS-based EADs fall under the A12 (TPS previously granted) and C19 (initial TPS application pending) categories. Individuals granted TPS may re-register for TPS and apply to renew their EADs as part of any announced re-registration period if the country continues to be designated for TPS.<sup>100</sup>

Over the course of FY 2022 and FY 2023, the Secretary newly designated five countries for TPS: Afghanistan,<sup>101</sup> Cameroon,<sup>102</sup> Ethiopia,<sup>103</sup> Sudan,<sup>104</sup> and Ukraine<sup>105</sup> because of humanitarian concerns and instability in these countries. These initial designations allowed nationals of these countries who were already in the United States to remain in the United States and apply for EADs. During this same period, the Secretary extended and redesignated for TPS Burma,<sup>106</sup> Haiti,<sup>107</sup> Syria,<sup>108</sup> Somalia,<sup>109</sup> South Sudan,<sup>110</sup> and Yemen,<sup>111</sup> which allowed existing TPS beneficiaries to re-register for TPS and apply for renewal of their EADs, and allowed additional nationals present in the United States from these countries to apply for TPS to remain in the United States and apply for EADs. The Secretary also extended the TPS designation for El Salvador,<sup>112</sup> Honduras,<sup>113</sup> Nicaragua,<sup>114</sup> Nepal,<sup>115</sup> and Venezuela,<sup>116</sup> thereby allowing existing TPS beneficiaries to re-register for TPS and apply for renewal of their EADs.

These additional designations, extensions, and redesignations resulted in a significant increase in initial and renewal EAD filings. In FY 2021, USCIS received 148,898 EAD applications filed by TPS applicants. Of these, 24,172 were renewal EAD applications. In FY 2022, USCIS received 100,484 EAD applications filed by TPS applicants. Of these, 33,352 were renewal EAD applications. In FY 2023, USCIS received 329,325 EAD applications filed by TPS applicants, which represent an

over 300 percent increase in TPS EAD applications from FY 2022 to FY 2023. Of these, 230,363 were renewal EAD applications as a result of the withdrawal of the TPS terminations and extensions of TPS in that fiscal year. As of January 2024, the Secretary has redesignated and extended TPS for Cameroon<sup>117</sup> and Syria.<sup>118</sup>

The increased number of TPS-based EAD filings (particularly in renewal EAD applications in the A12 category) from FY 2022 to FY 2023 further stretched limited USCIS resources and contributed to the longer processing times for renewal EAD applications overall. Specifically, this increase helps explain why the 80th percentile processing time for automatic extension-eligible renewal applicants was 14.5 months by February 2024,<sup>119</sup> and increased the number of persons who are projected to experience a lapse in their employment authorization and/or EAD validity starting May 2024, as further detailed below.

#### 4. Increased Workforce Resources Unlikely To Keep Pace

Despite USCIS' best efforts to sufficiently anticipate and allocate staff to process EAD applications, USCIS has been unable to keep pace due to unexpected increases in receipts. The agency increased its adjudicative resources in concert with the increased receipts, devoting approximately 54 percent more adjudicative hours to EADs in FY 2023 than in FY 2022, resulting in 46 percent more EAD completions than in FY 2022.<sup>120</sup> USCIS projects that EAD application filings will continue to increase into FY 2024. The rapid increase in anticipated EAD application filings in FY 2024,<sup>121</sup> combined with the mandated 30-day

processing time for initial C08 EAD applications, means that USCIS expects a shortfall in adjudications compared to receipts. This shortfall will prevent USCIS from adjudicating renewal EAD applications in time to avoid approximately 800,000 applicants from experiencing a temporary lapse in employment authorization and/or employment authorization documentation during the 2-year period beginning May 2024 absent the implementation of this temporary final rule.

From FY 2021 to FY 2023, adjudicative staff time<sup>122</sup> in the Service Center Operations (SCOPS) and Field Operations Directorate (FOD) spent on EAD adjudications increased rapidly. In FY 2021, USCIS Immigration Services Officers (ISOs) in these directorates expended 6,571,544 hours on all form types. This equates to roughly 5,249 full-time equivalents (FTEs).<sup>123</sup>

During FY 2021, USCIS spent 420,248 hours on EAD applications alone, which represents approximately 336 FTEs, or 6 percent of the total adjudicative time spent on all filings. In FY 2022, USCIS ISOs expended 6,732,963 hours (5,378 FTEs) in adjudications in SCOPS and FOD, with 512,413 hours (which equates to approximately 409 FTEs), or 8 percent of total adjudication time for all filings, used on EAD applications alone. In FY 2023, the proportion of time spent on EAD application adjudications continued to increase, with 788,861 hours (which equates to approximately 630 FTEs), or 12 percent of the total adjudicative time of 6,376,682 (5,093 FTEs).<sup>124</sup>

Thus, from FY 2021 to FY 2023, the proportion of USCIS' total adjudicative time that was spent on EAD adjudications doubled from 6 percent of total adjudicative time to 12 percent, and USCIS was not able to sufficiently increase staff for EAD adjudications,

<sup>117</sup> 88 FR 69945 (Oct. 10, 2023).

<sup>118</sup> 89 FR 5562 (Jan 29, 2024).

<sup>119</sup> For more information on how USCIS calculates its processing times, see USCIS' web page at <https://egov.uscis.gov/processing-times/more-info> (last visited Nov. 14, 2023).

<sup>120</sup> The 54 percent increase in officer hours did not result in a 54 percent increase in completions because there are different hours per completion rates for different EAD categories. There was a significant increase in C08 initial adjudications in FY 2023. In FY 2023, the average C08 initial EAD application took 0.44 hours, whereas EADs overall took 0.23 hours. Therefore, the difference in complexity of different types of EAD adjudications is the primary reason for the deviation in the increase of total hours and total completions.

<sup>121</sup> The Volume Projection Committee (VPC) forecasts USCIS workload volume using subject matter expertise from various directorates and program offices, including the Service Centers, National Benefits Center, RAIO, and regional, district, and field offices. Input from these offices helps refine the volume projections. VPC forecasts that there will be 4.6 million EAD application filings for FY 2024, compared to the approximately 3.49 million EAD applications filed in FY 2023.

<sup>122</sup> Adjudicative staff time means actual time, in hours, that USCIS spends adjudicating a benefit request. This includes straight time and overtime.

<sup>123</sup> An FTE is an approximation of the number of hours of labor that make up the equivalent of one full-time employee. It allows for a more meaningful comparison of resources than the raw number of staff allocated to a particular adjudication, as it accounts for factors such as part-time work, leave, and other factors. When calculating FTEs, USCIS used a 60-percent utilization rate to account for non-adjudicative time, such as the time officers spend attending trainings and roundtable discussions, performing administrative tasks, and leave.

<sup>124</sup> The number of adjudicative hours in FOD and SCOPS went down in FY 2023, as the FTE equivalent of approximately 157 Immigration Services Officers were detailed to credible fear screenings.

<sup>99</sup> See INA sec. 244(a)(4), 8 U.S.C. 1254a(a)(4); 8 CFR 244.5, 274a.12(c)(19).

<sup>100</sup> See INA sec. 244(a)(1)(B), 8 U.S.C. 1254a(a)(1)(B); 8 CFR 244.12, 274a.12(a)(12).

<sup>101</sup> 87 FR 30976 (May 20, 2022).

<sup>102</sup> 87 FR 34706 (June 7, 2022).

<sup>103</sup> 87 FR 76074 (Dec. 12, 2022).

<sup>104</sup> 87 FR 23202 (Apr. 19, 2022).

<sup>105</sup> 87 FR 23211 (Apr. 19, 2022).

<sup>106</sup> 87 FR 58515 (Sept. 27, 2022).

<sup>107</sup> 88 FR 5022 (Jan. 26, 2023).

<sup>108</sup> 87 FR 46982 (Aug. 1, 2022).

<sup>109</sup> 88 FR 15434 (Mar. 13, 2023).

<sup>110</sup> 88 FR 60971 (Sept. 6, 2023).

<sup>111</sup> 88 FR 94 (Jan. 3, 2023).

<sup>112</sup> 88 FR 40282 (June 21, 2023).

<sup>113</sup> 88 FR 40304 (June 21, 2023).

<sup>114</sup> 88 FR 40294 (June 21, 2023).

<sup>115</sup> 88 FR 40317 (June 21, 2023).

<sup>116</sup> 87 FR 55024 (Sept. 8, 2022).

despite its robust hiring efforts.<sup>125</sup> This doubling of adjudicative time expended on a single form type over 2 years is highly unusual<sup>126</sup> and cannot be sustained without increasing resources and staffing rapidly.

As discussed earlier in this section, USCIS projects continued growth in EAD filings in FY 2024, requiring a combination of reallocating additional staff to adjudicate EAD applications, providing additional overtime opportunities, and hiring new staff.<sup>127</sup>

Based on these developments, USCIS predicts that without this TFR, approximately 800,000 noncitizens will experience a lapse in employment authorization or proof of employment authorization for the 2-year period beginning May 2024.<sup>128</sup>

### B. Other Measures Taken To Reduce EAD Application Processing Times

USCIS has also taken other significant operational steps to streamline EAD adjudications and reduce EAD processing times. Backlogs in general are a significant concern for the applicants who are applying for benefits with USCIS.<sup>129</sup> 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 and/or employment eligibility verification documentation, 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 on pending EAD applications have on applicants and is striving to address the backlogs through a number of measures, including but not limited to this TFR. Specifically, USCIS has taken the following steps to address EAD application workloads and processing times, which includes initiatives that were implemented prior to the 2022 TFR and are still in effect, such as lifting the hiring freeze, publishing the Fee Rule, and reducing processing time for adjustment of status applicants with visas that are immediately available.

#### 1. Increased EAD Validity Periods for Certain Applicants

As discussed in section II. B., Legal Framework for Employment Authorization, while certain classes of noncitizens are authorized to engage in employment authorization incident to status or circumstance, other classes of noncitizens are authorized to engage in employment only if they apply for and are granted such authorization by USCIS.<sup>130</sup> Under governing regulations, USCIS has the discretion to assign the validity period for EADs.<sup>131</sup>

Since 2021, USCIS has made multiple policy changes to increase the maximum validity period for EADs in a number of categories.<sup>132</sup> In February 2022, USCIS increased the validity period for initial and renewal EADs for asylees and refugees, noncitizens with withholding of deportation or removal, and VAWA self-petitioners from maximum 1 year to maximum 2 years.<sup>133</sup>

<sup>130</sup> See 8 CFR 274a.12(a)-(c).

<sup>131</sup> See 8 CFR 274a.12(a) ("USCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an alien's authorization to work in the United States."); 8 CFR 274a.12(c) ("USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.")

<sup>132</sup> See, e.g., USCIS, DHS, 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> (updating the validity period for initial and renewal EADs issued to applicants for adjustment of status under INA 245 from 1 year to 2 years).

<sup>133</sup> See USCIS, DHS, Policy Alert (PA-2022-07), "Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Categories" (Feb. 7, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220207-EmploymentAuthorizationValidity.pdf>.

USCIS also changed the policy by which, in some cases, initial and/or renewal EADs were issued for noncitizens with deferred action (non-DACA) and parolees for a validity period that was less than the period of deferred action or parole. The update increased the maximum period of EAD validity to run concurrently with the underlying deferred action or parole, thus reducing the need for repeat renewal EAD filings by these noncitizens.<sup>134</sup>

On September 27, 2023, USCIS updated its policy to increase the validity period to a maximum of 5 years for initial and renewal EADs for certain noncitizens who must apply for employment authorization, including applicants for asylum or withholding of removal, adjustment of status under section 245 of the INA, 8 U.S.C. 1255, and suspension of deportation or cancellation of removal.<sup>135</sup> USCIS expects this EAD policy to cause EAD filings in the applicable categories to significantly decrease starting in late FY 2025 and remain low until the third quarter of FY 2028, as there should be relatively few EADs with an expiration date between September 25, 2025, and September 26, 2028. Although USCIS predicts that the main effects of this policy change will not occur until after October 2025, USCIS projects that the increased validity periods will lead to a greater than 95 percent reduction in renewal EAD filing volumes from FY 2026 to late FY 2028 for categories covered by this policy.

The guidance that was published as part of the updated policy also explains that the categories of noncitizens who are automatically authorized employment incident to status or circumstances and provided more information on who can present a Form I-94, Arrival/Departure Record, to an employer as an acceptable document showing employment authorization under List C of Form I-9, Employment Eligibility Verification.<sup>136</sup> This guidance

<sup>134</sup> See USCIS, DHS, Policy Alert (PA-2022-07), "Updating General Guidelines on Maximum Validity Periods for Employment Authorization Documents based on Certain Categories" (Feb. 7, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220207-EmploymentAuthorizationValidity.pdf>.

<sup>135</sup> See USCIS, DHS, Policy Alert (PA-2023-27), "Employment Authorization Document Validity Period for Certain Categories" (Sept. 27, 2023), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230927-EmploymentAuthorizationValidity.pdf>.

<sup>136</sup> See USCIS, DHS, Policy Alert (PA-2023-27), "Employment Authorization Document Validity Period for Certain Categories" (Sept. 27, 2023), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230927-EmploymentAuthorizationValidity.pdf>.

<sup>125</sup> See other parts of this preamble explaining operational challenges encountered through litigation and other events, such as the need for increased staffing at the southwest border.

<sup>126</sup> For example, over the same time period, adjudicative time spent on other large USCIS workloads held relatively steady. As a percentage of adjudication time for all filings, time spent on Form N-400, Application for Naturalization was 22 percent in FY 2021, 22 percent in FY 2022, and 20 percent in FY 2023. Time on Form I-129, Petition for Nonimmigrant Worker seeking H-1B classification was 8 percent of all total filings in FY 2021, 8 percent in FY 2022, and 9 percent in FY 2023.

<sup>127</sup> The resources required to reduce the processing backlogs for renewal EAD applications is discussed at section III.C.3.a.

<sup>128</sup> See section V.B.2. Table 7, TFR Future Population Projections by Month, Rounded to Thousands.

<sup>129</sup> For example, the Citizenship and Immigration Services Ombudsman 2023 Annual Report to Congress stated that the backlogs at USCIS have resulted in an "ongoing exponential increase . . . in requests for case assistance." The Report further states "USCIS began the year fully cognizant of its challenges in decreasing processing times and getting its backlogs under control and took significant steps to accomplish those goals. But 2022 brought with it significant new tasks for the agency that would create their own processing and operational challenges—challenges that the agency continues to grapple with in 2023 and which will impact future workloads." See CIS Ombudsman, DHS, "Citizenship and Immigration Services Ombudsman Annual Report 2023" (June 30, 2023) at v, viii, [https://www.dhs.gov/sites/default/files/2023-07/2023%20Annual%20Report%20to%20Congress\\_0.pdf](https://www.dhs.gov/sites/default/files/2023-07/2023%20Annual%20Report%20to%20Congress_0.pdf).

also clarified that certain Afghan and Ukrainian parolees are employment authorized incident to parole.<sup>137</sup>

With the ongoing efforts to improve processing, which USCIS anticipates will lead to eventual reductions in filing volumes, USCIS will be better able to keep up with the EAD application workflow, avoid lapses in employment authorization and documentation, focus on reducing the overall backlog at USCIS, and enable officers to focus on other workloads.

## 2. Lifted the Hiring Freeze and Increased the Number of Full Time Equivalent Employees

USCIS is a fee-based agency that relies on predictable fee revenue and its carryover from the previous year. Due in part to the significant drop in revenue from the impact of the COVID-19 pandemic on benefit request filings and USCIS' inability to update its fee structure since the 2016 Fee Rule, as explained below, USCIS employed every available means to preserve sufficient funds to meet payroll and carryover obligations. These measures included drastic cuts as well as an agency-wide hiring freeze beginning on May 1, 2020.<sup>138</sup>

USCIS lifted the agency-wide hiring freeze in March 2021. With the hiring freeze lifted, USCIS was able to begin hiring personnel in an effort to return to pre-pandemic staffing levels. Initial hiring was largely internal in order to fill promotional vacancies. Following that initial hiring, USCIS posted public job announcements to hire from outside USCIS. This effort's impact is not realized immediately, as it is lengthy, time-consuming, and ongoing. The hiring process entails posting the job announcement, reviewing resumes, providing qualified candidates' information to the hiring office, conducting assessments and interviews, making and approving selections, and completing background checks prior to a new employee entering on duty. New hires then go through orientation, several weeks of basic training, duty-specific training, and mentoring.<sup>139</sup> The entire process from entering on duty to

a new hire reaching full proficiency may take several months.

Hiring new personnel continued to be a USCIS priority in 2023 in order to help reduce backlogs and meet operational requirements. When DHS issued the 2022 TFR on May 4, 2022, USCIS had approximately 18,500 employees. USCIS ended 2022 with 19,983 staff, and staffing levels grew to 20,631 by June 30, 2023.

As discussed previously, from FY 2021 to FY 2023, USCIS increased the number of FTEs adjudicating EAD applications from 336 FTEs to 630 FTEs, an 87.5-percent increase.<sup>140</sup> However, a large portion of the FTE increase for EADs was dedicated to initial C08 EAD applications due to the 30-day processing requirement. As a result, USCIS was unable to divert resources to other categories, such as renewal EAD applications in the auto-extension categories. From FY 2021 to FY 2023, USCIS increased the number of FTEs adjudicating initial C08 EAD applications by approximately 480 percent.<sup>141</sup>

In short, from FY 2021 to FY 2023, USCIS increased the number of FTEs dedicated to adjudicating EAD applications by 87.5 percent. However, this significant increase in personnel performing EAD adjudications has not been sufficient to address the surge in applications. USCIS expects a continued FTE shortfall in the short term that will prevent USCIS from adjudicating renewal EAD applications in time to prevent a temporary lapse in employment authorization for approximately 800,000 applicants during the 2-year period beginning May 2024.

## 3. Issuance of Final Fee Rule

USCIS is primarily funded by fees charged to applicants and petitioners for the adjudication of immigration and naturalization benefits requests and is authorized, by law, to recover the full cost<sup>142</sup> of all adjudications and naturalization services.<sup>143</sup> USCIS

calculates and proposes fees to recover the full cost of operations associated with adjudicating immigration benefit requests as authorized by section 286(m) of the INA, 8 U.S.C. 1356(m). USCIS last adjusted its fee schedule in December 2016, including the fees for EAD applications, although the mandated biennial fee reviews indicate an urgent need to update USCIS filing fees.<sup>144</sup> However, DHS until recently has been unable to update the fee structure, as explained below, and the current 2016 fee structure, including the Form I-765 fee of \$410 per adjudication, has been insufficient to recover the full cost of USCIS operations, thus leading to the fiscal troubles previously described.<sup>145</sup>

In the spring of 2020, in the wake of the COVID-19 pandemic, USCIS revenue dropped by 40 percent in April and an additional 25 percent in May from the forecasted collections. That created a possibility that USCIS might violate statutory anti-deficiency requirements and led to dramatic cuts in spending through the last half of FY 2020, a hiring freeze, and planned furloughs if revenue did not increase.<sup>146</sup>

Towards the end of June and July 2020, revenue began to return to normal levels and, in conjunction with major budget cuts, allowed USCIS to avoid the furloughs. In FY 2021, USCIS instituted 32 percent cuts to non-payroll expenses, continued the hiring freeze through April 2021, and did not fund enhancements. While USCIS' carryover funding has stabilized, USCIS is still enduring the effects of those 32 percent budget cuts.<sup>147</sup>

DHS issued a final rule on August 3, 2020, to adjust the USCIS fee schedule by a weighted average of 20 percent, reflecting the results of the FY 2019/2020 USCIS fee review.<sup>148</sup> DHS

and naturalization services at a level to "ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants"). This contrasts with congressional appropriated agencies, whose budgets are not directly impacted by fluctuations in fee revenue.

<sup>144</sup> See 81 FR 73292 (Oct. 24, 2016) ("2016/2017 Fee Rule"). Under the Chief Financial Officers Act of 1990 ("CFO Act"), codified at 31 U.S.C. 901-03, and under the Office of Management and Budget (OMB) Circular A-25, USCIS must conduct biennial reviews of the non-statutory fees deposited into USCIS' fee account. The primary objective of a fee review is to determine whether immigration and naturalization benefit fees will generate sufficient revenue to fund the anticipated operating costs associated with administering the nation's legal immigration system and to propose the necessary adjustments.

<sup>145</sup> See 88 FR 402, 405 (Jan. 4, 2023).

<sup>146</sup> See 88 FR 402, 426 (Jan. 4, 2023).

<sup>147</sup> See 88 FR 402, 426 (Jan. 4, 2023).

<sup>148</sup> See 85 FR 46788 (Aug. 3, 2020) ("2020 Fee Rule"). The final rule was issued after DHS has

<sup>137</sup> See USCIS, DHS, Policy Alert (PA-2023-27), "Employment Authorization Document Validity Period for Certain Categories" (Sept. 27, 2023), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230927-EmploymentAuthorizationValidity.pdf>.

<sup>138</sup> Although the agency-wide hiring freeze started on May 1, 2020, USCIS' FOD initiated a hiring freeze in December 2019 and USCIS' SCOPS Directorate did the same starting in February 2020.

<sup>139</sup> See USCIS, DHS, "Training," <https://www.uscis.gov/about-us/careers/training> (last updated Jan. 2, 2020).

<sup>140</sup> An FTE is an approximation of the number of hours of labor that make up the equivalent of one full-time employee. See fn. 123 in section III.A.4 of this preamble.

<sup>141</sup> As previously discussed, USCIS ISOs spent 68,000 hours on C08 initial EAD applications in FY 2021, 116,000 hours in FY 2022, and 361,000 hours in FY 2023.

<sup>142</sup> Full costs of providing all adjudication and naturalization services, includes support costs such as physical overhead, information technology management and oversight, human resources, national security vetting and investigations, accounting and budgeting, and legal services. See 88 FR 402, 417 (Jan. 4, 2023) ("2023 Fee Rule NPRM").

<sup>143</sup> See INA sec. 286(m), 8 U.S.C. 1356(m) (authorizing DHS to charge fees for adjudication

estimated an average annual USCIS deficit of \$1,035.9 million.<sup>149</sup> The rule was scheduled to become effective on October 2, 2020.<sup>150</sup> However, USCIS was not able to implement the fees set out in the 2020 fee rule because it was enjoined by two Federal district courts.<sup>151</sup>

On January 31, 2024, DHS published a new Fee Rule to cover the increased cost of adjudicating benefit requests.<sup>152</sup>

As explained in section III.B.2 of this preamble, prior to finalizing the Fee Rule, a USCIS endured a lengthy hiring freeze that left thousands of positions unfilled for an extended period. Even though the hiring freeze ended on March 31, 2021, USCIS was constrained for a prolonged period by the fee levels in the 2016 Fee Rule. USCIS is working diligently to backfill vacant positions and hire for new ones. However, the Federal recruitment, hiring, and vetting processes take many months followed by onboarding, basic training, and several weeks of form-specific training and mentoring. Incoming receipts have exceeded the agency's gains through hiring, and those hiring gains have been limited by insufficient revenue.<sup>153</sup>

#### 4. Prioritized Adjudication of Employment-Based I-485 Adjustment Applications

Another area in which USCIS is actively prioritizing its workload is employment-based adjustment of status applications, which has downstream effects on EAD application adjudications, particularly those based on a pending adjustment of status application (C09). Since employment-based adjustment of status applicants are eligible for employment authorization based on the pendency of the adjustment of status application, the number of such applications filed with USCIS and the duration of their

pendency directly impact the number of initial and renewal EAD applications filed. 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. USCIS typically processes approximately 120,000 employment-based adjustment of status applications each year,<sup>154</sup> which generally corresponds with the number of available employment-based immigrant visas minus the number of such visas issued by Department of State annually. However, in FY 2021, FY 2022, and FY 2023, additional employment-based visas became available because of unusually low visa usage in the family-sponsored preference categories due in part to consular closures during the COVID-19 pandemic.<sup>155</sup> In response, USCIS prioritized processing of employment-based adjustment of status applications to maximize usage of available visas. By the end of FY 2021, USCIS had processed and approved approximately 175,000 employment-based adjustment of status applications, an increase of approximately 50 percent above the typical baseline.<sup>156</sup> USCIS continued this prioritization in FY 2022, approving more than 220,000 employment-based adjustment of status applications, and in FY 2023, where preliminary estimates show that USCIS approved more than 145,000 such applications. However, at the start of FY 2024 approximately 180,000 employment-based adjustment of status applications remained unadjudicated, including approximately 122,000 impacted by priority date retrogressions that may leave them pending for many years and thereby eligible for C09 EADs during this extended period.<sup>157</sup>

To the extent possible, USCIS is committed to prioritizing adjudicating employment-based adjustment of status applications to utilize the available visa numbers each fiscal year.<sup>158</sup> In turn, many applicants are relieved from filing renewal EAD applications, because approval of the adjustment of status application grants the noncitizen lawful permanent resident status such that they are employment authorized incident to status, and leads to issuance of a Permanent Resident Card, an acceptable Form I-9 document.<sup>159</sup> Therefore, the more adjustment of status applications USCIS is able to process and approve, the fewer C09 renewal EAD applications USCIS will receive, thereby reducing the number of EAD renewal filings overall. In the interim, urgent action is needed to address the growing number of renewal EAD applicants who may soon experience a gap in their employment authorization and/or EAD because of USCIS' predicted but unprecedented renewal EAD processing times.

#### 5. Issued Guidance Stating That Spouses of E and L Nonimmigrants Are Employment Authorized Incident to Status

In March 2022, USCIS issued policy guidance stating that spouses of E<sup>160</sup>

*processes-and-procedures/visa-availability-priority-dates/visa-retrogression* (last accessed Dec. 7, 2023). In the interest of reducing the burden on both the agency and the public, USCIS has implemented multiple increases of the maximum validity period for initial and renewal EADs issued to applicants for adjustment of status under sec. 245 of the INA, 8 U.S.C. 1255, as described in section III.B.1 of this preamble. USCIS' return to its processing goal of 3 months for EAD renewal applications is critically important for applicants facing visa retrogression, as they may require multiple renewals.

<sup>158</sup> While the INA provides that unused employment-based visas allocated to a given fiscal year are made available in the subsequent fiscal year to family-sponsored preference categories, those visas are effectively lost due to other provisions that have the effect, after accounting for the number of immigrant visas used by immediate relatives of U.S. Citizens (among others), of setting the number of family-sponsored preference visas in a fiscal year at 226,000. See INA sec. 201(c) and (d); 8 U.S.C. 1151(c) and (d). To avoid the loss of unused employment-based immigrant visas, USCIS prioritizes employment-based adjustment of status applications over most other applications, including EAD renewal applications.

<sup>159</sup> See 8 CFR 274a.12(a)(1).

<sup>160</sup> See INA sec. 101(a)(15)(E), 8 U.S.C. 1101(a)(15)(E) (providing that a noncitizen entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which the noncitizen is a national, (or, in the case of a noncitizen who acquired the relevant nationality through a financial investment and who has not previously been granted status under this subparagraph, the foreign state of which the noncitizen is a national and in which the noncitizen has been domiciled for a continuous period of not less than 3 years at any point before applying for a nonimmigrant visa under this

published a proposed rule. See 84 FR 62280 (Nov. 14, 2019).

<sup>149</sup> See 85 FR 46788, 46794 (Aug. 3, 2020).

<sup>150</sup> See 85 FR 46788 (Aug. 3, 2020).

<sup>151</sup> *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020) ("ILRC"); *Nw. Immigrant Rights Project v. USCIS*, 496 F. Supp. 3d 31 (D.D.C. 2020) ("NWIRP").

<sup>152</sup> See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, proposed rule, 88 FR 402, 492 (Jan. 4, 2023); and U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, final rule, 89 FR 6194 (Jan. 31, 2024).

<sup>153</sup> From FY 2021 through FY 2022, USCIS received a range of approximately 2.3 to 2.6 million EAD applications (seeking both initial EADs and renewal of initial EADs) each fiscal year. In FY 2023, this figure increased to approximately 3.5 million. This increase in EAD applications contributed to the formation of backlogs, as discussed further in section III.C.1 of this preamble.

<sup>154</sup> See Office of Immigration Statistics, DHS, "2021 Yearbook of Immigration Statistics," Table 7, "Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2012 2021," [https://www.dhs.gov/sites/default/files/2023-03/2022\\_1114\\_plcy\\_yearbook\\_immigration\\_statistics\\_fy2021\\_v2\\_1.pdf](https://www.dhs.gov/sites/default/files/2023-03/2022_1114_plcy_yearbook_immigration_statistics_fy2021_v2_1.pdf) (last visited Nov. 14, 2023).

<sup>155</sup> Family-sponsored visas that remain unused at the end of the fiscal year are made available in the subsequent fiscal year to employment-based categories. See INA sec. 201(d); 8 U.S.C. 1151(d); see also USCIS, DHS, Archive, "Fiscal Year 2022 Employment-Based Adjustment of Status FAQs" (last reviewed/updated Aug. 26, 2022), <https://www.uscis.gov/archive/fiscal-year-2022-employment-based-adjustment-of-status-faqs>.

<sup>156</sup> See USCIS, DHS, News Release, "USCIS Announces FY 2021 Accomplishments" (Dec. 16, 2021), <https://www.uscis.gov/newsroom/news-releases/uscis-announces-fy-2021-accomplishments> (last viewed Nov. 27, 2023).

<sup>157</sup> For more information on visa retrogression, see <https://www.uscis.gov/green-card/green-card->

and L<sup>161</sup> nonimmigrants were authorized to work incident to status and did not need to obtain an EAD in order to seek employment.<sup>162</sup> This new policy resulted in reduced initial and renewal EAD applications by these noncitizen spouses. During the 12 months preceding this policy update, between March 1, 2021, and February 28, 2022, USCIS received an average of 700 A17 (spouse of E nonimmigrant) and 1,500 A18 (spouse of L nonimmigrant) EAD applications per month. Between March 1, 2022, and September 30, 2023, after the policy began to take effect, USCIS received an average of 220 A17 and 350 A18 EAD applications per month. In FY 2023, USCIS received an average of 160 A17 and 90 A18 EAD applications per month. Therefore, this policy resulted in a reduction of about 2,000 initial and renewal EAD applications per month.

#### 6. Permitted Certain Asylum Applicants To Electronically File EAD Applications

In January 2023, USCIS announced that certain asylum applicants were now eligible to electronically file applications for EADs in the C08 category.<sup>163</sup> This allowed applicants to submit their applications, check the status of their case, and receive notices from USCIS online, thus reducing the operational costs associated with paper applications such as scanning, manual data entry, and shredding. These cost savings have allowed resources to be used elsewhere, including funding new positions and overtime. Offering the option to file EAD applications online has made the process more efficient, secure, and convenient for EAD

subparagraph), and the spouse and children of any such noncitizen if accompanying or following to join such alien.).

<sup>161</sup> See INA sec. 101(a)(15)(L); 8 U.S.C. 1101(a)(15)(L) (providing that a noncitizen who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the noncitizen spouse and minor children of any such noncitizen if accompanying him or following to join him”).

<sup>162</sup> See USCIS, DHS, Policy Alert (PA–2022–11), “Documentation of Employment Authorization for Certain E and L Nonimmigrant Dependent Spouses” (Mar. 18, 2022) <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220318-EmploymentAuthorization.pdf>.

<sup>163</sup> See USCIS, DHS, “Asylum Applicants Can Now File Form I–765 Online,” <https://www.uscis.gov/newsroom/alerts/asylum-applicants-can-now-file-form-i-765-online> (last accessed Dec. 7, 2023).

applicants and increased operational efficiencies for USCIS.

#### 7. Alternative Backlog Reduction Method Considered But Not Implemented: Changing the Adjudication of EAD Renewal Applications To Prioritize Adjudication by the Expiration Date of an Applicant’s 180-Day Automatic Extension

In addition to the backlog reduction efforts described in section III.B of this preamble, USCIS explored the possibility of changing the order of renewal EAD adjudications from a general First in First Out (FIFO) processing order<sup>164</sup> to a processing order that would prioritize adjudication based on the expiration date of the applicant’s 180-day automatic extension period. After careful consideration, USCIS has determined that this option was not operationally feasible. The primary reasons are the manual effort required to identify and assign cases to officers based on when an individual’s previous employment authorization expires, the volume of impacted cases, and the inability to surge additional resources to implement such a change.

Regarding the manual effort required to identify when the EAD associated with a renewal case expires, there is currently no system-based way to assign work based on expiring employment authorization. This means that, although cases can be tracked online using existing systems, the act of delivering those cases based on expiration dates to an officer requires that they be manually assigned. Additionally, as the categories of renewal applications are filed and adjudicated in a mix of paper and electronic formats, records staff must physically locate each individual paper file. EAD applications that are paper files are generally organized and assigned by receipt date on file room shelves, so any attempt to manually identify when the EAD associated with a renewal case expires would require physically tabbing through all files received on the same given day and for the same filing category. Multiplying that effort by the hundreds of thousands of pending renewal EAD applications would cause significant inefficiencies for both adjudications and records staff, diverting resources further away from other tasks, in turn creating new backlogs. As of November 2023, approximately 467,000 thousand EAD applications pending with SCOPS (44 percent) remained in paper files.

<sup>164</sup> Under a FIFO processing order, applications are generally reviewed in the order in which they are received.

Even with respect to electronically filed renewal EAD applications, it is currently not possible to assign cases electronically by expiration date. USCIS would have to do so manually, using spreadsheets to log and identify all pending EAD renewal applications and then document and sort each case by date of EAD expiration. USCIS would then need to identify each application in the system and then manually route each EAD application to be assigned for pre-processing and adjudication.<sup>165</sup> The task of manually assigning work for both pre-processing and adjudication would take additional time and interfere with USCIS’ overall productivity until the system can be modified to accommodate a new process for prioritizing and assigning work. As discussed below, it would take at least one year to modify the system to re-prioritize this workload.

In addition, the information technology resources required to modify the system in this manner and the time it takes to develop, test, and implement an automated assignment process make it infeasible to reprioritize the workload in the system in time to prevent the renewal EAD expirations beginning in May 2024. To implement this process in USCIS’ Electronic Immigration System online system, it would take the USCIS Office of Information Technology approximately 6 to 9 months of development work and an additional 3 months for beta testing and deployment. In addition, changes would need to be made to the process by which cases are selected for adjudication in the case management system used by USCIS to process immigration benefit requests.

Finally, prioritizing renewal EAD applications based on the expiration of the 180-day automatic extension periods versus a general FIFO processing order would lead to the inequitable result that applicants who filed their renewal EAD applications right before the expiration of their EADs could be prioritized over applicants who filed their renewal EAD applications according to USCIS’ recommended filing period in advance of their EAD expiration date. Such prioritization could incentivize more applicants to file their renewal EAD applications close to the expiration of their EADs, as their applications would effectively be expedited over other applications filed up to 6 months in advance of expiration. Should that occur, USCIS and the public would

<sup>165</sup> Before most applications and petitions are assigned to an officer for adjudication, they are pre-processed, meaning the information contained with the case is ingested, vetted, and verified, and then the case is routed to the appropriate workflow for adjudication.



become more reliant on automatic extensions to help minimize the problem of gaps in employment authorization and/or valid documentation instead of the preferred solution of maintaining the current processing order, continuing to pursue additional processing efficiencies, and temporarily extending the automatic extension period to up to 540 days in this TFR.

### C. The Need To Increase the Automatic Extension Period From 180 Days to 540 Days

#### 1. EAD Application Processing Backlogs

USCIS relies on a combination of internal processes and plans to work to reduce backlogs.<sup>166</sup> Although USCIS has been diligently implementing the backlog mitigation efforts discussed in section III.B of this preamble in order to reduce renewal EAD application processing times, USCIS is unable to achieve its target 3-month processing goal or significantly reduce the EAD renewal processing times to below 180 days due to the volume of pending EAD applications, new EAD filings that USCIS continues to receive, and time needed to increase staffing levels to meet existing demands.

As of February 2024, USCIS had approximately 439,000 pending renewal EAD requests in the categories eligible for automatic extension,<sup>167</sup> and received an average of approximately 52,800 additional automatic extension-eligible renewal EAD applications per month in FY 2023.<sup>168</sup> These additional renewal

<sup>166</sup> The primary way staffing for backlog reduction has taken place is through hiring based on fee-funded receipts, improved efficiencies to current processes, and some appropriations from Congress.

<sup>167</sup> The vast majority of applicants filing renewal EAD applications and who are eligible for the automatic extension of EADs under 8 CFR 274a.13(d) fall into three filing categories: (1) noncitizens who have properly filed applications for asylum and withholding of deportation or removal (C08); (2) 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); and (3) 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, 8 U.S.C. 1229b, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (C10). In FY 2023, these three filing categories made up nearly 61 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 41 percent of the renewal EAD receipts filed in categories eligible for the automatic extension, while the C09 category comprised approximately 10 percent and the C10 comprised approximately 10 percent.

<sup>168</sup> In FY 2023, USCIS received a total of approximately 633,000 renewal EAD applications

applications are adding to the current backlog, given that USCIS currently completes approximately 49,100 automatic extension-eligible renewal EAD applications per month.<sup>169</sup>

In FY 2023, the 80th percentile processing time for all renewal EAD applications was 14.2 months. For those automatic extension-eligible renewal applicants, as of February 2024, the 80th percentile processing time was 14.5 months.<sup>170</sup> Given these processing times and USCIS' EAD adjudication rates, DHS projects that, between May 2024 to March 2026, approximately 800,000 renewal applicants eligible for an automatic extension will exceed the 180-day automatic extension period unless this Temporary Final Rule is issued.

#### 2. Impact of Long Processing Times for Renewal EAD Applications

For the reasons discussed in section III.A of this preamble, the dramatic increase in EAD applications and associated operational challenges were caused by a number of external developments that constrained USCIS' ability to dedicate sufficient resources to processing renewal EAD applications. As a result, the 180 days of additional employment authorization and/or EAD validity under 8 CFR 274a.13(d) are insufficient. After the additional 180 days are exhausted, many applicants will still be waiting for their renewal EAD applications to be approved. These applicants will experience a lapse in their employment authorization and/or EAD validity while their renewal applications remain pending.

Without immediate intervention, DHS estimates that the situation will dramatically worsen over time, as each month thousands of additional renewal EAD applicants will be at risk of losing their employment authorization and/or EAD validity despite the 180-day automatic extension period currently provided by regulation.

USCIS projects that approximately 800,000 individuals could lose employment authorization between May 2024 and March 2026 in the absence of

in the categories eligible for automatic extension, which averages to approximately 52,800 filings per month.

<sup>169</sup> Based on current processing times, many of the 534,000 currently pending renewal EADs will remain pending through the end of FY 2024. These applications generally do not add to the number of renewal applicants who will lose employment authorization in May 2024 because most of the pending renewal applications were filed under the 2022 TFR and still benefit from the 540-day automatic extension period.

<sup>170</sup> For more information on how USCIS calculates its processing times, see USCIS' web page at <https://egov.uscis.gov/processing-times/more-info> (last visited Nov. 14, 2023).

this TFR.<sup>171</sup> In May 2024, 3,000 renewal applicants, the majority<sup>172</sup> of whom are in the C08 pending asylum applicant category, are projected to experience a gap in their employment authorization and/or EAD validity. The number of applicants who could lose employment authorization and/or EAD validity each month will rapidly increase to 12,000 during July, and peaking at more than 60,000 during November 2025, 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. By statute, asylum applicants cannot be approved for initial EADs until their asylum applications have been pending for 180 days.<sup>173</sup> 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 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 work 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 their authorization to work.

Continuation of employment authorization and/or EADs is also a requirement for their employers who must comply with Form I-9 reverification requirements in order to continue to employ these employees.<sup>174</sup> In addition, some employers, notwithstanding possible violation of section 274B of the INA, 8 U.S.C. 1324b

<sup>171</sup> See section V.B.2., Table 7, TFR Future Population Projections by Month, Rounded to Thousands.

<sup>172</sup> See section V.B.2., Table 6A. EADs that could lapse in the absence of the TFR, by Class and Percent Variation.

<sup>173</sup> See INA sec. 208(d)(2), 8 U.S.C. 1158(d)(2).

<sup>174</sup> See 8 CFR 274a.2(b)(1)(vii).

(governing unfair immigration-related employment practices), may be hesitant to hire asylum seekers in the first place if it appears maintaining their employment will be difficult due to potential lapses in employment authorization.

Continuous employment authorization and documentation during the pendency of an asylum application is vital for asylum seekers in the United States to access housing, food, and other necessities. In addition, asylum seekers may need income from 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 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. The physical harm experienced by many asylum seekers frequently necessitates continuous medical care for extended periods of time. Finally, the purpose for which asylum seekers came to the United States is to seek long-term protection by receiving asylum.

In addition, having unexpired employment authorization and EADs is necessary for certain noncitizens such as asylum applicants and TPS beneficiaries when they apply for benefits that require proof of identity or immigration status. The only acceptable document available to some noncitizens such as asylum applicants and TPS beneficiaries to establish identity for other purposes, such as obtaining a REAL ID-compliant driver's license or identification card, may be an unexpired EAD.<sup>175</sup> REAL ID-compliant driver's licenses as well as identification cards are used for other official purposes including access to Federal facilities and boarding federally regulated commercial aircraft.<sup>176</sup> Without an unexpired EAD, certain classes of noncitizens would not be able to apply for REAL ID-compliant driver's licenses and IDs.

DHS is aware of the importance of employment authorization and evidence of employment authorization for applicants' and their families' livelihoods, as well as their U.S. employers' continuity of operations and financial health. DHS also is cognizant of the potential detrimental impact that gaps in employment authorization may have on an applicant's eligibility for future immigration benefits should the

applicant, *e.g.*, inadvertently engage in unauthorized employment during the gap,<sup>177</sup> and on their U.S. employers who must examine unexpired documents that evidence their employees' employment eligibility and attest that their employees are authorized to work in the United States.<sup>178</sup> DHS also acknowledges that the substantial increase in backlogs and prolonged processing times for renewal EAD applications are not the fault of applicants, but nonetheless will have significant adverse consequences for applicants, their families, and their employers in the absence of this TFR.

### 3. The Current Automatic Extension Period of 180 Days Must Be Temporarily Increased to 540 Days

DHS has determined that the automatic extension period of up to 180 days at 8 CFR 274a.13(d) is currently insufficient to meet the original purpose for which it was implemented: to prevent the occurrence of gaps in employment authorization and documentation for eligible applicants.<sup>179</sup> Although USCIS has significantly increased staffing as well as case completions, these gains have been outstripped by the increased volume of receipts and other operational issues. As a result, USCIS is unable to significantly increase its rate of completion in the immediate term and, therefore, is currently unable to meaningfully reduce the volume of pending cases while also keeping pace with the inflow of renewal EAD filings. While USCIS will continue to explore and implement ways to improve adjudicative efficiencies in the short and long term, USCIS expects that its substantial renewal EAD backlogs will continue in the immediate future. This temporary circumstance has created an 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.

<sup>177</sup> 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 secs. 245(c)(2) and (8), 8 U.S.C. 1255(c)(2) and (8).

<sup>178</sup> See, *e.g.*, INA sec. 274A(b)(1), 8 U.S.C. 1324a(b)(1), 8 CFR 274a.2(a)(3).

<sup>179</sup> See Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers final rule, 81 FR 82398, 82405 (Jan. 17, 2017) ("To prevent gaps in employment for such individuals and their employers, the final rule provides for the automatic [180-day] extension of EADs (and, where necessary, employment authorization) upon the timely filing of a renewal application.").

#### a. Reduce Backlogs

As stated above, USCIS received an average of approximately 52,800 automatic extension-eligible EAD applications per month in FY 2023, and completes approximately 49,100 such requests per month, leading to the growing backlog.<sup>180</sup> The 80th percentile processing time for the automatic extension categories combined as of February 2024 was 14.5 months. Based on current incoming volumes and completions, USCIS projects that this backlog will hold steady, if not slightly increase, in the next 6 months. USCIS began to hire following the end of the hiring freeze associated with the fiscal impacts of COVID-19 and the potential furlough, both of which contributed to higher-than-average attrition. The hiring and training processes are lengthy, but USCIS is continuing to grow and see the increases in completions associated with improved staffing. Additionally, the agency continues to refine and expand the use of systems to improve processing efficiency.

Based on the growth of receipts for renewal EAD applications in the past year<sup>181</sup> and USCIS' projection of similar growth, DHS believes that a temporary increase of 360 days (beyond the 180-day period) for a total of 540 days (approximately 18 months) is an appropriate increase of the automatic extension period to mitigate the risk that a majority of eligible applicants will experience a lapse in employment authorization or EAD validity, consistent with the purpose of the generally applicable automatic extension provision provided under the current regulation.

The temporary extension period implemented in this TFR better reflects current and potential processing times for renewal EADs and should provide USCIS with more time to further increase adjudicative staff, implement additional processing efficiencies, and reduce renewal EAD processing times to a level that aligns with the current up to 180-day automatic extension provision. USCIS is committed to mitigating the impact of renewal EAD application processing delays on applicants as it continues to work to return to its goal of processing renewal EAD applications within 3 months.<sup>182</sup>

<sup>180</sup> See section V.B.2, Table 6A., EADs that could lapse in the absence of the TFR, by Class and Percent Variation.

<sup>181</sup> See section III.A, Table 1C. of this preamble for more details.

<sup>182</sup> See USCIS, DHS, "Reducing Processing Backlogs," <https://egov.uscis.gov/processing-times/reducing-processing-backlogs> (last visited Jan. 19, 2024).

<sup>175</sup> 6 CFR 37.11(c).

<sup>176</sup> REAL ID Act of 2005, Public Law 109-13, div. B, Title II, Sec. 201(3) (May 11, 2005).

To determine how long DHS should provide this temporary increased automatic extension period, DHS assessed the pending and incoming volume of renewal EAD filings against current USCIS resources. As of February 2024, USCIS had approximately 439,000 pending renewal EAD requests in automatic extension-eligible categories, and this is projected to increase for the near future. To achieve USCIS' processing goal of 3 months for EAD renewal applications,<sup>183</sup> USCIS must keep pace with the incoming volume (in other words, complete approximately 57,500 renewal EAD requests in automatic extension-eligible categories per month projected in the 18 month period beginning in May 2024) in addition to reducing the pending volume of renewal requests from 439,000 to 172,500.<sup>184</sup> USCIS anticipates that the decrease in filings for applicants who received an EAD with 5-year validity will provide an opportunity to address existing backlogs and improve processing times. USCIS currently completes approximately 49,100 automatic-extension eligible renewal EAD adjudications per month, averaging 0.23 hours per completion. To reduce the expiration counts to near zero by the end of the TFR period, USCIS would need to increase completions by approximately 4,900 per month, which is about a 10% increase. This means that USCIS would need to devote approximately 162,000 officer hours a year at 15 minutes per case, or achieve an equivalent increase in completions through policy changes, processing enhancements, or other means, in order to keep pace with the incoming flow of new renewal requests and minimize the number of renewal applicants who may lose their employment authorization and/or documentation prior to the approval of their EAD applications. As described in section III.C.3.b of this preamble, USCIS will continue pursuing other means to increase completions and reduce expirations while this TFR is in effect.

Therefore, DHS has concluded that it will authorize a temporary 360-day increase to the automatic 180-day extension period, for a total of 540 days, to individuals who file a renewal EAD application during the 540-day period following publication of this rule. DHS

<sup>183</sup> See USCIS, DHS, "Reducing Processing Backlogs," <https://egov.uscis.gov/processing-times/reducing-processing-backlogs> (last visited Jan. 19, 2024).

<sup>184</sup> USCIS estimates that 172,500 pending requests translates roughly to a 3-month processing time, depending on monthly EAD renewal application receipts and the number of officer hours devoted to processing renewal receipts.

will also grant the additional 360-day increase to the automatic extension period to those with pending renewal applications that were filed after the expiration of TFR 2022, that is, on or after October 27, 2023. Applicants who file an EAD 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).

This TFR applies to two groups of applicants. First, the rule applies to those renewal applicants eligible for the automatic extension who have filed their renewal EAD applications on or after October 27, 2023,<sup>185</sup> which remain pending as of the date this rule goes into effect, [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], and whose EAD has not expired or whose current up to 180-day auto-extension has not yet lapsed, since this group is at imminent or near-term risk of experiencing a gap in employment authorization and/or documentation.<sup>186</sup> Second, the rule applies to new renewal applicants who file their EAD applications during the 18-month period following the rule's effective date to avoid a future gap in employment authorization and/or documentation.<sup>187</sup> However, in recognition of Congress' clear intent in the INA to prohibit and provide penalties for unauthorized employment, including the accountability of employers that employ noncitizens who are not authorized to work in the United States,<sup>188</sup> this TFR does not address periods of unauthorized employment. In other words, this rule does not cure any unauthorized employment that may have accrued prior to issuance of the rule.

In addition, DHS has determined that the temporary amendment made by this rule should remain in the Code of

<sup>185</sup> Individuals who have filed their renewal EAD application on or before October 26, 2023.

<sup>186</sup> An individual who filed a renewal EAD application on or after October 27, 2023, but whose application was denied prior to the publication date of this rule, no longer has a pending application and therefore will not receive the additional automatic extension.

<sup>187</sup> Providing a set amount of additional automatic extension time for a set 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, since the temporary solution is clear, can be relied upon, can be planned for, and otherwise operates in the same way as the existing automatic extension described in 8 CFR 274a.13(d)(1) and the 2022 TFR.

<sup>188</sup> See generally INA sec. 274A, 8 U.S.C. 1324a.

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.<sup>189</sup> As such, this TFR will take effect on April 8, 2024, and will be removed from the CFR on September 20, 2027, that is, approximately 3 years and 6 months (or 1,260 days) after the rule takes effect, although no new beneficiaries will receive a 540-day automatic extension after September 30, 2025. Further, as is consistent with current guidance, applicants should file a renewal EAD application no earlier than 180 days prior to the expiration date of their EAD.

#### b. Improve Future Processing Times and Reduce Filing Volume

DHS also considered other factors that may further help to reduce the renewal EAD application processing times, including the potential for additional officers based on a potential increase in filing fee revenue while this TFR is in effect, as well as processing efficiencies through streamlining certain steps in the processing of renewal EAD applications and the policy changes described above. Based on the available data on the pending and incoming volume of renewal EAD filings, and taking into consideration future variables, such as increased adjudicative staff and filing fees, USCIS expects to improve its processing times over the coming years.

Additionally, the automatic extensions provided in this TFR will extend through the period in which USCIS expects to see a decrease in filings due to the policy change to provide 5-year validity to certain categories of EADs. This window of decreased receipts should provide USCIS the opportunity to significantly decrease backlogs. Based on the conditions in place at the beginning of FY 2024, USCIS projects that the implementation of the 5-year-maximum EAD policy will result in a significant drop in EAD renewal applicants as of September 27, 2025. The largest volume of EAD categories are C08s, C09s, and

<sup>189</sup> 720 days is the amount of time needed to cover the up to 540-day automatic extension for all EAD renewal applicants eligible for the automatic extension, including those who timely filed an EAD renewal application on or before September 30, 2025 but whose EAD expires within 180 days after September 30, 2025. Such applicants could be eligible for the up to 540-day automatic extension, beginning on the day their EAD expires.

C10s, which have generally been issued 5-year EADs starting on September 27, 2023.<sup>190</sup> This means that EADs in these categories issued on or after September 27, 2023, will not be facially expiring until on or after September 26, 2028. Thus, DHS projects, as of the beginning of FY 2024 that there will be very few EAD renewal applicants in these categories after September 27, 2025 (just before the beginning of FY 2026), until early FY 2028. 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.

In addition, the 540-day filing period will ensure that eligible EAD renewal applicants who timely file a renewal application will have a near term solution and will not experience a lapse in employment authorization and/or documentation starting in May 2024, while USCIS continues to pursue a long-term solution by soliciting public input and fully assessing the effects of policy and operational changes described in this preamble.

#### 4. EAD Renewal Applicants at Risk of Experiencing a Gap in Employment Authorization or EAD Validity Under This TFR

The data projection in the Regulatory Impact Analysis (“RIA”) indicates that even with the 540-day automatic extension provided in this TFR, approximately 260,000 EAD renewal applicants are potentially at risk of experiencing a gap in employment authorization or proof of employment authorization.<sup>191</sup> That is, at the baseline and assuming that no operational or other policy changes are implemented, of the projected 689,000 (lower bound estimate) to 824,000 (upper bound estimates)<sup>192</sup> of renewal applicants who receive a temporary up to 540-day automatic extension period, about 260,000 renewal EAD applicants could still lapse between November 2025 and April 2027.<sup>193</sup> However, this projection is based on data from the beginning of

FY 2024 and the conditions in place at that specific time. Because of several variables, these data projections cannot fully take into account the complete effect of operational and policy changes described above, combined with any future changes and operational shifts (such as hiring additional officers or additional technological changes and operational shifts that improve processing efficiency) that USCIS plans to undertake to reduce EAD processing times.<sup>194</sup> This TFR will provide USCIS with more time to evaluate the effects of the operational changes already implemented<sup>195</sup> and consider and implement additional operational, policy, and technological changes that may further improve the overall efficiency of USCIS adjudications. Based on current projections, this TFR also will ensure that, during the 540 days following publication of this TFR, none of the affected applicants are expected to experience a gap in employment authorization and/or EAD validity because of USCIS processing delays. This TFR will therefore address the associated harmful effects that gaps in employment authorization and/or documentation will have for applicants, their families, their employers, and the economy during that time.

As part of the development of this rule, DHS considered whether the temporary automatic extension period in the new 8 CFR 274a.13(d)(6) should be increased to at least up to 730 days (rather than up to 540 days). Based on the baseline data projections, DHS believes that increasing the automatic extension period to at least up to 730 days could ensure that a large part of the approximately 260,000 renewal EAD

applicants who are currently predicted to experience a gap in employment authorization and/or documentation under the 540-day automatic extension period would not experience any gaps.

However, although DHS understands that granting an automatic extension of 540-days might not fully resolve the problem, DHS has determined to focus on near-term needs of applicants, their families, and employers by ensuring that, through this TFR, none of them will imminently or in the near-term experience the harmful effects that gaps in employment authorization and/or documentation could create. At the same time, the rule provides DHS with an additional window during which it can consider long-term solutions by soliciting public comments, evaluating the effects of ongoing policy and operational changes described in this preamble, and continuing to identify new strategies and efficiencies in the future.

Creating a near-term solution with a 540-day extension period is furthermore appropriate because longer extension periods would create additional complexities for employers. For example, TPS designations and associated EAD benefits cannot be granted for longer than 18 months (which is approximately 540 days).<sup>196</sup> If USCIS were to extend the automatic EAD extension period beyond 540 days, it would have to create a separate provision for TPS-based EAD applicants. Having up to 730 days of an automatic extension period for one group of EAD renewal applicants and 540 days for others increases the risk of confusion as employers would be required to understand and adhere to additional different extension periods depending on eligibility category on the EAD the worker possessed and when the EAD renewal application was filed. For example, an employer may have multiple employees who are employment authorized under the C08 category but, depending on when their EAD renewal application was filed, those employees may have different amounts of time for which their employment authorization and EAD are automatically extended. Even though they all have employment authorization under C08, those employees who filed an EAD renewal application before October 27, 2023, would have an automatic extension up to 540 days, whereas those who filed on or after October 27, 2023, would have an automatic extension up to 730 days. These variables increase the risk that an

<sup>194</sup> Although these data projections cannot fully take into account the complete effect of possible operational and policy changes, USCIS does include a sensitivity analysis that considers a change in officer output by +/- 10 percent and +/- 15 percent. All other variables remain constant. See Tables 6A and 6B.

<sup>195</sup> For example, as explained in section III.B.1. of this preamble, USCIS expects that the new 5-year EAD practice implemented in September 2023 will cause certain EAD renewal filings in the applicable categories to significantly decrease starting in October 2025 and to remain low until the third quarter of FY 2028. There should be very few EADs in the categories covered by the 5-year EAD policy with a validity expiration date between September 25, 2025, and September 26, 2028. Although the main effects of the 5-year EAD policy change will not occur until October 2025, USCIS projects that the increased validity periods will lead to a 60 percent reduction in volumes, on average, and possibly greater for categories who historically file only one EAD renewal to maintain employment authorization during the pendency of their primary immigration benefit. After October 2025, USCIS, as well as applicants filing for renewal of their EADs, will benefit from the long-term effects of this policy change as the reduced filing volumes should allow USCIS to reduce EAD renewal processing times.

<sup>190</sup> In general, USCIS issued EADs for 2 years in these categories prior to September 27, 2023.

<sup>191</sup> See V.B.2. Table 6 detailing how variation in the inputs used to the model a baseline affect the range of results of the rule’s estimated impacts in the RIA.

<sup>192</sup> See V.B.2. Table 6 and Table 7.

<sup>193</sup> DHS predicts that, based on the high level of C08 filings who received a 2-year validity EAD prior to the policy change implementing a 5-year policy, USCIS will experience a spike in renewal EAD processing times starting around August 2024 and lasting through October 2025 because of a large amount of C08 renewal filings. As a result of this spike in processing times, USCIS projects that approximately 260,000 renewal EAD applicants could lapse between November 2025 and April 2027 if there is no change to current conditions.

<sup>196</sup> See INA secs. 244(a)(2), (b)(2), (d), 8 U.S.C. 1254a(a)(2), (b)(2), (d); 8 CFR 244.12.

employer may make a mistake when verifying employment authorization or determining when reverification needs to occur. Because employers may face civil money penalties if they do not properly maintain employment eligibility verification paperwork or employ a noncitizen without employment authorization,<sup>197</sup> the risk of a mistake stemming from different automatic extension periods is not insignificant.

In addition, DHS currently assesses that it is premature to grant an automatic extension for up to 730 days (or approximately 2 years), in part because the longer the period of time before an employer has to reverify a noncitizen employee whose employment authorization is automatically extended, the greater the risk they could unknowingly employ someone whose employment authorization has ended.<sup>198</sup>

Additionally, both employers and applicants are already familiar either with the normal 180-day extension or the 540-day extension under the 2022 TFR. The 540-day extension provided under the 2022 TFR continues to be effective for some applicants until October 15, 2025, and having other validity periods in this 2024 TFR may be confusing to applicants, employers, and the public at large. For these reasons, and because employers would assess the applicability of the auto-extension based in part on a non-secure document (such as the Form I-797C, Notice of Action), at this time DHS prefers shorter validity periods for temporary, non-secure documents.

Also, operationally, while managing 540- and 730-day extensions might be feasible and could mitigate harms projected after October 2025, the additional complexity, for both USCIS and employers, of administering different automatic extension durations could delay issuing or implementing this TFR to address imminent lapses in employment authorization and EAD validity.

DHS also believes that the automatic extension period of 540 days is appropriate in scope because of the uncertainties in data projections. As described above, USCIS' current projections are based on factors as they exist as of the beginning of FY 2024 and the conditions in place at that specific time. USCIS' projections become less certain further into the future because

those existing factors will be impacted as changes and operational shifts arise. For example, over the course of the coming months, processing times may improve based on the policy and operational changes described throughout this preamble and by gaining additional adjudicative efficiencies and technological changes. As a result, the projection that approximately 260,000 renewal EAD applicants might experience a lapse in employment starting in October 2025 may exceed the actual number. On the other hand, there are also unpredictable variables that are out of USCIS's control, such as the events that resulted in the need for this very rulemaking. Thus, because of these uncertainties, DHS believes it to be appropriate to address the imminent and near-term needs of applicants and their U.S. employers by implementing an up to 540-day automatic extension period for eligible EAD renewal applications properly filed during the 540 days after this TFR is published, and to create a longer-term solution after soliciting additional input and having had the opportunity to fully assess the effects of USCIS policy and operational changes described in this preamble.

Finally, DHS notes that providing a 730-day *filing period* (i.e., the period of time, following publication of this rule, during which the timely filing of an EAD renewal application results in an up to 540-day automatic extension), would not assist those 260,327 EAD renewal applicants who could still experience a lapse in their EAD validity. This is because the cause of the remaining 260,000 at-risk renewal EAD applicants under this TFR is primarily the number of 2-year initial asylum application EADs (C08) issued in mid- to late-FY 2023, when USCIS substantially increased its production to comply with the 30-day processing time requirement imposed by the *Rosario* court order.<sup>199</sup> Based on current data predictions, and if staffing levels and adjudicative efficiencies remain unchanged, renewal of these initial C08 EADs will be pending longer than the 540-day automatic extension period. Thus, extending the filing period to 730 days would not assist these applicants and would not have an impact because they will already have timely-filed and pending EAD renewal applications. If their applications are approved, they generally will be granted a 5-year EAD and/or employment authorization.

For these reasons, DHS believes an up to 540-day automatic extension period

and a 540-day automatic extension filing period are appropriate as they are narrowly tailored to serve the imminent short-term need of eligible EAD renewal applicants and their U.S. employers. These periods also allow DHS to consider longer-term solutions following receipt of additional input and assess the effect of ongoing and future policy and operational changes. If DHS determines that future regulatory action would be warranted, DHS may issue another rule. DHS welcomes public comment that would inform any potential future regulatory actions on this subject, including whether to permanently extend the automatic extension period to 540 days, or whether a different permanent extension period should be implemented, for some or all applicants covered by the automatic extension provision on either a temporary or permanent basis.

#### D. Severability

In issuing this TFR, it is DHS's intention that the rule's various provisions be considered severable from one another to the greatest extent possible. For instance, if a court of competent jurisdiction were to hold that the automatic extension may not be applied to a particular category of renewal EAD applicants or in a particular circumstance, DHS would intend for the court to leave the remainder of the rule in place with respect to all other covered persons and circumstances. DHS's overarching goal is to avoid widescale lapses in employment authorization and EAD validity that would result in substantial and unnecessary harm to noncitizens who timely filed for extensions of employment authorization, their families, their employers, and the public at large.

### IV. Temporary Regulatory Change: 8 CFR 274a.13(d)(5) and 8 CFR 274a.13(d)(6)

#### A. Adding New 8 CFR 274a.13(d)(6)

With this TFR, DHS is amending 8 CFR 274a.13(d) to add a new paragraph (6) that will be in effect temporarily until September 20, 2027. 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 properly file a renewal EAD application on or after October 27, 2023, and on or before September 30, 2025 and whose application is pending

<sup>197</sup> See INA sec. 274A(e)(5), 8 U.S.C. 1324a(e)(5).

<sup>198</sup> EAD renewal applications are filed by the noncitizen, so employers do not know when or if the application is approved. Employers usually must rely on the employee to provide the information.

<sup>199</sup> See *Rosario v. USCIS*, 365 F.Supp.3d 1156 (W.D. Wash. 2018).

during the 18-month<sup>200</sup> period beginning April 8, 2024, and ending September 30, 2025. Automatic extensions of employment authorization and/or EAD validity will revert to the up to 180-day period for those eligible applicants who timely file renewal EAD applications after September 30, 2025. The increased automatic extension period will apply to eligible renewal applicants who timely file their EAD applications on or before the last day of the 18-month period.

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 renewal EAD request even if this date is after September 30, 2025.

Moreover, 8 CFR 274a.13(d)(6) will remain in the CFR for an additional 720 days after this 540-day period, until September 20, 2027, to ensure that renewal applicants who are already within their up to 540-day automatic extension period as of September 30, 2025, 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 (“facially 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 renewal EAD 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).<sup>201</sup> While the current provision at 8 CFR 274a.13(d)(4), and, likewise, the provision in this TFR, do not require

<sup>200</sup> For ease of reference, DHS sometimes refers to the approximate period of 18 months. However, the precise number of days is 540.

<sup>201</sup> As it is currently the case with the up-to 180-day automatic extension, if an adjustment of status applicant’s (C09) EAD card is combined with the advance parole authorization, *i.e.*, the applicant is issued a combo card (in this case, the EAD card itself has an annotation “SERVES AS I-512 ADVANCE PAROLE”). Similarly, the 540-day automatic extension provided by the 2022 TFR, as well as the up-to 540-day automatic extension provided by this rule, do not apply to the advance parole part of the applicant’s combo card.

that the 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 an automatic extension and currently includes an explanation of the up to 180-day automatic extension period. On and after April 8, 2024, 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 renewal EAD application before April 8, 2024. However, even Form I-797C notices for an EAD application filed after October 26, 2023, that refer to a 180-day automatic extension still meet the regulatory requirements. Therefore, individuals in the categories covered by this rule who are issued Form I-797C notices with a Received Date of October 27, 2023, through the day preceding April 8, 2024 that refer to a 180-day extension, along with their qualifying EADs, still receive the extension of up to 540 days from the date on the face of the EAD under this rule. USCIS will update the web page on the USCIS website that is referenced in the current Form I-797C receipt notice to reflect the change in the automatic extension period. The public should refer to this web page when determining whether a Form I-797C Notice of Action, if presented with the facially expired EAD, is acceptable to show that the EAD validity is extended. Employers completing Form I-9 may attach a copy of the web page 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. The automatic extension established by this rule applies to EADs as such; therefore, if another agency accepts unexpired EADs for any purpose (such as establishing identity or, in some situations, immigration status), then the agency should generally accept the EADs that are automatically extended under this rule. This applies to benefit granting agencies that are registered to use the SAVE<sup>202</sup> program to verify

<sup>202</sup> SAVE is a program administered by USCIS and is used by Federal, state and local benefit granting agencies to verify the immigration status of their benefit applicants in order for the agency to determine eligibility for the benefits they

immigration status, because SAVE can verify a benefit applicant’s immigration status using an automatically extended EAD.

This rule does not modify the current reverification 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 extends the automatic extension period in 8 CFR 274a.13(d) from up to 180 days to up to 540 days. Therefore, to complete Form I-9 for new employment, the employee and employer should use the extended expiration date to complete Sections 1 and 2 of the Form I-9 and reverify once the automatic extension period expires.<sup>203</sup> 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 once the automatic extension expires.<sup>204</sup>

Under this TFR, 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.<sup>205</sup>

#### *B. Amending 8 CFR 274a.13(d)(5)*

To avoid confusion between the automatic extension period granted under 8 CFR 274a.13(d)(5) and period granted under newly added 8 CFR 274a.13(d)(6), DHS is amending existing 8 CFR 274a.13(d)(5) by revising the heading in the paragraph to reflect that the paragraph applies to renewal applications properly filed on or before October 26, 2023.<sup>206</sup>

With this TFR, DHS is not extending or otherwise amending the provisions in

administer. See <https://www.uscis.gov/save> (last visited Jan. 19, 2024).

<sup>203</sup> See 8 CFR 274a.2(b)(1)(vii); see also USCIS, DHS, “Automatic Extensions Based on a Timely Filed Application to Renew Employment Authorization and/or Employment Authorization Document” <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/50-automatic-extensions-of-employment-authorization-and-or-employment-authorization-documents-eads-in/51-automatic-extensions-based-on-a-timely-filed-application-to-renew-employment-authorization> (last visited Oct. 27, 2023).

<sup>204</sup> *Id.*

<sup>205</sup> 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.

<sup>206</sup> See 8 CFR 274a.13(d)(5) heading.

8 CFR 274a.13(d)(5). As explained in the 2022 TFR, the filing period for the temporary increase of the automatic extension under 8 CFR 274a.13(d)(5) ended on October 26, 2023, after which the automatic extension period reverted to up to 180 days.<sup>207</sup> The increased automatic extension period under 8 CFR 274a.13(d)(5) was available to eligible renewal applicants who had a timely filed renewal EAD application pending during the 18-month period beginning May 4, 2022, and ending at the end of October 26, 2023, and it remains valid until the individual's up to 540-day automatic extension period expires.<sup>208</sup> However, once an individual's up to 540-day automatic extension period under 8 CFR 274a.13(d)(5) expires, the individual will not receive any additional employment authorization and/or EAD validity under this new TFR, because DHS is not extending the effect of 8 CFR 274a.13(d)(5).

Additionally, the 2022 TFR provided that 8 CFR 274a.13(d)(5) would remain in the CFR for an additional 720 days after October 26, 2023, although the up to 540-day automatic extension period has reverted to up to 180 days for individuals who filed a renewal application after October 26, 2023.<sup>209</sup> Therefore, 8 CFR 274a.13(d)(5) will remain in the CFR until October 15, 2025. The 2022 TFR explained that retaining the paragraph until October 15, 2025, will ensure that applicants who are within their up to 540-day automatic extension period on or after October 26, 2023, will not lose 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 will be able to take full advantage of the up to 540-day period.<sup>210</sup>

Having both paragraphs 8 CFR 274a.13(d)(5) and 8 CFR 274a.13(d)(6) may result in the confusion of employers, applicants, and the public in general. Thus, to avoid confusion, DHS is amending 8 CFR 274a.13(d)(5) by revising its heading to clearly state that 8 CFR 274a.13(d)(5) only applies to renewal applications properly filed on or before October 26, 2023.

<sup>207</sup> See 87 FR 26614, 26631 (May 4, 2022).

<sup>208</sup> For example, if the applicant properly and timely filed the EAD renewal application on October 26, 2023, the applicant's employment authorization and/or EAD validity lasts up to 540 days from the date of expiration printed on the applicant's employment authorization and/or EAD, or upon issuance of notification of a denial on the renewal EAD request.

<sup>209</sup> See 87 FR 26614, 26631.

<sup>210</sup> See *id.*

## V. Regulatory Requirements

### A. Administrative Procedure Act

This rule is informed and supported by comments on the 2022 TFR, which as noted above suggested making the TFR permanent. In addition, DHS is issuing this rule without a separate proposed rule describing the present emergency, or a delayed effective date. DHS therefore invokes the "good cause" and other exceptions in the APA. 5 U.S.C. 553(b)(B) and (d)(3); *see also* 5 U.S.C. 553(d)(1) (exception for delayed effective dates for substantive rules that grant or recognize an exemption or relieve a restriction).<sup>211</sup>

#### 1. Requirements for Establishing Good Cause

An agency may forgo notice-and-comment rulemaking and a delayed effective date when the 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).

The "impracticable" prong of the good cause exception "excuses notice and comment in emergency situations, or where delay could result in serious harm."<sup>212</sup> Although the good cause exception is "narrowly construed and only reluctantly countenanced,"<sup>213</sup> "it is an important safety valve to be used where delay caused by notice and comment would do real harm."<sup>214</sup> An agency may find that advance notice and comment or a delayed effective date is "impracticable" when undertaking such procedures would impede due and timely execution of important agency functions.<sup>215</sup> For example, a finding of

<sup>211</sup> Separate from the APA's 30-day delayed-effective-date requirements, 5 U.S.C. 553(d), the Congressional Review Act imposes a 60-day delayed-effective-date requirement for rules identified at 5 U.S.C. 804(2), *see also* 5 U.S.C. 801(a)(3). Under both 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, as it does in this rulemaking. *See* 5 U.S.C. 553(d)(3) and 808(2).

<sup>212</sup> *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

<sup>213</sup> *State of New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *see also Am. Fed. 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. . .").

<sup>214</sup> *U.S. v. Dean*, 604 F.3d 1275, 1279 (11th Cir. 2010).

<sup>215</sup> *See Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001) ("With respect to the 'impracticable' ground, 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

impracticability may be appropriate when an investigation shows that a new rule must be put in place immediately to avert a serious safety risk to the public.<sup>216</sup> Courts have held that a determination of impracticability "is inevitably fact-or context-dependent,"<sup>217</sup> and have acknowledged that the need to avert an imminent "fiscal calamity could conceivably justify bypassing the notice-and-comment requirement," if, for instance, the agency's finding is supported by an adequate record and reflects consideration of alternatives to bypassing notice-and-comment procedures.<sup>218</sup> In determining whether to invoke the exception under 5 U.S.C. 553(d)(3) some courts call for the agency "to balance the necessity for immediate implementation against the principles of fundamental fairness which requires that all affected persons be afforded a

by the notice otherwise required in [§ 553]. . .') (quoting United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30–31 (1947)).

<sup>216</sup> *See Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001) (citing the Attorney General's Manual on the APA (1947)).

<sup>217</sup> *Mid-Tex Elec. Co-op, Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987); *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984) ("But it is clear beyond cavil that we are duty bound to analyze the entire set of circumstances. . .'). Courts have explained that notice-and-comment rulemaking may be impracticable where, for instance, 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*, 370 F.3d at 1179; if "a safety investigation shows that a new safety rule must be put in place immediately," *Util. Solid Waste Activities Grp.* 236 F.3d at 755 (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 Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).

<sup>218</sup> *See Sorenson Comms., Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93–94 (D.C. Cir. 2012) (acknowledging that good cause may be found when "an entire industry and its customers were imperiled," in contrast to a situation where the agency seeks to rescue certain third parties from the consequences of their own business choices); *Mid-Tex Elec. Co-op, Inc.*, 822 F.2d at 1132 (upholding a good cause finding where the agency sought to avert "irremedial [sic] financial consequences and regulatory confusion"); *Am. Fed'n of Govt. Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (concluding that the agency's good cause finding was a reasonable response to avoid economic harm to certain poultry processors and likely shortages and increases in consumer prices); *N. Am. Coal Corp. v. Director, Off. Of Workers' Comp. Prog.*, *DOL*, 854 F.2d 386, 389 (10th Cir. 1988) (concluding that "the loss or delay of medical benefits to many eligible coal miners was a real harm and the extension of the filing deadline operated as a safety valve to prevent this harm."); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 18 (D.D.C. 2017) (reasoning that fiscal injury to an agency may be less likely to support a good cause finding than fiscal injury to third parties).

reasonable time to prepare for the effective date of its ruling.”<sup>219</sup>

DHS believes that engaging in the APA’s notice and comment requirement under 5 U.S.C. 553(b) in this situation would impede due execution of USCIS’ mission and result in real and serious harm to the public. As outlined in this preamble, unless DHS takes this action immediately, USCIS’ lengthy processing times for renewal EAD applications will result in hundreds of thousands of renewal EAD applicants experiencing gaps in employment authorization and/or EAD validity, leading to adverse impacts on the applicants, their families, their employers, and their communities. The grave situation that these third parties face is not the result of their own actions and is beyond their control. Rather, the present situation is the result of several circumstances that affected USCIS operations, resulting in significant increases to USCIS processing times for several categories of renewal EAD applications since the publication of the 2022 TFR.

DHS believes, as supported by the comments received on the 2022 TFR,<sup>220</sup> that this regulation will allow USCIS to immediately avert the dire impact the circumstances create for affected renewal EAD applicants, their families, and their employers. Accordingly, DHS believes that bypassing the ordinary notice and comment procedure and the delayed effective date requirement is justified in the totality of the circumstances and is consistent with USCIS’ statutory mission to take regulatory action to administer employment authorization benefits effectively,<sup>221</sup> and is necessary to achieve the purpose of 8 CFR 274a.13(d).

## 2. The EAD Processing Backlog Has Grown Despite USCIS’ Best Efforts

In the middle of FY 2023, EAD application filings began to increase substantially. USCIS ultimately received a record-breaking total of approximately

3.49 million initial and renewal EAD applications in FY 2023, which is up from approximately 2.33 million EAD filings in FY 2022 (October 2021 through September 2022), a 50-percent increase of approximately 1.2 million EAD initial and renewal filings. Of these, approximately 1.12 million renewal EAD applications were filed in FY 2023, which was 13 percent higher than the volume received in FY 2022 (approximately 990,000 applications). Thus, the historic 1 million application increase in initial and renewal filings, compounded by the lack of fee increase, the adjudicative demands of USCIS’ responses to global humanitarian crises, and other increases in immigration benefit filings, has created an unsurmountable operational strain. This strain significantly impacts USCIS’ ability to keep pace with the growing numbers of applications.

As explained in detail elsewhere in this preamble, the effects of USCIS’ previous and current financial strains have unfortunately continued through FY 2022 and FY 2023. In particular, the preliminary injunction of the 2020 Fee Rule has resulted in USCIS operating with insufficient reserves to increase staffing commensurate with increased filing rates. If USCIS operates under these conditions, it significantly hampers USCIS’ agility when reacting to spikes in filings.<sup>222</sup> Thus, although USCIS increased its workforce in FY 2023, substantially increased the number of officer hours spent adjudicating EAD applications,<sup>223</sup> and took numerous steps to improve adjudicatory efficiency,<sup>224</sup> it has been unable to sufficiently reduce renewal EAD processing times. The problem has been compounded by a litigation outcome that requires USCIS to reimplement the 30-day processing timeline for initial C08 EADs.<sup>225</sup> The operational burden on USCIS resulting from complying with court orders and reimplementing the 30-day processing timeline was further strained by the recent surge in initial C08 EAD applications: In FY 2023 (October 2022 through September 2023) there were approximately 800,000 initial C08 EAD applications, which is an increase of approximately 200 percent over the

approximately 266,000 initial C08 EAD applications filed in FY 2022. Because adjudicative capacity to date has been unable to keep up with the increased rate of filings, in order to comply with the *Rosario* court order and the required 30-day processing timeline, USCIS had to prioritize initial C08 EAD applications over other applications, including renewal EAD applications, which has negatively affected renewal EAD processing times overall.<sup>226</sup>

As explained earlier in the preamble, EAD application processing times and the number of pending EAD applications have not sufficiently improved, despite multiple operational and sub-regulatory efforts that USCIS has been implementing. Despite USCIS’ best efforts at backlog reduction, ongoing and dynamic circumstances, which are outside of USCIS’ control, have prevented USCIS from keeping up with the adjudicatory workload.

During FY 2024, USCIS has continued to closely monitor the automatic extension-eligible renewal EAD caseloads and processing times.<sup>227</sup> These improvements have not yet provided the desired reduction in pending EAD applications. For example, Table 2 shows that the volume of pending EAD applications has not materially improved in FY 2024.<sup>228</sup> The total number of pending EAD applications at the end of February of 2024 is approximately 1.40 million applications, which continues to pose a challenge for USCIS and also impacts processing times for renewal EAD applications eligible for automatic extensions because of the limited amount of USCIS resources that can be allocated to those case types. The total number of pending auto-extension EAD renewal applications at the end of February 2024 was approximately 439,000. While some progress has been made in addressing the backlog, the progress has not yet achieved sufficient gains to reduce EAD renewal processing times and avoid imminent and near-term lapses in employment authorization for EAD renewal applicants.

<sup>219</sup> *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 752 (10th Cir. 1987) (finding that the agency’s reliance on the good cause exception under 5 U.S.C. 553(b) and (d)(3) to be proper given the immediate urgency that warranted the imposition of the regulations as an interim action). Note that the requirements of § 553(d)(3) do not apply in the case of an action covered by section 553(d)(1), *i.e.*, a rule which grants or recognizes an exemption or relieves a restriction. This is one such rule.

<sup>220</sup> See section II.C.2 of this preamble.

<sup>221</sup> See Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, sec. 101(b)(1)(F), codified as 6 U.S.C. 111(b)(1)(F). USCIS, as a component of DHS, should exercise its 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.

<sup>222</sup> See “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” 88 FR 402, 529 (Jan. 4, 2023) (stating that processing times increase, and the case processing backlog grows when USCIS does not have sufficient resources to meet its goals).

<sup>223</sup> See section III.A.2. of this preamble (as compared to FY 2021).

<sup>224</sup> See section III.B. of this preamble.

<sup>225</sup> See *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11 (D.D.C. 2022).

<sup>226</sup> See section III.A.2.a, Operational Challenges Associated with Initial EAD Application Filings by Pending Asylum Applicants (C08).

<sup>227</sup> See Sections III.A.2 and B.

<sup>228</sup> See Section III.A.1. Table 2. Pending EAD Applications by Month.



### 3. Advance Notice and Comment Are Impracticable Due to Imminent Risk of Severe Harm to Third Parties

Processing times<sup>229</sup> for renewal EADs that are eligible for the up-to 180-day automatic extension were 14.5 months as of February 2024.<sup>230</sup> It is not operationally feasible, particularly because of demands on USCIS to comply with court orders and the 30-day timeline for adjudication of initial C08 EAD applications, for USCIS to redirect any portion of its resources currently dedicated to adjudicating initial EAD applications to handle the adjudication of renewal EAD applications. Consequently, the lengthy processing times, which exceed the up to 180-day automatic extension available under the current rule, will lead to significant gaps in employment authorization and/or employment authorization documentation for those who complied with all requirements to timely file a renewal EAD application so as not to experience such gaps.

Because this result would substantially harm applicants, their families and their employers, DHS believes there is urgent need to act via this rule to mitigate the risk of a significant lapse in employment authorization for a majority of eligible applicants. DHS anticipates that, without this action, as soon as May 2024, the 180-day extension of employment authorization and/or EADs of approximately 3,000 renewal applicants will expire.<sup>231</sup> After May 2024, the number of renewal applicants expected to experience gaps in employment authorization and/or EAD validity each month will rapidly increase to up to 12,000 (upper bound estimate) per month by July 2024, to up to 45,000 (upper bound estimate) by April 2025 and up to 64,000 (upper bound estimate) per month by November 2025.<sup>232</sup> Thus, in the absence of this action, DHS anticipates that over the time period of May 2024 to March 2026,<sup>233</sup> between 689,000 (lower bound estimate) to 824,000 (upper bound estimate) renewal EAD applicants would be at risk of losing their employment authorization and/or valid

documentation<sup>234</sup> and, consequently, experiencing job loss, while waiting for USCIS to process their renewal EAD applications.<sup>235</sup>

Of the approximately 3,000 renewal applicants projected to face this situation in May 2024, the majority<sup>236</sup> are asylum applicants (C08 category), a particularly vulnerable population. Continuous employment authorization during the pendency of an asylum application is vital for asylum seekers in the United States, given their particularly vulnerable position. Therefore, this group of renewal applicants needs urgent action via this rulemaking so these applicants can continue to have employment authorization and/or EAD validity and continue to make a living to sustain themselves and their families.

Considering the total population potentially impacted by this rule, DHS estimates that, with the implementation of this rule, approximately \$60.1 billion (for the upper bound population estimate using a 2-percent discount rate) in labor income for affected renewal applicants would be preserved from FY 2024 through FY 2028.<sup>237</sup> This also translates to potential preserved employment taxes of approximately \$6.3 billion (for the upper bound population estimate using a 2-percent discount rate)<sup>238</sup> that benefit government entities and that would be forgone if these individuals were to lose their employment due to the potential lapses in employment authorization simply on account of processing delays.

Any delay in action to provide an advance opportunity for notice and comment, therefore, would risk severe harm and unnecessary burdens on

<sup>234</sup> See section V.B.2. Table 6A. EADs that could lapse in the absence of the TFR, by Class and Percent Variation. 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.

<sup>235</sup> See DHS's analysis outlined in the preamble at section V.B., Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review), regarding the affected population.

<sup>236</sup> See section V.B.2. Table 6A. EADs that could lapse in the absence of the TFR, by Class and Percent Variation.

<sup>237</sup> Labor earnings includes wages and salaries as well as benefits (e.g., paid leave, supplemental pay, insurance).

<sup>238</sup> See section V.B.3.c. Table 13, Monetized Expected Value Impacts for the TFR (\$ millions, 2022).

applicants, their families, employers, and communities. DHS believes, based on the success of the 2022 TFR, that the immediate implementation of this rulemaking will serve the short-term needs of applicants, their families and employers as it will significantly reduce the potential for additional gaps in employment authorization and/or EAD validity, job loss, and financial uncertainty for renewal EAD applicants and their families.<sup>239</sup> At the same time, the rule provides DHS with an additional window during which it can consider long-term solutions by soliciting public comments and evaluating the effects of the ongoing policy changes described throughout this preamble and future policy and operational changes that will enable USCIS to reach its target processing time of 3 months.

As it relates to employers, DHS notes that as of the beginning of the calendar year 2024, employers continue to face a variety of challenges, including more job openings than available workers.<sup>240</sup> To ensure continuity of operations, businesses and entities may have made decisions (for example, entering into contracts, applying for grants, signing leases, or commencing development of product lines) in reliance on the expectation that their affected employees would receive timely renewals of employment authorization and documentation. Thus, this rule prevents adverse impacts on businesses and individuals resulting from the uncertainty associated with widescale lapses in employment authorization.<sup>241</sup>

DHS's analysis suggests that, if this rule is not implemented immediately, approximately 63,000 to 82,000 employers may be negatively affected.<sup>242</sup> DHS further estimates that these businesses and organizations employing affected EAD holders would incur approximately \$17.4 billion in labor turnover costs (for the upper bound population estimate using a 2-percent discount rate) for the separation and replacement of these employees.<sup>243</sup>

<sup>239</sup> See section V.B.2. Table 7, TFR Future Population Projections by Month, Rounded to Thousands, Column "With TFR," showing that the effect of this TFR.

<sup>240</sup> Bureau of Labor Statistics data show that, as of December 2023, there were 0.7 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," <https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm> (last visited Feb. 6, 2024).

<sup>241</sup> See section V.B. Introduction, Table 5. OMB A-4 Accounting Statement (\$ millions, 2022).

<sup>242</sup> See section V.B.1. Table 3. Summary of Impacts (2022 dollars, FY 2024-FY 2028).

<sup>243</sup> See section V.B.3.c. Table 13. Monetized Expected Value Impacts for the TFR (\$ millions,

<sup>229</sup> Processing times are based on the 80th percentile of those approved or denied.

<sup>230</sup> See section III.A.3., Additional Designations for Temporary Protected Status.

<sup>231</sup> See section V.B.2. Table 7. TFR Future Population Projections by Month, Rounded to Thousands.

<sup>232</sup> See section V.B.2. Table 7. TFR Future Population Projections by Month, Rounded to Thousands.

<sup>233</sup> See section V.B.2. Table 7. TFR Future Population Projections by Month, Rounded to Thousands.

Thus, this rule would avoid significant costs to employers that employers would otherwise experience through no fault of their own.<sup>244</sup>

With this TFR, DHS seeks to reduce the likelihood that additional businesses and entities may be adversely impacted by terminating employees whose employment authorization or documentation expires due to USCIS processing delays. However, the longer this rule is delayed, the greater these potential costs to employers will be. The resulting costs and disruptions in business continuity that employers will experience are the same harm that 8 CFR 274a.13(d) and this rulemaking seek to prevent. As outlined elsewhere in this preamble, in its 2016 rule proposing the up to 180-day automatic extension of employment authorization, DHS explained that the purpose of the provision is to mitigate the risk of gaps in employment authorization and required documentation and the resulting consequences to eligible renewal applicants and their employers.<sup>245</sup> As a DHS component agency, one of USCIS' primary functions is to administer immigration benefits, including adjudicating requests for and issuing employment authorization and/or EADs.<sup>246</sup> As explained previously, the INA recognizes the Secretary's

2022). Turnover costs are calculated as a percent of annual salary. Amount shown as total present value, using a 2-percent discount rate.

<sup>244</sup> See section III.C.3. The Current Automatic Extension Period of 180 Days Must be Temporarily Increased to 540 Days.

<sup>245</sup> See 80 FR 81899, 81927 (Dec. 31, 2015). Further, 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 81899, 81927 (Dec. 31, 2015). ("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' current 3-month average processing time for Applications for Employment Authorization.") After receiving and considering public comments, DHS published the final rule. DHS later also welcomed comments on the 2022 TFR, as discussed above. Thus, the concept of the up to 180-day automatic extension has been ventilated for public comment multiple times. This TFR is merely a temporary 18-month deviation from the 180-day timeframe, warranted in this situation for the reasons explained.

<sup>246</sup> As of March 1, 2003, the former INS ceased to exist as an agency within the U.S. 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 U.S. Citizenship and Immigration Services in the U.S. Department of Homeland Security. See HSA of 2002, Public Law 107-296, sections 451 and 471(a) (Nov. 25, 2002); 68 FR 10922 (Mar. 6, 2003). Additionally, under the HSA 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.

authority to extend employment authorization to noncitizens in the United States<sup>247</sup> and authorizes the Secretary to take necessary regulatory action to carry out this authority effectively.<sup>248</sup>

In short, an advance opportunity for notice and comment and a 60-day delayed effective date would result in thousands of renewal EAD applicants and their employers experiencing gaps in employment authorization and/or EAD validity. Such a course of action is therefore impracticable as it would impede USCIS functions in effectively administering DHS's employment authorization authority and document issuance functions and would have a significant negative impact on applicants and employers. Under the current circumstances, DHS believes that an immediate, temporary increase in the duration of the automatic extension period is necessary to achieve this purpose.

#### 4. The TFR Is of Limited Duration and Scope

Although courts have noted that the time-limited nature of an agency's action cannot, by itself, justify forgoing notice and comment rulemaking, it is a significant factor in the agency's claim for good cause when addressing an emergency.<sup>249</sup> DHS believes that issuing this measure as a temporary rule, which will be for only a period of 540 days, is a reasonable approach to avoid the harms discussed in this rule and thus supports the claim of good cause. Specifically, the regulatory reach of the amendments to 8 CFR 274a.13(d) is limited to individuals with renewal EAD applications properly filed on or after October 27, 2023, and on or before September 30, 2025.<sup>250</sup> The amendments to DHS regulations made by this TFR will only remain in place for a total of 1,260 days (*i.e.*, 3.5 years). The temporal limitations and narrowly scoped population are suitably tailored to avert imminent and near-term harm to a specific class of applicants and their employers, given the special circumstances.<sup>251</sup>

<sup>247</sup> See INA sec. 274A(h)(3)(B), 8 U.S.C. 1324a(h)(3)(B).

<sup>248</sup> See INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

<sup>249</sup> See *Mid-Tex*, 822 F.2d at 1132 (stating that public notice and comment gain in importance the more expansive the regulatory reach of an agency's rule and that courts, therefore, have consistently recognized that a rule's temporally limited scope is among the key considerations in evaluating an agency's "good cause" claim.).

<sup>250</sup> See 8 CFR 274a.13(d)(6).

<sup>251</sup> Courts have been more inclined to finding good cause for issuance of rules without notice and comment if the effect is limited in scope and duration. See, *e.g.*, *Nat'l Fed'n Emps v. Divine*, 671

The remedy is further limited to applicants who are currently in the United States and authorized to work. These applicants are merely seeking renewal of their employment authorization and/or EADs, not initial determination of their eligibility. These individuals, if employed, are already workers in the U.S. labor market as a result of the initial employment authorization, and they have relied on the current regulations under 8 CFR 274a.13(d) to avoid experiencing a gap in employment if they timely and properly file the renewal applications. Yet, having complied with the law, they nonetheless face a gap in employment authorization and/or documentation because of processing delays that directly resulted from the emergent circumstances that befell USCIS. This TFR is limited to renewal EAD applicants—*i.e.*, those who have already been authorized for employment—and the additional automatic extension will have minimal adverse impact, if any, on other U.S. workers.<sup>252</sup> Moreover, in providing significant benefits for renewal applicants and their U.S. employers, this rule indirectly benefits

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.*, 653 F.2d at 582 (upholding Mine Safety and Health Administration order delaying implementation of a rule without notice and comment "for a relatively short time"); *San Diego Navy Broadway Complex Coalition v. U.S. Coast Guard*, 2011 WL 1212888, at \*6 (S.D. Cal. 2011) (finding good cause for issuance of a TFR because agency limited its effect to several months and also explicitly indicated its intent to initiate notice-and-comment rulemaking).

<sup>252</sup> See section V.B.3.d., Module D. Other Impacts. As explained, this rule extends current employment authorization for individuals who are at risk of losing such authorization solely because of USCIS processing delays; it does not grant new work authorization to additional persons. See *id.* According to the most recent data (applicable to October 2023), the U.S. labor force stands at 167,728,000. The maximum population of about 824,000 represents 0.50 percent of the national labor force, approximately 554,000 of which would potentially not lapse as a result of the action being taken. See *id.* Additionally, according to the Bureau of Labor Statistics data, and as of December 2023, there were 0.7 unemployed persons per job opening. See U.S. Department of Labor, U.S. Bureau of Labor Statistics, "Number of unemployed persons per job opening, seasonally adjusted," <https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm> (last visited Feb. 6, 2024). Thus, data indicates that there are currently more jobs than available employees. As such, DHS believes, based on the nature of this rulemaking as well as current economic conditions, that the hypothetical possibility of some U.S. workers replacing workers who would temporarily lose employment authorization in the absence of this rulemaking is not a compelling reason to allow widespread losses of employment authorization due to USCIS processing delay.

U.S. workers by protecting the financial stability and continuity of operations for affected U.S. employers.

This temporary measure is consistent with the intent of the current 8 CFR 274a.13(d). In this rule, DHS neither makes additional categories eligible for the automatic extension nor alters existing procedures for such extension; DHS is simply temporarily increasing the up to 180-day timeframe for those already eligible for an automatic extension. As shown by the 2022 TFR, such an increase in the automatic extension of employment authorization and/or EAD validity is effective, yet narrowly scoped, measure for navigating filing spikes and their effects on application processing times.

DHS also significantly limits this rulemaking to address the potential lapses that are imminent, further demonstrating that DHS has good cause to issue this rulemaking without the notification procedures required under the APA. The data projections show that even with the 540-day automatic extension provided in this TFR, approximately 260,327 EAD renewal applicants (or approximately 33 percent of the applicants who are the subjects of this rule) are potentially at risk of experiencing a gap in employment authorization and/or EAD validity once their 540-day automatic extension period expires.<sup>253</sup> The data further indicates that extending the automatic extension period to up to 730 days would be required to prevent many of these lapses in employment authorization and/or EAD validity, which could begin in November 2025, based on projected processing times.<sup>254</sup> At this time, DHS has limited the automatic extension to the minimum period necessary to avert the immediate emergency while USCIS (1) works to improve processing times and (2) seeks comment on this TFR and potential additional measures to take at a future time.

DHS appreciates that this TFR does not resolve all potential uncertainty with respect to renewal EAD applications, but notes that it has sought comment on potential solutions and that USCIS' ongoing streamlining efforts, sub-regulatory measures, and technology innovations may produce significant results within this filing period. The filing period and concomitant up to 540-day automatic extension established by this TFR is

<sup>253</sup> See section V.B.2. Table 6B. EADs that could lapse under the TFR, by Class and Percent Variation.

<sup>254</sup> See section V.B.3.d. Table 14, Approximate EAD lapses under different extensions.

therefore appropriately tailored to avert imminent harm to renewal EAD applicants, their families and employers and provide USCIS with the time needed to assess the effect of any recently implemented adjudicative efficiency measures<sup>255</sup> and implement further improvements.

##### 5. USCIS Has Not Delayed in Issuing This TFR

Finally, in some cases regarding the good cause standard, courts have concluded that an agency's claim of emergency was undermined because the agency delayed in implementing its decision.<sup>256</sup> In such contexts, courts have considered, for instance, whether the agency "acted diligently" to address the problem and "overcome the hurdles created by other parties,"<sup>257</sup> whether the circumstances requiring agency action "were beyond the agency's control,"<sup>258</sup> and whether the agency addressed the emergency with an action of limited scope and duration.<sup>259</sup>

As an initial matter, DHS notes that the harm the agency seeks to avoid is vast and would directly befall many blameless third parties.<sup>260</sup> DHS further urges that the agency has not delayed at all. As noted above, USCIS has been taking active measures to reduce the backlog since the publication of the 2022 TFR,<sup>261</sup> including staffing

<sup>255</sup> See section III.B. Other Measures Taken to Reduce EAD Application Processing Times.

<sup>256</sup> Many of the leading cases involve circumstances where the agency cited a need to meet an imminent statutory or administrative deadline. See *Env'tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915 (D.C. Cir. 1983) (rejecting a claim of good cause to suspend certain reporting requirements before they entered into effect, because the agency had almost a year earlier deferred such requirements and announced that it intended to rescind them); *Council of Southern Mountains, Inc.*, 653 F.2d at 580–82 (stating that "only in exceptional circumstances" may "the imminence of [a legal or administrative] deadline" for taking a particular action "permit[] avoidance of APA procedures," because otherwise the agency could delay in acting and then claim an emergency); *NRDC v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) (rejecting the agency's claim of an emergent need to review and reconsider certain standards prior to an impending and self-imposed administrative deadline); *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 16–17 (collecting cases).

<sup>257</sup> See, e.g., *Council of Southern Mountains, Inc.*, 653 F.2d at 581.

<sup>258</sup> See, e.g., *Council of Southern Mountains, Inc.*, 653 F.2d at 581; *Nat'l Fed'n of Fed. Empl. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982).

<sup>259</sup> See, e.g., *Council of Southern Mountains, Inc.*, 653 F.2d at 581; *Devine*, 671 F.2d at 612.

<sup>260</sup> See, e.g., *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 16–17.

<sup>261</sup> Cf., e.g., *Tri-County Tel. Ass'n, Inc. v. FCC*, 999 F.3d 714, 720 (D.C. Cir. 2021) ("But this is not a case of unjustified agency delay. The Commission did act earlier. . . . [and t]he agency needed to act again. . . . because "persistent power outages and other logistical challenges ha[d] made the continued operation of restored networks more expensive than some expected.").

increases, overtime allowance, policy changes that reduce overall adjudicatory volumes and eliminate unnecessary hurdles for applicants, and technological innovations that have created operational efficiencies.

Unfortunately, these measures have not yet been sufficient to return to the goal of normal average processing times of 3 months for renewal EAD applications because of the volume of EAD applications that USCIS received in FY 2023—a circumstance that is beyond USCIS' control. USCIS has looked for other options to further create efficiencies but has yet been unable to create efficiencies that match the increase in receipts. Accordingly, having tried many alternatives and in the face of a dynamic set of challenges,<sup>262</sup> DHS has determined that this temporary regulatory action is the only practicable solution to reduce the likelihood that approximately 824,000 renewal applicants, their families, and their employers will imminently face the dire circumstances and associated costs resulting from a lapse in employment authorizations and/or EAD validity periods. USCIS developed the technical analysis underlying this regulation on an expedited basis, and dedicated scarce agency resources to the swift issuance of this rule while addressing other pressing policy matters, such as the Fee Rule.

In sum, 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 5 U.S.C. 553(d) would be impracticable due to the need to prevent significant harm to renewal EAD applicants, their families, employers, and communities.

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

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

<sup>262</sup> See also section III.A.1, Comparing Fiscal Year (FY) 2023 Receipts to FY 2022 Receipts, describing the significant increase in the numbers of filings in the second half of FY 2023.

environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action” as defined under section 3(f)(1) of E.O. 12866, as amended by Executive Order 14094. Accordingly, OMB has reviewed this rule.

## 1. Introduction

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 timely filed their EAD renewal applications, will be increased from up to 180 days to up to 540 days for qualified applicants who filed or file an EAD renewal application between October 27, 2023 and September 30, 2025.

As is detailed earlier in the preamble, processing times for renewal EAD applications remain at such a level that the current 180-day automatic extension period for certain renewal EAD applicants’ employment authorization and/or EADs is currently insufficient. Despite USCIS working on reducing the backlog of renewal EAD applications, recent events have made it difficult to keep up with the adjudicatory

workload.<sup>263</sup> While USCIS is implementing solutions to return processing times to target levels, USCIS is taking additional steps to mitigate the risk that renewal EAD applicants will experience a lapse in employment authorization and/or documentation and related consequences while their renewal EAD applications remain pending.<sup>264</sup>

In the absence of this rule, we estimate that between approximately 689,000 and 824,000 renewal EAD applicants will experience a lapse in employment authorization and/or employment authorization documentation between May 2024 and March 2026. As of the current data analysis (November 1, 2023) even with the extension up to 540 days about 260,000 renewal EAD applicants may still experience a lapse,<sup>265</sup> beginning in November 2025, under baseline conditions, *i.e.*, assuming status quo conditions.<sup>266</sup> The purpose of this TFR is to reduce the likelihood that large numbers of eligible applicants who qualify for automatic extensions of their expiring EADs will experience gaps in employment authorization and/or EAD validity.<sup>267</sup> This TFR will therefore provide for greater earnings stability for individuals and continuity of business operations for their employers.

DHS has determined that the population impacted by this TFR consists of the pool of future applicants who, without this rule, would likely experience a lapse in employment during the 23-month period as described above. Because USCIS cannot

forecast the future population with precision, we present a baseline population that could range from 689,000 to 824,000. After applying an adjustment for current unemployment conditions in the economy (described in detail in the ensuing analysis section), we arrive at an adjusted population that could range from 663,000 to 793,000.

DHS has prepared two types of quantified estimates of the impacts that could be generated by this TFR applicable to the adjusted population. This rule will prevent the majority of EAD holders from incurring a loss of earnings (“stabilized earnings”) because of USCIS processing delays for renewal EAD applications, as under this rule there will be no disruption to their earnings due to a lapsed EAD. This rule will also generate labor turnover cost-savings to businesses that employ the EAD holders, as under this rule there would not be a disruption to the majority of EAD holders’ employment authorization and/or document validity. 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.<sup>268</sup>

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 3, where the monetized figures represent the forecast expected value (which is the mean of trial-based simulations) discounted at 2 percent.

TABLE 3—SUMMARY OF IMPACTS  
[2022 Dollars, FY 2024–FY 2028]

### EAD Holder Earnings Preserved (“Stabilized Earnings”):

- *Entities directly affected:* Individual EAD holders.
- *Population:* maximum 663,000 to 793,000 individuals with renewal EADs.
- *Monetized present value estimate (2 percent):* \$29.1 billion.
- *Type:* Stabilized labor income to affected renewal EAD 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 authorization and, by extension, 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.

<sup>263</sup> Events such as increased designations of countries for temporary protected status, increased number of Afghan and Ukrainian national parolees, increased asylum filings due to the end of the Title 42 public health Order, and a court decision to require USCIS to process all initial EAD applications from asylum applicants with 30 days. Please see “Additional Designations for Temporary Protected Status,” “Increased EAD Validity Periods for Certain Applicants,” “Impact of the Significant Increase in Referrals to USCIS for Credible Fear Assessments,” and “Effect of Operational Challenges on EAD Application Adjudications” in the preamble for more information.

<sup>264</sup> Such measures include increasing the validity periods for certain types of applicants, permitting certain asylum applicants to electronically file EAD applications, lifting the USCIS hiring freeze and increasing the number of employees, prioritizing

workload management, and addressing fiscal issues in the Fee Rule. Please see “Other Measures Taken to Reduce EAD Application Processing Times” in the preamble for more information.

<sup>265</sup> Extensions beyond 540 days would likely reduce the number of EADs that would still lapse, however this TFR opts for a 540-day extension, as discussed in the preamble and later in “Module D. Other Impacts.”

<sup>266</sup> The estimate of 260,000 renewal EAD applicants that may still experience a lapse is based on assumptions that renewal applicants will maintain the same filing behavior, operational efficiency and productivity will not change, and staffing levels and adjudication hours for EAD renewals will remain unchanged.

<sup>267</sup> As stated earlier in the preamble, 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. Ninety-five 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.

<sup>268</sup> This rule will also prevent a reduction in State and local tax revenue but that is not quantified in this analysis. Please see Table 5 for more information.

TABLE 3—SUMMARY OF IMPACTS—Continued  
[2022 Dollars, FY 2024–FY 2028]

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- *Potential preserved employment taxes:* \$3.1 billion (Present Value, 2-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.

**Employer Labor Turnover Cost Savings:**

- *Entities directly affected:* businesses that employ the EAD holders.
- *Population:* Possibly 63,000 to 82,000 employers.
- *Monetized present value estimate (2 percent):* \$5.2 billion.
- *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 employee annual earnings, both of which vary within a range.

**Other Impacts Considered:**

- Individuals impacted would likely benefit from cost-savings accruing to not having to incur the direct costs and some related costs associated with searching for and obtaining a new job once their renewal EAD that lapsed is eventually approved.
- To the extent that individuals' earnings will be maintained, burdens to their support network would be prevented.
- DHS does not expect adverse disruptions to the labor market from this TFR, as the rule is intended to avoid disruptions to employment.
- DHS did not include estimates for stabilized earnings for any duration of continued unemployment that EAD holders might have experienced beyond their EAD lapse duration without this rule. Inclusion of such additional time would increase the estimates of saved earnings from the rule.
- Avoid opportunity costs to businesses for having to choose the next best alternative to employment of the affected renewal EAD 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).
- Prevent adverse impacts on businesses and individuals resulting from the uncertainty associated with widescale lapses in employment authorization.

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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 renewal EAD applicants would have lost if they had experienced a gap in employment authorization and/or employment authorization documentation 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 renewal EAD applicants do not depend on whether their employer can find replacement labor. This rule will prevent affected renewal EAD applicants from incurring a loss of earnings.

DHS estimates that stabilized earnings to renewal EAD applicants ranges from \$2.0 billion to \$12.7 billion with a primary estimate of \$6.2 billion (annualized, 2 percent), depending on the wages and other compensation the renewal EAD applicants earn, the number of renewal EAD applicants affected, and the duration of the gap in employment authorization and/or employment authorization documentation that would occur without this rule.<sup>269</sup> DHS uses estimates of the stabilized earnings as a measure of either: (1) prevented transfers of this compensation 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 renewal EAD 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 immediately find reasonable labor substitutes for the positions the renewal EAD applicants would have lost, businesses would have lost little or no productivity. Accordingly, this rule prevents \$6.2 billion (primary estimate annualized, 2 percent) from being transferred from affected renewal EAD 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 within the period of analysis find reasonable labor substitutes for the position the EAD holder filled, then businesses would have lost productivity. Accordingly, \$6.2 billion 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 renewal EAD 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 \$6.2 billion would have resulted in employment tax losses to the Federal Government (*i.e.*, Medicare and Social Security) of \$0.7 billion (annualized, 2 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 search for a replacement for affected renewal EAD applicants. Accordingly, DHS estimates the rule will also result in additional labor turnover cost savings to businesses ranging from \$0.09 billion to \$3.7 billion, with a primary estimate of \$1.1 billion (annualized, 2 percent) depending on the wages and other compensation the renewal EAD applicants earn, the number of renewal EAD applicants affected, and the replacement cost to employers.

Table 4 below summarizes these two scenarios and the primary estimate of this rule at a 2-percent discount rate. 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 immediately found for half of all renewal EAD applicants and not found for the other half (*i.e.*, an average of the two extreme scenarios described above). However, as noted previously, December 2023 unemployment and job openings data indicate there are more jobs available than people looking for

<sup>269</sup> Lapse-duration accounted for approximately 47.5 percent of this range, wages accounted for 47.0 percent, and the lapse rate 4.9 percent. For more information, please see section V.B.3.b.i. "Earnings impact to EAD holders."

jobs.<sup>270</sup> 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 renewal EAD applicants without this rule.

TABLE 4—PRIMARY ESTIMATE—MONETIZED ANNUALIZED IMPACTS AT 2%  
[Millions]

Category	Description	Scenario 1: immediate replacement labor found for all affected EAD	Scenario 2: no replacement labor found for affected EAD over the period of analysis	Primary estimate: replacement labor found for half of affected EAD holders
<b>Transfers</b>				
Stabilized Earnings .....	Prevented compensation transfers from renewal EAD applicants to other workers.	\$6,176.5	\$0	\$3,088.3
Employment Taxes .....	Prevented reduction in employment taxes paid to the Federal Government.	0	651.7	325.9
<b>Cost Savings</b>				
Labor Turnover .....	Prevented labor turnover costs to businesses .....	1,098.3	1,098.3	1,098.3
Productivity .....	Prevented lost productivity to businesses (stabilized earnings used as a proxy).	0	6,176.5	3,088.3
Total Cost Savings ....	.....	1,098.3	7,274.8	4,186.6

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 renewal EAD applications and individuals associated with them will change.<sup>271</sup> A resultant effect of the caseload changes is that as USCIS works through this backlog, the number of affected renewal EAD applicants and the durations for which renewal EAD applicants may experience a lapse in employment without this rule will likely vary from the durations modeled. 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.<sup>272</sup> For example, if someone performs

childcare, housework, home 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.<sup>273</sup> The monetized estimates of the compensation this rule preserves are measured relative to a baseline in which individuals lose employment authorization and the associated income as a result of the problem this rule seeks to address. The monetary value of the compensation 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 compensation 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 compensation 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 employment authorization.

Pursuant to OMB Circular A-4, DHS has prepared an A-4 Accounting Statement for this rule.<sup>274</sup>

<sup>270</sup> Bureau of Labor Statistics data show that, as of December 2023, there were 0.7 unemployed persons per job opening. See U.S. Department of Labor, U.S. Bureau of Labor Statistics, "Number of unemployed persons per job opening, seasonally adjusted," <https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm> (last visited Feb. 6, 2024).

<sup>271</sup> Caseload changes can be the result of workforce hiring and/or officer re-assignments to other non-EAD renewal application workloads, as well as policy changes such as increasing certain EAD validity periods and improving processing efficiency through increased use of technological advancements.

<sup>272</sup> Boardman et al., *Cost-Benefit Analysis Concepts and Practice* (2018), p. 152.

<sup>273</sup> For regulatory analysis purposes, DHS generally assumes the value of time for unemployed individuals is at least the value of the Federal minimum wage.

<sup>274</sup> OMB Circular A-4 (November 9, 2023) is available at <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf> (last viewed on March 12, 2024).

TABLE 5—OMB A–4 ACCOUNTING STATEMENT  
 [\$ Millions, 2022]  
 [Period of analysis: FY 2024–FY 2028]

Category	Primary estimate		Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)
<b>Benefits:</b>					
Monetized Benefits .....	2%	N/A	N/A	N/A	RIA.
Annualized quantified, but un-monetized, benefits .....	N/A		N/A	N/A	RIA.
Unquantified Benefits .....	<ul style="list-style-type: none"> <li>Avoiding a lapse in employment authorization and/or EAD validity for renewal EAD applicants may also prevent any monetary or other support that would have been necessary for the support network of affected EAD holders to transfer to affected EAD holders during such a period of unemployment.</li> <li>The rule would prevent affected individuals from incurring direct and indirect costs associated with looking for work.</li> </ul>				RIA.
<b>Costs:</b>					
Annualized monetized costs .....	2%	–\$4,186.6	–\$87.9	–\$16,449.3	RIA.
Annualized quantified, but un-monetized, costs .....	N/A		N/A	N/A	RIA.
Qualitative (unquantified) costs .....	<ul style="list-style-type: none"> <li>It will better ensure other cost savings of holding an EAD or job will not be disrupted or subject to significant uncertainty because of USCIS processing delays, such as valid identity documents, or health insurance obtained through an employer.</li> <li>Additionally, this rule will prevent adverse impacts on businesses that would result from required terminations for affected renewal EAD applicants, or the uncertainty associated with widescale lapses in employment authorization.</li> <li>In cases where, in the absence of this rule, companies cannot find reasonable substitutes for the labor the affected renewal EAD 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 renewal EAD applicant.</li> </ul>				RIA.
<b>Transfers:</b>					
Annualized monetized transfers: “on budget” .....	2%	0	0	0	RIA.
From whom to whom? .....	N/A				N/A.
Annualized monetized transfers: stabilized earnings .....	2%	3,088.3	0	12,749.4	RIA.
From whom to whom? .....	This rule will prevent compensation from transferring from affected renewal EAD applicants to other workers.				RIA.
Annualized monetized transfers: taxes .....	2%	325.9	0	1,345.3	RIA.
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 a reduction in income taxes from employees to Federal, State, and local governments (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 renewal EAD 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 renewal EAD applicant.				RIA, RFA.
Effects on wages .....	Preserve access to wages and other compensation for renewal EAD applicants.				RIA.
Effects on growth .....	None.				RIA.

2. Background and Population

As is detailed in the preamble and elsewhere in this rule, processing times for renewal EAD applications continue

to increase to such a level that the current 180-day automatic extension period for certain renewal EAD applicants’ employment authorization

and/or EADs is currently insufficient. DHS has carefully analyzed the current backlog of cases and has been able to make projections regarding the

population. At the likely time the TFR would become effective, DHS has identified approximately 1 million EADs that would be slated to expire during FY 2024 through FY 2027. We culled this “broad” population for cases accruing to very early filers and certain classes that might be adjudicated to arrive at a “baseline” population of about 793,000 that would likely face a lapse. Our analysis considers projected

filing volumes, filing time behavior, case processing times, and officer completion metrics. However, there is likely to be some variation in the officer completion metrics that source this figure, and we have allowed this input to vary 10- and 15-percent from the baseline to account for uncertainty such as in USCIS workforce hiring of adjudication officers and officer re-assignments to other non-EAD renewal

application workloads.<sup>275</sup> The results are captured in Table 6, which shows by EAD category. As is shown, the population could range from about 689,000 to 824,000, and at the baseline, about 260,000 could still lapse (beginning in November 2025 after exceeding the up to 540-day automatic extension) under the action being taken.<sup>276</sup>

TABLE 6A—EADS THAT COULD LAPSE IN THE ABSENCE OF THE TFR, BY CLASS AND PERCENT VARIATION

Variation	A03	A05	A10	C08	C09	C10	Total
+15%	315	16,706	6,152	494,631	149,619	22,001	689,423
+10%	426	17,525	7,591	529,156	152,125	24,568	731,391
Baseline	628	18,701	10,622	581,372	155,699	26,030	793,053
- 10%	912	19,584	12,082	602,442	158,365	26,171	819,556
- 15%	1,033	20,050	12,510	604,356	159,575	26,181	823,706

Table 6B—EADS That Could Lapse Under the TFR, by Class and Percent Variation

Variation	A03	A05	A10	C08	C09	C10	Total
+15%	0	2,040	0	90	65,061	33	67,223
+10%	0	4,111	0	52,030	77,651	33	133,825
Baseline	0	7,703	0	155,730	96,861	33	260,327
- 10%	0	10,960	0	262,245	110,540	74	383,818
- 15%	86	12,100	989	314,911	117,581	74	445,741

Source: USCIS analysis of renewal EAD filing data, provided by Office of Performance and Quality (OPQ), USCIS, DHS, Claims 3 database; data provided October 18, 2023.

Note: Numbers may not total due to rounding.

In developing the populations examined for this analysis, it is useful to consider three categories. First, there are applicants whose automatically extended EADs under the relevant categories benefited from the FY 2022 TFR (*i.e.*, they filed on or before October 26, 2023). Second, there are applicants who filed after October 26, 2023 and whose EADs are still valid, including being within the 180-day auto-extension period, but whose auto-extension period will expire in the timespan leading up to this TFR taking effect (the “current” period captures the date of the analysis, which is November 2023, through April 2024). Third are the applicants whose EADs would lapse after this TFR becomes effective if it were not for the TFR. These population components will be considered “past,” “current,” and “future,” respectively.

In this specific case, we think it is most appropriate to attribute the impacts to the “future” population

when the TFR is in effect. The “past” pool of applicants benefited from the previous TFR and would not be affected by this rule. The “current” pools of applicants, whose EADs may lapse before this rule takes effect, also would not gain any benefit from this rule. However, this population is expected to be relatively very small in size (if not zero) compared to the size of the pool of “future” applicants.

In the absence of this rule, we estimate that between 689,000 and 824,000 renewal EAD applicants will likely experience a lapse in employment authorization and/or employment authorization documentation. This “future” population would begin to lapse in May 2024 if not for this TFR, as applicants would have reverted back to an auto-extension period of up to 180 days beginning in October 2023. These lapses would occur through March 2026, a point in time when it is estimated that USCIS would have

caught up on adjudicating these renewal filings. This TFR will reduce the likelihood that renewal EAD applicants will experience gaps in employment authorization and/or EAD validity with an auto-extension period of approximately 18 months. Because this rule auto-extends employment authorization for an additional 18 months and does not on its own reduce incoming volumes, it is estimated that even under this rule some renewal EAD applicants may still experience lapses. However, they would not begin to experience lapses until 18 months after the effective date of this TFR (approximately November 2025), under the baseline scenario and would occur through March 2027 under this TFR. Table 7 provides a granular tabulation of the populations without the TFR and with the TFR and figure 2 provides a monthly expirations of baseline values from Table 7.

<sup>275</sup> All other variables remain constant.

<sup>276</sup> Certain categories have been excluded from this analysis. The A17 (E spouses), A18 (L spouses) and C26 (H spouses) potential auto-extensions are limited to the duration of their unexpired I-94 or the auto extension period, whichever is shorter. However, I-94 data is controlled by CBP Arrival and Departure Information System (ADIS) and is currently not available in a batch/systematic manner for USCIS to use to calculate this auto-extension end date and estimate these populations. Moreover, a large cohort of E, L, and H spouses concurrently file renewal EAD applications with an

underlying Form I-129 and Form I-539, and therefore the auto-extension end date is limited by the current I-94 validity date. But, in these circumstances, the E, L, and H spouses do not have an unexpired I-94 that extends beyond the current expiration date of the existing EAD. While a minority of renewal EAD applications filed for these spouses are not filed concurrently with the Form I-539, and their associated EADs face expiration, USCIS projects that H spouses (the largest population in the cohort) would mostly be processed on time to avoid any lapses in EAD validity. Furthermore, with the new “incident to

status” employment authorization for E and L spouses, the relatively low number of A17 and A18 renewals noticeably decreased during the first six months of FY 2024. The A12 and C19 categories (TPS categories) often have a separate auto-extension related to each country-specific Federal Register Notice (FRN). Additionally, each TPS designation, redesignation, or extension only remains in place for up to 18 months at a time. A07, A08, C16, C20, C22, C24, and C31 all have relatively low renewal filing rates. As such, these categories are excluded from this analysis.

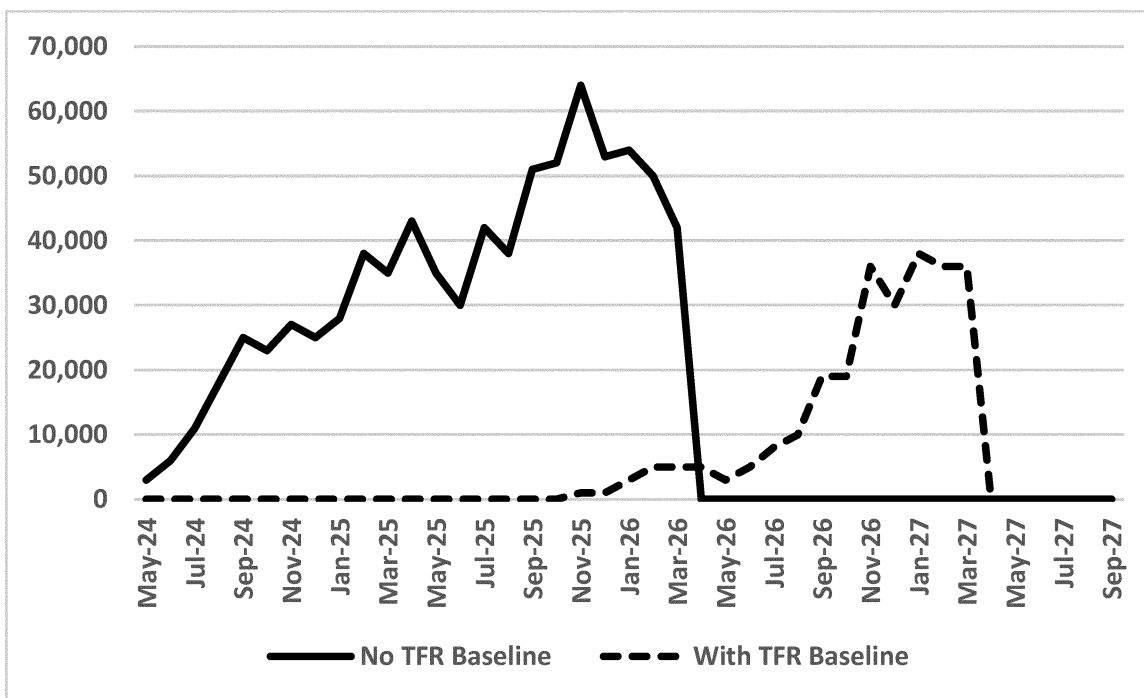


TABLE 7—TFR FUTURE POPULATION PROJECTIONS BY MONTH, ROUNDED TO THOUSANDS

	No TFR			With TFR		
	Low bound: EADs facing lapse each month (baseline +15%)	Baseline: EADs facing lapse each month	Upper bound: EADs facing lapse each month (baseline -15%)	Low bound: EADs facing lapse each month (baseline +15%)	Baseline: EADs facing lapse each month	Upper bound: EADs facing lapse each month (baseline -15%)
May-24	3,000	3,000	3,000	0	0	0
Jun-24	5,000	6,000	6,000	0	0	0
Jul-24	10,000	11,000	12,000	0	0	0
Aug-24	16,000	18,000	18,000	0	0	0
Sept-24	22,000	25,000	26,000	0	0	0
Oct-24	16,000	23,000	27,000	0	0	0
Nov-24	19,000	27,000	31,000	0	0	0
Dec-24	17,000	25,000	29,000	0	0	0
Jan-25	21,000	28,000	32,000	0	0	0
Feb-25	27,000	38,000	42,000	0	0	0
Mar-25	27,000	35,000	36,000	0	0	0
Apr-25	32,000	43,000	45,000	0	0	0
May-25	26,000	35,000	36,000	0	0	0
Jun-25	23,000	30,000	32,000	0	0	0
Jul-25	36,000	42,000	43,000	0	0	0
Aug-25	33,000	38,000	39,000	0	0	0
Sept-25	49,000	51,000	52,000	0	0	1,000
Oct-25	50,000	52,000	52,000	0	0	2,000
Nov-25	61,000	64,000	64,000	0	1,000	2,000
Dec-25	52,000	53,000	53,000	0	1,000	4,000
Jan-26	53,000	54,000	54,000	0	3,000	7,000
Feb-26	50,000	50,000	50,000	1,000	5,000	7,000
Mar-26	41,000	42,000	42,000	1,000	5,000	12,000
Apr-26	0	0	0	2,000	5,000	12,000
May-26	0	0	0	1,000	3,000	13,000
Jun-26	0	0	0	3,000	5,000	13,000
Jul-26	0	0	0	4,000	8,000	25,000
Aug-26	0	0	0	3,000	10,000	22,000
Sept-26	0	0	0	4,000	19,000	36,000
Oct-26	0	0	0	5,000	19,000	44,000
Nov-26	0	0	0	9,000	36,000	54,000
Dec-26	0	0	0	8,000	30,000	51,000
Jan-27	0	0	0	8,000	38,000	51,000
Feb-27	0	0	0	10,000	36,000	49,000
Mar-27	0	0	0	8,000	36,000	41,000
Apr-27	0	0	0	0	0	0
May-27	0	0	0	0	0	0
Jun-27	0	0	0	0	0	0
Jul-27	0	0	0	0	0	0
Aug-27	0	0	0	0	0	0
Sept-27	0	0	0	0	0	0
<b>Total</b>	<b>689,000</b>	<b>793,000</b>	<b>824,000</b>	<b>67,000</b>	<b>260,000</b>	<b>446,000</b>

Source: USCIS analysis of renewal EAD filing data, provided by Office of Performance and Quality (OPQ), USCIS, DHS, Claims 3 database; data provided October 18, 2023.

Figure 2. Monthly Expirations of Baseline Values from Table 7



An assumption that is implicit in the populations developed above 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 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.

USCIS stresses that the population over time can vary via changes in volumes, processing times, and other factors that are very difficult 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. To the extent that the population can vary, the impacts estimated in the following analysis would vary as well.

### 3. Impact Analysis

This section is organized into modules as follows: Module A develops earnings levels for the renewal EAD

filers, which is a key component of the impacts we estimate. Module B focuses on the impact simulations for the impacted population's labor earnings impacts and is divided into two sections: (1) labor earnings, and (2) labor turnover cost. Module C collates the monetized impacts and discounts them over the course of the five fiscal years in which the impacts could accrue. Module D concludes with consideration of other possible effects.

#### a. Module A. Earnings of Renewal EAD Applicants

USCIS expects 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 core component of both impacts is the earnings of the renewal EAD filers, which figure prominently into the monetized estimates. Since there is likely to be variation in earnings applicable to the population, in this module we cover the methodology to develop a range for earnings bounded by a lower and upper level.

Because many of the individuals renewing EADs would be relatively new entrants to the labor force, we would not expect most of them to earn very higher wages. The Federal minimum wage

is currently \$7.25 per hour,<sup>277</sup> but many States have implemented higher minimum wage rates.<sup>278</sup> However, the Federal Government does not track a nationwide population-weighted minimum wage estimate. Individuals in the population of interest could be located anywhere within the United States and may be subject to a range of minimum wage rates depending on the State or city in which they live.

Consistent with other rules, DHS uses the 10th percentile hourly wage from the Bureau of Labor Statistics (BLS) National Occupational Employment and Wage Estimates for all occupations as a reasonable proxy for the effective minimum wage for individuals who are likely to earn an entry-level wage. BLS estimates account for changes in wages across the United States labor market, which is updated annually and will thus reflect any changes to State minimum wage rates. The 10th percentile hourly wage estimate for all occupations is currently \$13.14, not accounting for worker benefits.<sup>279</sup>

It is likely however, that some individuals impacted earn wages above the minimum. Because the EADs

<sup>277</sup> See DOL, "Minimum Wage," <https://www.dol.gov/general/topic/wages/minimumwage> (last accessed Nov. 7, 2023).

<sup>278</sup> See DOL, "State Minimum Wage Laws," <https://www.dol.gov/agencies/whd/minimum-wage/state> (last accessed Nov. 7, 2023).

<sup>279</sup> See BLS, "May 2022 National Occupational Employment and Wage Estimates," "United States," [https://www.bls.gov/oes/2022/may/oes\\_nat.htm#00-0000](https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000) (last visited Nov. 7, 2023). The 10th, 25th, 75th and 90th percentile wages are available in the downloadable XLS file link.

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 E-Verify case data for FY 2021 and FY 2022 for the EAD categories potentially impacted, which yielded 12.26 million records.<sup>280</sup> These data neither distinguish between an E-Verify case for an initial EAD, a renewal EAD, or the E-Verify case result, but they do provide information that we can draw from regarding employment. The

E-Verify data do not provide information on job type or occupation, but it does provide information about the primary business activity of the EAD holder's employer as categorized by the North American Classification System (NAICS).

Analysis of the E-Verify case data shows that they disproportionately accrued to a small subset of activity. Of 103 represented economic activities, only three exhibited shares of cases higher than 10 percent—Professional, Scientific, & Technical Services (24.5 percent), Other Information Services (19.1 percent), and Administrative and Support Services (11.9 percent). Moreover, the upper quartile (75th percentile) is reached with just eleven activities. The average individual share

across these eleven activities was 6.8 percent, while for the entire remainder the individual average was 0.3 percent. Given this concentration, we will center the analysis on the activities comprising the upper quartile.

In Table 8 we present the activities, followed by the level of activity applicable to the respective the North American Industry Classification System (NAICS) code from the BLS. We rescaled the shares of the activities according to the total number of records for the upper quartile (9.01 million) and obtained the July 2022 average hourly wage for the activities of all employees within the relevant NAICS codes from BLS.<sup>281</sup> We then calculated a weighting factor input, which is the product of the wage and the rescaled share.

TABLE 8—DERIVATION OF UPPER BOUND FOR HOURLY WAGE <sup>282</sup>

Economic activity	NAICS code	Level	Share (%)	Cumulative	Wage <sup>283</sup>	Weight factor
Professional, Scientific, & Technical Services	541000	subsector .....	33.3	33.3	48.34	16.10
Other Information Services .....	519100	industry .....	26.0	59.4	45.27	11.79
Administrative & Support Services .....	561000	subsector .....	16.2	75.6	25.78	4.18
Internet Service providers, Web Search Portals, & Data Processing.	518200	industry .....	7.4	83.0	51.33	3.80
Educational Services .....	611000	subsector .....	3.1	86.1	33.31	1.03
Food Services & Drinking Places .....	722000	subsector .....	2.8	88.8	18.54	0.51
Nursing & residential Care Facilities .....	623000	subsector .....	2.5	91.4	23.31	0.59
Publishing Industries (non-internet) .....	511000	subsector .....	2.3	93.7	50.10	1.17
Specialty Trade Contractors .....	238000	subsector .....	2.3	96.0	33.83	0.78
Hospitals .....	622000	subsector .....	2.1	98.1	38.00	0.80
Management of Companies/Enterprises .....	550000	sector .....	1.9	100.0	44.48	0.84
Sum (rounded) .....						41.60

Summing along the final column yields an hourly wage of \$41.60, which will apply as the upper earnings bound for this analysis, noting that it is 39.6 percent higher than the national average wage weighted across all occupations, of \$29.76.<sup>284</sup>

DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent BLS report detailing average total employee compensation for all civilian U.S. workers.<sup>285</sup> DHS estimates the benefits-to-wage multiplier to be 1.45, which

incorporates employee wages and salaries and the full cost of benefits, such as paid leave, insurance, and retirement.<sup>286</sup> Therefore, using the benefits-to-wage multiplier, DHS calculates the total rate of compensation for individuals at the high end of the range as \$60.32. DHS calculates the total

<sup>280</sup> USCIS, DHS, Immigration Records and Identity Services Directorate (IRIS), Verification Division; (Oct. 12, 2023).

<sup>281</sup> BLS, "Industries at a Glance," "Industries by Supersector and NAICS Code," [https://www.bls.gov/iag/tgs/iag\\_index\\_naics.htm](https://www.bls.gov/iag/tgs/iag_index_naics.htm) (last visited Nov. 7, 2023).

<sup>282</sup> There are some technical details applicable to Table 8. The title of the activity shown is in a few cases abbreviated for space consideration. Otherwise, they reflect exactly what was recorded in the E-Verify data. For the activities shown comprising the upper quartile, from the first level analysis one activity, Non-store Retailers, was dropped, and "replaced" by Management of Companies/Enterprises. The reason this was conducted is that in the recent (2022) revision to the NAICS codes, Non-store Retailers was eliminated. Many such revisions to activities have been made, and the BLS will often describe what revised activity(ies) in the update ensconce the former classification. In this case, the removed activity consists of three current industry groups, Electronic Shopping and Mail-Order Houses (NAICS 4541), Vending Machine Operators (NAICS

4542), and Direct Selling Establishments (NAICS 4543). However, the BLS does not provide wage data applicable to these industry groups ([see https://www.bls.gov/iag/tgs/iag454.htm](https://www.bls.gov/iag/tgs/iag454.htm)). In addition, internet Service providers, Web Search Portals, & Data Processing appears to apply to a dated 2002 NAICS application, and was changed in a 2007 revision to "Data Processing, Hosting, and Related Services" subsector ([see https://www.bls.gov/iag/tgs/iag518.htm](https://www.bls.gov/iag/tgs/iag518.htm)).

<sup>283</sup> July 2022 average hourly wages from the following: <https://www.bls.gov/iag/tgs/iag54.htm>; <https://www.bls.gov/iag/tgs/iag519.htm>; <https://www.bls.gov/iag/tgs/iag561.htm>; <https://www.bls.gov/iag/tgs/iag518.htm>; <https://www.bls.gov/iag/tgs/iag61.htm>; <https://www.bls.gov/iag/tgs/iag722.htm>; <https://www.bls.gov/iag/tgs/iag623.htm>; <https://www.bls.gov/iag/tgs/iag511.htm>; <https://www.bls.gov/iag/tgs/iag238.htm>; <https://www.bls.gov/iag/tgs/iag622.htm>; <https://www.bls.gov/iag/tgs/iag55.htm>. For Educational Services, the average earnings are reported annually for five specific occupations, and the hourly wage was derived by dividing the annual salary by 2,080

annual work hours ([see https://www.bls.gov/iag/tgs/iag61.htm](https://www.bls.gov/iag/tgs/iag61.htm)) (Obtained 10–15–2023).

<sup>284</sup> The national average wage is found in the "May 2022 National Occupational Employment and Wage Estimates" in the BLS Occupational Employment and Wage Statistics (OEWS) portal, [https://www.bls.gov/oes/2022/may/oes\\_nat.htm](https://www.bls.gov/oes/2022/may/oes_nat.htm) (last updated Apr. 25, 2023). Relevant calculation:  $(41.60 \div 29.80) - 1 \times 100$ .

<sup>285</sup> See BLS, Economic News Release, "Employer Costs for Employee Compensation—June 2023," Table 1. Employer costs for employer compensation by ownership, p. 4, [https://www.bls.gov/news.release/archives/eccc\\_09122023.pdf](https://www.bls.gov/news.release/archives/eccc_09122023.pdf) (last visited Nov. 7, 2023).

<sup>286</sup> The benefits-to-wage multiplier is calculated as follows:  $(\text{Total Employee Compensation per hour}) \div (\text{Wages and Salaries per hour}) = \$43.26 \div \$29.86 = 1.45$  (rounded). See BLS, Economic News Release, "Employer Costs for Employee Compensation—June 2023," Table 1. Employer costs for employer compensation by ownership, p. 4, [https://www.bls.gov/news.release/archives/eccc\\_09122023.pdf](https://www.bls.gov/news.release/archives/eccc_09122023.pdf) (last visited Nov. 7, 2023).

rate of compensation for individuals at the lower end of the range as \$19.05 per hour, where the 10th percentile hourly wage estimate is \$13.14 per hour and the average benefits are \$5.91 per hour.<sup>287</sup>

b. Module B. Impacts That Could Accrue to Labor Earnings

i. Earnings Impact to EAD Holders

There are three core inputs (“components” or “variables”) requisite to estimate the impacts that could accrue to labor compensation; the lapse-duration, earnings, and the impacted population. DHS first extracted adjudication records on 77,000 auto-extended EADs for the relevant categories, which had lapsed and where the renewal EAD applications were subsequently approved from January 1, 2022, to May 15, 2022.<sup>288</sup> This date range is the benchmark needed for this module of the analysis because it captures the most recent data in the past in which the auto-extension was 180 days and USCIS was experiencing processing delays that resulted in lapses in employment authorization. This timeframe serves as the general structure for the distribution or shape of lapse durations; later, we make further adjustments to account for the larger population of renewal applications in need of processing than during this time period.

Next, USCIS used the Excel random number generator tool to randomly sample 3,000 records in order to work with a much smaller and tractable data set. For each record, we calculated the lapse-duration in calendar days. The data were next grouped into the number of cases that elapsed per day-duration and the concomitant share of cases applicable to each duration was tabulated.

Having a tractable sample, it is important to evaluate the structure of the data. We utilized the Oracle Crystal Ball® Modelling and Simulation Software (“OCB”) to analyze the data. The data analysis batch fit tool in OCB indicates that the Gamma density function provides the best fit.<sup>289</sup> 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. The durations display a wide range (1—1,049) and cluster around a median of 58, which is lower than the mean of 77.9, further informing the positive skew.<sup>290</sup> The extreme skew of the data can be evidenced from Table 9, which displays the percentiles applicable to the average lapse durations.

TABLE 9—PERCENTILES FOR THE NUMBER OF CALENDAR DAYS BETWEEN WHEN AUTO-EXTENDED EADS EXPIRED AND RENEWAL FORMS I-765 WERE SUBSEQUENTLY APPROVED FROM JANUARY 1, 2022, TO MAY 15, 2022

[“Lapse Duration” in calendar days]

Percentile	Lapse duration
10	10
20	21
30	30
40	42
50	58
60	89
70	121
80	147
90	176
100	1,049

Source: USCIS analysis of renewal EAD filing data, provided by Office of Performance and Quality (OPQ), USCIS, DHS, Claims 3 database; data provided October 18, 2023.

As can be seen, the extreme jump in the lapse value from 176 to 1,049 in the 90th to 100th percentile is evident that there is long tail on the right side of the distribution capturing a small number of low probability outlier (numerically high value) durations.

All three core inputs require some adjustments to make them as salient as possible. Foremost, the lapse-durations are in calendar days, hence we make an adjustment to account for a full-time 8-hour workday and 5-day workweek. However, not all U.S. workers are employed full-time, so we also make an adjustment to number of hours worked per week. BLS currently reports that average weekly hours across all private nonfarm industries is 34.4.<sup>291</sup> This

Anderson-Darling (A–D) test, which in this case is 20.661.

<sup>290</sup> The produced tuning parameters are, location = 0.96, scale = 78.0, shape = 1.04671.

<sup>291</sup> BLS, Economic News Release, “The Employment Situation—September 2023,” [https://www.bls.gov/news.release/archives/empst\\_10062023.htm](https://www.bls.gov/news.release/archives/empst_10062023.htm) (Oct. 6, 2023).

figure is 86.0 percent of a 40-hour workweek.

As it relates to the core variable, population, 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, with few exceptions, 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 as of October 2023 is 3.9 percent.<sup>292</sup> 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 current unemployment, which is conducted by integrating the employment rate, as unity minus 0.039, to arrive at 0.961.

DHS scales the baseline population by the unemployment rate and the lapse rate—the percentage of the affected renewal population that might still experience a lapse in EAD with this rule—to achieve the population likely to avoid a lapsed EAD with this rule. The sensitivity analysis discussed in Tables 6 and 7 reveals that the percentage of EADs that would lapse under the proposed bridge varies. As such, the rate that would not lapse also varies. For the baseline population and lapse rate we rely on the triangle distribution. This distribution is ideal for these inputs because it sets a minimum and maximum value around a center point (“likeliest” value). In our calibration, the center point is the baseline value. For the population, the approximate minimum is 689,000, maximum is 824,000, and the center point is 793,000. For the lapse rate, the minimum is 9.8 percent, maximum is 54.1 percent, and the center point is 32.8 percent.<sup>293</sup> See Table 6.

[www.bls.gov/news.release/archives/empst\\_10062023.htm](https://www.bls.gov/news.release/archives/empst_10062023.htm) (Oct. 6, 2023).

<sup>292</sup> BLS, Economic News Release, “The Employment Situation—October 2023,” <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> (Nov. 7, 2023).

<sup>293</sup> Low bound: 67,223 lapses with the rule/689,423 without; Primary: 260,327 lapses with the rule/793,053 without; Upper bound: 445,741 lapses with the rule/823,706 without.

<sup>287</sup> The calculation of the benefits-weighted 10th percentile hourly wage estimate: \$13.14 per hour × 1.45 benefits-to-wage multiplier = \$19.053 = \$19.05 (rounded) per hour.

<sup>288</sup> Data provided by the USCIS, OPQ, Performance and Evaluation reporting (PAER) Division. USCIS Global Claims, and Global systems (10–17–23).

<sup>289</sup> OCB ranks density fit according to internal routines that evaluate the appropriateness of several tests according to features of the data. 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

DHS is interested in estimating the mean and a range for the impacts that is likely to be realized and employs a simulation approach. For the earnings we rely on the uniform distribution. This is a discrete 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 have no evidence or data to suggest that the earnings would tend to cluster at either the low or high end of the range.

Next, DHS adjusts the lapse durations for the expected future under the TFR. DHS explained that the Gamma density function provides the best fit to the lapse- durations. DHS will operate under the assumption that the underlying data structure does not change over the future (the period of the TFR). Specifically, the durations will be positively skewed and clustered around a median less than the mean, with a long thin tail capturing very low-probability values substantially greater than the mean. The benefit of the Gamma distribution is that the location parameter is generally close to the minimum value, which will be consistent (in time), and the scale parameter represents the mean. The key shift factor that will change in the future is that the average duration will increase drastically. This increase will result from the increased processing times for EAD renewal filings that are concomitant to the growth in filings and the resulting backlog of cases, as is described in the preamble. We therefore have the capability to change the mean, and providing we do not alter the shape parameter, the general underlying data structure is retained—albeit with a new mean. In practice, changing the mean can have some effect on the other two parameters, but the distortion is very miniscule. DHS ran dozens of experiments with a range of means that could be gleaned as appropriate as being

informed by the data and in every case the Gamma fit was solidly retained, visual examination yielded no discernable differences in structure, and the parameters varied by a miniscule amount. Stated in more slightly formal terms, the distribution for lapse-durations that DHS is working with is generally scalable about its mean, which is a crucial necessary condition for estimation.

To determine the mean to impute we analyzed data provided by the USCIS Office of Performance and Quality, applicable to estimated lapse-durations by the size of the population that could be impacted. We began by forecasting monthly filing volumes over the period of analysis based on historical filing patterns and expected EAD expirations by month. We also estimated average monthly officer completions based on FY 2023 totals.

Because USCIS generally adjudicates applications in the order of the date received, for each month in the analysis we calculated the pending inventory by adding forecasted receipts and subtracting average officer completions. Using this information, we are able to estimate the number of pending applications that would expire each month and the estimated amount of time until the expired EADs would be adjudicated (*i.e.*, the lapse duration). Next, DHS utilized estimates of the number of possible lapses and the estimate of the average lapse duration over the period in which most of the EADs would lapse. We then divided the number of EADs lapsing by duration into the total number that could lapse over the entire period to obtain individual weighting factors. Multiplying each weight factor by the lapse duration and summing over all data points yielded a weighted average lapse duration of 271 days.

Above, we have described the adjustments made to the population to account for unemployment and

employment lapses that may still happen, to wages to account for benefits, and to the lapse duration to account for the work week and hours worked. In practice, it is not necessary to make the adjustments to the core inputs directly or even sequentially. The reason is that the inputs (core and incumbent adjustment factors) interact in the estimation procedure multiplicatively, hence they can be abridged into a single equation and nested compactly as a “one-step” routine in the software program.

The inputs and settings for the estimates are encapsulated in Table 10. In practice there are two modules (populations) that will comprise the earnings impacts. The Department believes the impacts will be beneficial to EAD holders as “preserved” or “stabilized” earnings. For EADs that this rule will prevent from lapsing, the duration input is the gamma density tuned to the parameters produced by the software and truncated at the upper end by a value of 360 (days), since the gamma curve is infinite in its upper tail. However, individuals with EADs that may still lapse would also incur a benefit of being able to work exactly 360 days longer than they otherwise would—there is no variation or distribution, as the extra days is the point value of 360 days. There are any number of ways to derive an expression capturing the two population modules that may still incur stabilized earnings, *i.e.*, (a) those that would be prevented from lapsing, and (b) those that would still lapse. In the technical appendix accompanying this rulemaking, we develop the system from its long form into a compact nested equation, which is the product of two terms, as is shown in Table 10. The combined employment “intensity” scalar is developed to abridge all non-varying inputs common to both modules as a single input for purpose of brevity.

TABLE 10—MODEL FOR ESTIMATION OF EARNINGS IMPACT

Input	Structure	Settings
Baseline Population (P) .....	Triangle distribution .....	Min: 689,000. Max: 824,000 Likeliest: 793,000.
Lapse rate (L) .....	Triangle distribution .....	Min: 9.8%. Max: 54.1%. Likeliest: 32.8%.
Hourly wage (W) .....	Uniform distribution .....	Min: \$13.14. Max: \$41.60.

TABLE 10—MODEL FOR ESTIMATION OF EARNINGS IMPACT—Continued

Input	Structure	Settings
Lapse Durations: ..... D <sub>S</sub> : EADs saved from lapse ..... D <sub>L</sub> : EADs that lapse .....	D <sub>S</sub> : Gamma density; ..... D <sub>L</sub> : Point value .....	D <sub>S</sub> : Gamma density. Location: 0.96. Scale: 271.0. Shape: 1.047. Max: 360. D <sub>L</sub> : 360.
Combined scalar .....	Point value .....	Benefits multiplier (B): 1.45. Workweek time (T): 5 ÷ 7 days = 0.714. Average hours (H): 34.4 ÷ 40 hours = 0.86. Full time day hours (F): 8.0. Employment rate (E): 1 – 0.039 = 0.961. Scalar (S) = B × T × H × F × E = 6.85.
Nested equation .....	{(W × S × P) × (D <sub>S</sub> – (L × (D <sub>S</sub> – D <sub>L</sub> )))}	
Results summary .....	Forecast values (millions, undiscounted) <sup>294</sup>	
	Range level	Preserved earnings impact
	low	\$10,230.1
	average	30,984.8
	high	63,958.4
	<ul style="list-style-type: none"> <li>• Impact type: stabilized earnings to individuals.</li> <li>• Contribution to forecast variance: Lapse duration = 47.5%. Hourly wage = 47.0%. Lapse rate: 4.9%. Population: 0.6%.</li> </ul>	

Source: USCIS analysis, 3–5–24.

OCB repeatedly calculates results using a different set of random values

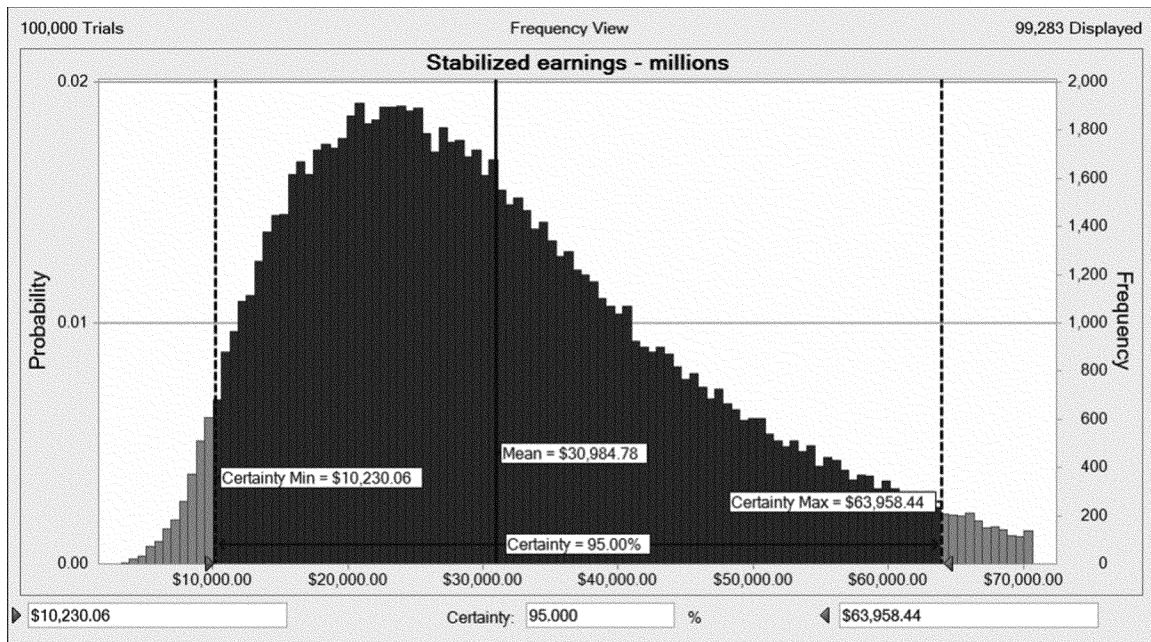
<sup>294</sup> The low and high values reflect a 95 percent certainty bound, which captures the distribution

from the range of values and probability distributions described in Table 10

specific values between the 2.5th and 97.5th percentiles.

above to build a model of possible results. We ran 100,000 randomized seed trials, which is more than sufficient to generate a 95 percent level of precision in the results.

Figure 3. Stabilized Earnings Estimate



Based on the simulation, and as shown in Figure 3, the expected value (which is the mean of probabilistic-based forecast values) for stabilized earnings is \$31.0 billion.<sup>295</sup> We also generated a 95 percent certainty range, which reports \$10.2 billion to \$64.0 billion. 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 lapse-durations (that vary) and wage contributed about the same, 47.5 and 47.0 percent of the total variation, in order, while the lapse rate contributed a small 4.9 percent of the variation (see Table 10 for more information). DHS believes that the earnings impact, which can be thought of as “stabilized” or “preserved” earnings to renewal EAD applicants, will be beneficial to the EAD holders, as the rule would prevent a lapse in their employment authorization and an incumbent interruption of their labor compensation.

If, without this rule, businesses would not have been able to find replacement labor for the position the affected renewal EAD applicant filled, then the unperformed labor would have resulted in a reduction in taxes from employers

<sup>295</sup> 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.

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.<sup>296</sup> 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 percent and 1.45 percent, respectively).<sup>297</sup> 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

<sup>296</sup> Robert Frank, “61% of Americans paid no federal income taxes in 2020, Tax Policy Center says,” CNBC (Aug. 18, 2021), <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 Tonya Moreno, “Your Guide to State Income Tax Rates,” The Balance, <https://www.thebalance.com/state-income-tax-rates-3193320> (last updated Jan. 3, 2022).

<sup>297</sup> The various employment taxes are discussed in more detail, see Internal Revenue Service, “Understanding Employment Taxes,” <https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes> (last updated Mar. 14, 2022). See Internal Revenue Service “Publication 15,” “(Circular E), Employer’s Tax Guide” (Dec. 19, 2023), <https://www.irs.gov/pub/irs-pdf/p15.pdf> for specific information on employment tax rates. Relevant calculation: (6.2 percent Social Security+1.45 percent Medicare)×2 employee and employer losses=15.3 percent total estimated public tax impact.

employees and employers to Medicare and Social Security is 15.3 percent.

DHS estimates the tax impacts on the unburdened earnings basis. This is done by multiplying the stabilized earnings by the employment tax rate of 15.3 percent, and dividing the resulting product by the benefits burden multiple of 1.45.<sup>298</sup> If, without this rule, all employers would have been unable to find replacement labor for the position the renewal EAD applicant filled, this rule will prevent a reduction in employment taxes from employers and employees to the Federal Government of \$3.3 billion, but could range from \$1.1 billion to \$6.7 billion, in undiscounted terms. 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.

There are several caveats to our estimates that could cause the true impacts to vary higher or lower. In one way, the estimates are likely to be understated. DHS accounted for the duration of the EAD lapse, but this is not necessarily the total spell of unemployment individuals could face. The BLS reports that the median spell of unemployment across all economic sectors is 9.2 weeks, which would be 64.4 days (unadjusted). We did not include this because we do not know if

<sup>298</sup> 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.

some portion of individuals may be able to return to their previous employers (for example, if the EAD lapse was shorter than the median spell of unemployment and if the employer has difficulty finding a replacement worker) or, for those who cannot, if they would start the search process until they became reauthorized to work. If they did not—*i.e.*, they started looking for new work during the lapse, double counting would be invoked for some portion of the duration. It may be useful to think of the total unemployment spell as being the sum of two parts, the EAD lapse and the [job] “search time.” We have no data to support a determination on when the search process starts, and hence if the two parts intersect, and therefore we do not include it. However, to the extent that it may be reasonable to assume that many individuals would not start looking for work until after they became re-authorized to work, incorporating the “search time” duration in addition to their lapse duration would substantially increase the scope of the stabilized earnings impacts.

Second, in addition to the search time spell of unemployment outside of the lapse alone, there are costs to looking for work. There are direct costs involved in activities such as resume updating, possibly learning new skills, travel to interviews, and so on. There are also time-related opportunity costs applicable to the job search. DHS does not have salient data or method to allocate the portion of individuals that would need to conduct a job search and the portion of the search time that could be conducted during the EAD lapse, and thus they are not monetized.

#### ii. 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 impacts 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.

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 temporarily 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.<sup>299</sup>

There are numerous studies and reports concerning labor turnover costs available from Human Resource entities that are cited across correspondent literature. Some focus on specific occupations, industries, salary levels, and often measure turnover cost in slightly different ways. Labor turnover cost is generally reported as a share of annual earnings or an actual cost per employee. Usually these reports measure the more direct, or “hard” costs associated with turnover and not intangible effects such as worker morale or lost productivity. 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. DHS captures preserved productivity savings—proxied by stabilized earnings to applicants—had employers not been able to immediately find replacement labor for renewal EAD applicants without this rule. DHS requests public comments 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.<sup>300</sup>

The CAP and other reports that we reviewed confirm three central aspects of turnover cost: (1) that they vary substantially across industries and jobs; (2) that they tend to grow (in absolute and percentage terms) according to skill level and earnings; and (3) that they are

<sup>299</sup> For additional descriptions of the components of labor turnover costs, see Ghase Charba, “Employee retention: The Real Cost of Losing an Employee,” PeopleKeep, (updated February 2, 2023), <https://www.peoplekeep.com/blog/employee-retention-the-real-cost-of-losing-an-employee>.

<sup>300</sup> DHS did not receive public comment on this specific request in the previous EAD Auto Extension TFR.

higher for salaried workers compared to hourly wage earners.<sup>301</sup> The report 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 replacement costs that can reach more than 100 percent of the salary—compared to jobs with low educational and technical requirements.<sup>302</sup> 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 on average \$75,000 per year or less (2012\$), turnover costs ranged typically from 10 to 30 percent of the salary, clustering at about 21 percent. More recent reports indicate that the typical cost is about one-third of the salary.<sup>303</sup>

DHS could nest the information provided 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 ensuing 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-five studies on turnover costs.<sup>304</sup> We selected data points that

<sup>301</sup> See Heather Boushey and Sarah Jane Glynn, “There Are Significant Business Costs to Replacing Employees,” Center for American Progress, (Nov. 16, 2012), <https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/>.

<sup>302</sup> See Shane Mcfeely and Ben Wigert, “This Fixable Problem Costs U.S. Businesses \$1 Trillion,” Workplace, (Mar. 13, 2019), <https://www.gallup.com/workplace/247391/fixable-problem-costs-businesses-trillion.aspx>. See also Kate Heinz, “The True Costs of Employee Turnover,” Built In, <https://builtin.com/recruiting/cost-of-turnover> (last updated June 23, 2023).

<sup>303</sup> See “The Real Cost of Employee Turnover in 2021,” Terra Staffing Group (Nov. 4, 2020), <https://www.terstaffinggroup.com/resources/blog/cost-of-employee-turnover>. See also Louie Andre, “112 Employee Turnover Statistics: 2021 Causes, Cost & Prevention Data,” Finances Online, <https://financesonline.com/employee-turnover-statistics/#cost> (last accessed Nov. 7, 2023).

<sup>304</sup> See Kate Bahn and Carmen Sanchez Cumming, “Improving U.S. Labor Standards and the Quality of Jobs to Reduce the Costs of Employee Turnover to U.S. Companies,” Washington Center for Equitable Growth, (December 2020), <https://>



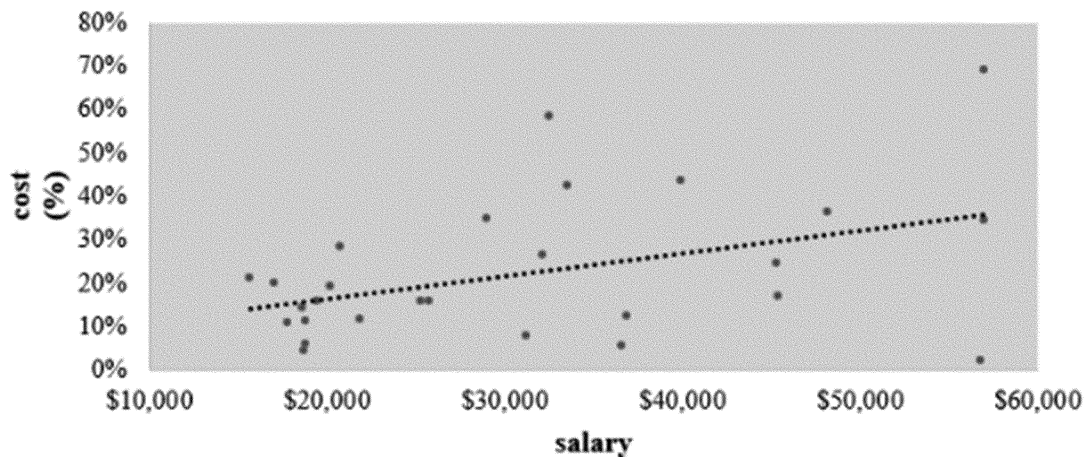
captured both the annual earnings salary (which the study benchmarked to 2019 levels) and turnover costs. We then culled the data applicable to salary levels more than the maximum in our earnings bound. We note before making any adjustments, multiplying the maximum wage (\$41.60) by 2,080 average annual hours yields a maximum annual earnings figure of \$86,528. Twenty-seven resulting data points were employed for the analysis. While this may be relatively few observations, OCB nevertheless was able to fit a lognormal density function to the data, and we are confident in relying on the results.<sup>305</sup> Foremost, the mean of 22.4 percent and the median of 16.6 percent of annual

salary are amenable to the metrics reported in the studies referenced above and fall within a substantial range, from 2.1 percent to 68.7 percent. Second, on qualitative grounds the lognormal distribution is well-suited as a setup, as it is often utilized in situations where there is wide variation and there is a discrete 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.<sup>306</sup>

Additionally, the scatterplots presented in Figures 4A and 4B with the fitted least squares line clearly reveal that turnover cost is an increasing function of the annual earnings, with a moderately strong correlation coefficient of 0.421.<sup>307</sup> Figure 4A plots the cost as a percentage of salary, as this is how it is inputted into the estimation, while Figure 4B plots the cost in actual dollars, for context (the data points utilized are provided in the accompanying technical appendix).

**Figure 4A. Relation Between Annual Salary and Turnover Cost (%)**



[equitablegrowth.org/wp-content/uploads/2020/12/122120-turnover-costs-ib.pdf](https://equitablegrowth.org/wp-content/uploads/2020/12/122120-turnover-costs-ib.pdf). The data are found in the methodological appendix, located in the Docket for this rulemaking.

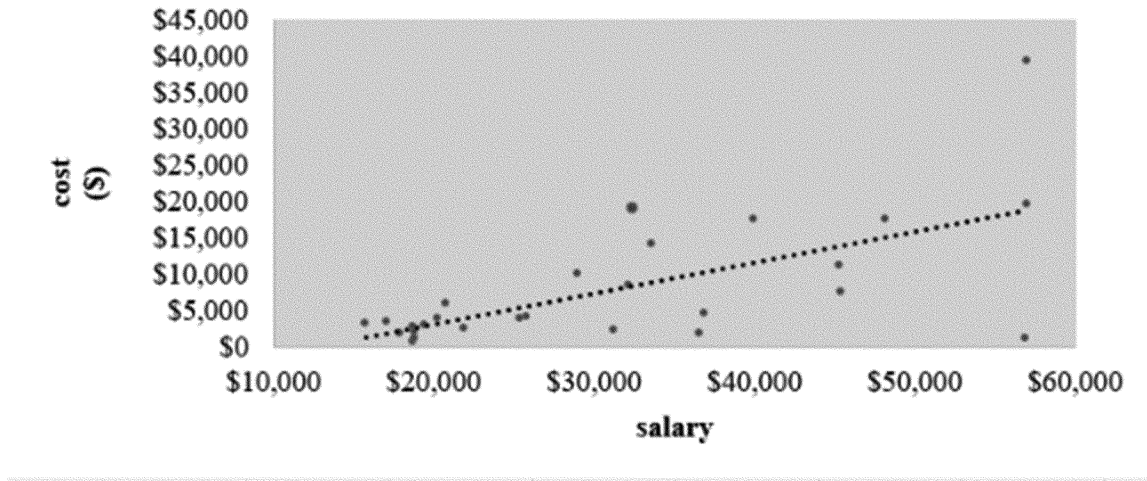
<sup>305</sup> DHS used the same general data source for the turnover costs for the 2022 EAD TFR. In that earlier rule a slightly different distribution was applied than the lognormal herein. The software periodically updates the mathematics and scoring algorithms applicable to density fits and the result was a slight change in the appropriate fit. However, both distributions take on a very similar shape and

any resulting differences in results would be very minor.

<sup>306</sup> OCB indicates that the multiple continuous distributions are appropriate for the data but ranks the Lognormal distribution highest in terms of goodness of fit with an A-D test statistic of  $t = 0.1282$  and an associated  $p$ -value of 0.971. The three produced parameters are as follows: location =  $-0.03$ , mean = 0.23, and standard deviation = 0.19. The fitted parameters affect the shape and position of the distribution.

<sup>307</sup> The slope coefficient for the regression of costs against salary is  $5.2E-06$ . By multiplying this figure by 5,000 to obtain 0.026, it can be interpreted that a \$5,000 increase in salary is associated with a 2.6 percentage point increase in labor turnover costs, on average, within the range of our data. The exact probability of committing a type I error ( $p$ -value) for the slope coefficient is 0.028, such that we can reject the hypothesis that salary and turnover costs are not systemically related (or such that the correlation in the particular data is due to randomness) with more than 95 percent confidence.

**Figure 4B. Relation Between Annual Salary and Turnover Cost (\$)**



To obtain the annual salary we multiply the (non-burdened) wage bounds (\$13.14 and \$41.60) by 2,080 annual full-time hours but make the adjustment to account for average hours by scaling by 0.86, as was introduced above for stabilized earnings. In addition, we scale the baseline population to account for unemployment and lapses that may still occur even with this rule; this rule would delay though not prevent separations for employees that may still experience a 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 renewal EAD

applicants that would have been terminated from or left their jobs had they not lost employment authorization.<sup>308</sup> DHS requests public comment on data that could be used to make such an adjustment.<sup>309</sup>

We calibrated the lognormal distribution for the parameters produced and calibrated the estimation program according to the below input values. The lognormal distribution is infinite in the upper tail and we truncated the cost percentage to 68.7 percent, the highest value in the underlying data. The core inputs are the baseline population, turnover cost percentage, and the wage (unburdened). In practice, it is not necessary to adjust them directly or even sequentially. The reason is that all the inputs (core and

adjustment factors) interact in the estimation procedure multiplicatively, hence they can be abridged into a single equation and nested compactly as a "one-step" routine in the software program as the product of two terms. The inputs and settings are collated in Table 11, with the nested equation shown as well. The correlation between cost and earnings is tuned to 0.421. Imputing 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 table below summarizes the entire system—the inputs, their settings, and the resulting outputs.

**TABLE 11—MODEL FOR ESTIMATION OF TURNOVER COST IMPACT**

Input	Structure	Settings
Baseline Population (P) .....	Triangle distribution .....	Min: 689,000. Max: 824,000. Likeliest: 793,000.
Lapse rate (L) .....	Triangle distribution .....	Min: 9.8%. Max: 54.1%. Likeliest: 32.8%.
Hourly wage (W) .....	Uniform distribution .....	Min: \$13.14. Max: \$41.60.
Turnover cost % (C) .....	Lognormal density .....	Location: -0.03. Mean: 0.23. S-dev.: 0.19. Max: 0.687.

<sup>308</sup> Further, DHS does not have data on the number of EAD renewal applicants that have been terminated because their employer used an online calculator provided by USCIS to assist in the determination of an EAD expiration date.

Presumably an employer would determine an EAD expiration well in advance of the date for business continuation purposes. Regardless, an employer would spend time utilizing this optional online

calculator with or without this rule and is not considered an additional burden for this rule.

<sup>309</sup> DHS did not receive public comment on this specific request in the previous EAD Auto Extension TFR.

TABLE 11—MODEL FOR ESTIMATION OF TURNOVER COST IMPACT—Continued

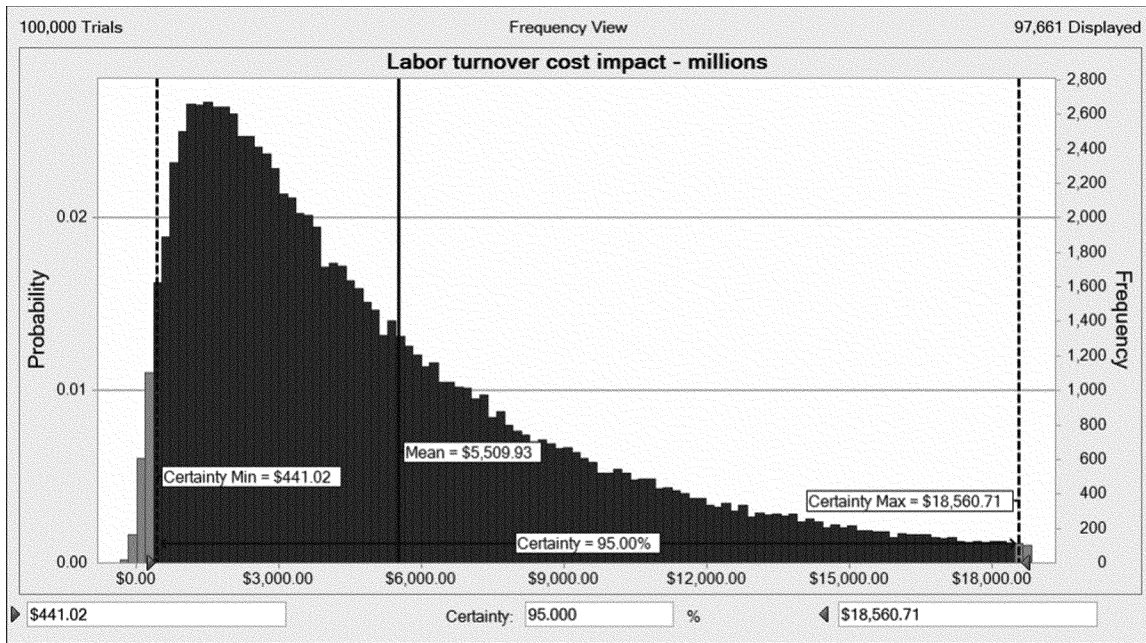
Input	Structure	Settings	
Employment scalar (S) .....	Point value .....	Average hour adjustment (H): 0.86. Full time annual hours (A): 2,080. Employment rate (E): 0.961. Scalar = H × A × E = 1,719.	
Correlation .....	W, C .....	0.421.	
Nested equation .....	{(W × C × P × S) × (1 - L)}		
Results summary .....	Forecast values (millions, undiscounted)		
	low	average	high
	\$441.0	\$5,509.9	\$18,560.7
<ul style="list-style-type: none"> <li>• Impact type: Cost-savings to employers</li> <li>• Contribution to forecast variance:                             <ul style="list-style-type: none"> <li>(a) Turnover cost (%) = 65.1%</li> <li>(b) Hourly wage = 34.9%</li> <li>(c) Population and lapse rate = negligible</li> </ul> </li> <li>Number of businesses impacted: 62,900–82,400</li> </ul>			

Source: USCIS analysis, 3–5–2024.

We ran 100,000 randomized seed trials, which is more than sufficient to generate 95 percent level of precision in

the results. The results are displayed in Figure 5.

Figure 5. Estimated Labor Turnover Impacts



Based on the simulation, the expected value is \$5.5 billion, and the 95 percent precision bound results in a range of forecasts from \$0.4 billion to \$18.6 billion. The sensitivity analysis reveals that variation in the turnover cost percentage of the salary contributed about 65.1 percent of the wide certainty range while about 34.9 percent was driven by the variance in earnings. The other inputs contributed negligibly.

In addition to the projected cost-savings to businesses reported above, DHS can make some estimates of the number of businesses that could benefit from the cost-savings. From the E-Verify data utilized to develop an upper wage bound, we randomly sampled 451 EAD employers, which is more than the requisite 384 needed for a 95 percent level of confidence and collected the number of E-Verify cases per EAD

employer.<sup>310</sup> The analysis reveals that there were on average ten cases per EAD employer for FY 2022. If this figure is

<sup>310</sup>DHS determined the sample size using a standard statistical formula based on the total EAD employer population of 149,132 in FY 2022 with a 95 percent confidence level and a 5 percent confidence interval. This means that there is a 95 percent chance that parameters descriptive of the population (e.g., the EAD employer population size) are no more than 5 percent different from the statistic obtained by the sample.

extrapolated to the baseline population, it would indicate that between 62,900 and 82,400 EAD employers could be impacted.

c. Module C. Monetized Impacts for the TFR

In Table 12 we collate the undiscounted monetized impacts derived from the above sections.

**TABLE 12—SUMMARY OF MONETIZED IMPACTS**  
[FY 2024 through FY 2028, undiscounted, in \$ millions, 2022\$]

	Stabilized earnings	Labor turnover cost	Total impacts	Employment taxes
Low end .....	\$10,230.1	\$441.0	\$10,671.1	\$1,079.5
Average .....	30,984.8	5,509.9	36,494.7	3,269.4
High end .....	63,958.4	18,560.7	82,519.1	6,748.7

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 population to the impacts, we can derive the yearly allocations directly from the population figures. According to our analysis, based on the

broad population, the shares of impacts allocated to the FYs 2024, 2025, 2026, 2027, and 2028, in order, are 6.0, 18.7, 36.2, 31.8, and 7.4 percent.<sup>311</sup>

Table 13 provides the allocated impacts according to the allocation derived above, to account for the average, and low and high ends of the

certainty bound in order. The table is organized into two sections to account for undiscounted terms and those at a 2-percent discount rate. We parsed out the stabilized earnings and labor turnover impacts separately, as they will embody different types of impacts.

**TABLE 13—MONETIZED EXPECTED VALUE IMPACTS FOR THE TFR**  
[\$ millions, 2022\$]

<b>A. Undiscounted</b>				
<b>1. Low end bound</b>				
FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes <sup>312</sup>
2024 .....	\$618.3 .....	\$26.7 .....	\$645.0 .....	\$65.2
2025 .....	1,909.3 .....	82.3 .....	1,991.6 .....	201.5
2026 .....	3,699.5 .....	159.5 .....	3,858.9 .....	390.4
2027 .....	3,249.3 .....	140.1 .....	3,389.4 .....	342.9
2028 .....	753.8 .....	32.5 .....	786.3 .....	79.5
5-year Total .....	10,230.1 .....	441.0 .....	10,671.1 .....	1,079.5
<b>2. Average</b>				
FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes
2024 .....	1,872.7 .....	333.0 .....	2,205.7 .....	197.6
2025 .....	5,782.8 .....	1,028.3 .....	6,811.1 .....	610.2
2026 .....	11,204.9 .....	1,992.5 .....	13,197.4 .....	1,182.3
2027 .....	9,841.4 .....	1,750.1 .....	11,591.5 .....	1,038.4
2028 .....	2,283.0 .....	406.0 .....	2,689.0 .....	240.9
5-year Total .....	30,984.8 .....	5,509.9 .....	36,494.7 .....	3,269.4
<b>3. High end bound</b>				
FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes
2024 .....	3,865.6 .....	1,121.8 .....	4,987.4 .....	407.9
2025 .....	11,936.8 .....	3,464.0 .....	15,400.8 .....	1,259.5
2026 .....	23,129.0 .....	6,712.0 .....	29,841.0 .....	2,440.5
2027 .....	20,314.5 .....	5,895.3 .....	26,209.8 .....	2,143.5

<sup>311</sup> These shares are derived by dividing into a total population of EADs that could expire (before making any adjustments) across the four-year span FY 2024 through FY 2027 of 1,112,425 the share that could expire in each of those years, in order, 90,612 (8.1 percent), 248,299 (22.3 percent), 455,822 (41.0 percent), and 317,692 (28.6 percent). Because the average lapse duration of 271 days is

74.2 percent of a 365-day year, the stabilized earnings and employment taxes may be spread over more than one fiscal year. To account for the cost savings accruing to the next fiscal year (the remaining 25.8 percent), we then extrapolate this percentage to the population for lapses that would begin in the second half of a fiscal year t. The resulting impacts are spread over FY 2024 through

FY 2028 in the following shares: 6.0 percent (8.1 percent × 74.2 percent), 18.7 percent (8.1 percent × 25.8 percent + 22.3 percent × 74.2 percent), 36.2 percent (22.3 percent × 25.8 percent + 41.0 percent × 74.2 percent), 31.8 percent (41.0 percent × 25.8 percent + 28.6 percent × 74.2 percent), and 7.4 percent (28.6 percent × 25.8 percent). Source: DHS, USCIS, OPQ (March 5, 2024).

TABLE 13—MONETIZED EXPECTED VALUE IMPACTS FOR THE TFR—Continued  
[\$ millions, 2022]

FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes
2028 .....	4,712.5 .....	1,367.6 .....	6,080.1 .....	497.3
5-year Total .....	63,958.4 .....	18,560.7 .....	82,519.1 .....	6,748.7
<b>B. 2% discount</b>				
<b>4. Low end bound</b>				
FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes
2024 .....	606.2 .....	26.1 .....	632.3 .....	64.0
2025 .....	1,835.1 .....	79.1 .....	1,914.2 .....	193.6
2026 .....	3,486.1 .....	150.3 .....	3,636.4 .....	367.8
2027 .....	3,001.8 .....	129.4 .....	3,131.2 .....	316.7
2028 .....	682.7 .....	29.4 .....	712.1 .....	72.0
5-year Total .....	9,612.0 .....	414.4 .....	10,026.3 .....	1,014.2
Annualized .....	2,039.3 .....	87.9 .....	2,127.2 .....	215.2
<b>5. Average</b>				
FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes
2024 .....	1,836.0 .....	326.5 .....	2,162.5 .....	193.7
2025 .....	5,558.2 .....	988.4 .....	6,546.6 .....	586.5
2026 .....	10,558.6 .....	1,877.6 .....	12,436.2 .....	1,114.1
2027 .....	9,092.0 .....	1,616.8 .....	10,708.7 .....	959.4
2028 .....	2,067.8 .....	367.7 .....	2,435.5 .....	218.2
5-year Total .....	29,112.6 .....	5,177.0 .....	34,289.5 .....	3,071.9
Annualized .....	6,176.5 .....	1,098.3 .....	7,274.8 .....	651.7
<b>6. High end bound</b>				
FY	Stabilized earnings	Labor turnover	Total impacts	Estimated taxes
2024 .....	3,789.8 .....	1,099.8 .....	4,889.6 .....	399.9
2025 .....	11,473.3 .....	3,329.5 .....	14,802.8 .....	1,210.6
2026 .....	21,795.0 .....	6,324.9 .....	28,119.8 .....	2,299.7
2027 .....	18,767.5 .....	5,446.3 .....	24,213.8 .....	1,980.3
2028 .....	4,268.3 .....	1,238.7 .....	5,506.9 .....	450.4
5-year Total .....	60,093.8 .....	17,439.2 .....	77,533.0 .....	6,340.9
Annualized .....	12,749.4 .....	3,699.9 .....	16,449.3 .....	1,345.3

For the discounted figures, the annualized amounts are the average annual equivalence basis.

d. Module D. Other 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.<sup>313</sup> These effects are very difficult to quantify and could be influenced by multiple factors, but we will address the possibilities at a conceptual level.

<sup>313</sup> Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB Regulatory Impact Analysis: A Primer pages 7 and 8 for further discussion of transfer payments and distributional effects. [https://www.reginfo.gov/public/jsp/Utilities/circular-a-4\\_regulatory-impact-analysis-a-primer.pdf](https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf).

In the cases where, in the absence of this rule, businesses would have been able to easily find reasonable labor substitutes for the renewal EAD 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 renewal EAD 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.

<sup>312</sup> 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.

In the cases where, in the absence of this rule, businesses would not have been able to easily find reasonable labor substitutes for the renewal EAD 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 renewal EAD 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 employment authorization and/or EAD validity after the automatic extension with others in the labor force, then once employment eligibility and 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. As discussed above, DHS was not able to monetize these potential additional costs.

DHS does not believe this rule will adversely affect the U.S. labor market. This rule extends current employment authorization for individuals who are at risk of losing it solely because of USCIS processing delays; it does not grant new work authorization to additional persons. DHS expects that this rule will help to partially alleviate the adverse effects that a lapse in employment authorization would have on affected current employment-authorized individuals and their employers. In FY 2022, 89 percent of EAD renewals for affected categories were approved<sup>314</sup> and all renewals, by definition, had a previously approved initial EAD application. According to the most recent data (applicable to October 2023), the U.S. labor force stands at 167,728,000.<sup>315</sup> The maximum population of about 824,000 represents 0.50 percent of the national labor force, approximately 554,000 of which would potentially lapse as a result of the action being taken.

Without this rule, EAD holders who remain eligible for employment authorization would encounter delays in renewal EADs and either be unauthorized to work for periods 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 mitigate the risk that these EAD holders will experience gaps in employment authorization and/or EAD validity 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 nongovernmental organizations. DHS believes these impacts would accrue as cost-savings to the noncitizen EAD holders and their families.

Finally, DHS provides Table 14 to elucidate the share and number of EADs that could lapse at the baseline population value (793,000).

TABLE 14—APPROXIMATE EAD LAPSES UNDER DIFFERENT EXTENSIONS

Extension days (above current 180 days)	Total automatic extension days (including current 180 days)	Approximate share that could lapse (percent)	Approximate number that could lapse
0	180	100	793,000
30	210	90	713,000
60	240	80	634,000
90	270	75	595,000
120	300	65	515,000
180	360	55	436,000
210	390	45	376,000
360	540	33	260,000
540	720	8	63,000

Source: USCIS analysis, 11–3–23

<sup>314</sup> We note that the applicable renewal EAD approval rate from FY 2022 for A03, A05, A07, A08, A10, A12, A17, A18, C08, C09, C10, C16, C19, C20, C22, C24, C26, and C31 filings was 89 percent. The calculation was made from EAD filing data. See Form I-765, Application for Employment Authorization, All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type (FY 2003 through 2022), [https://www.uscis.gov/sites/default/files/document/data/I-765\\_Application\\_for\\_Employment\\_FY03-22](https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-22)

*AnnualReport.pdf* (last updated Nov. 2022). Due to the increase in backlogs, the renewal EAD approval rate was calculated as the number of approvals divided by the sum of approvals and denials, rather than the receipts basis. Calculation:  $511,660 \div (511,660 + 63,545) = 0.89$ . We note that this percent may be understated because some C09 denials are denied because the applicant's Form I-485 was approved, and they are now a lawful permanent resident; setting aside C09 adjudications entirely, the renewal EAD approval rate would be 94%.

Calculation:  $430,879 \div (430,879 + 26,252) = 0.94$ . Further, the table in the above link notes that "[s]ome applications approved or denied may have been received in previous reporting periods." It is possible that an approval or denial reported in this table for FY 2022 could have been from a renewal EAD application submitted in FY 2021.

<sup>315</sup> BLS, "Employment Situation Summary Table A, Household Data, seasonally adjusted," "Civilian labor force," <https://www.bls.gov/news.release/empstat.a.htm> (last visited Nov. 7, 2023).

Even with the TFR an estimated 260,000 (baseline) EADs could still lapse, though adding 360 days to the current 180-day extension would help ensure that these lapses would not occur until November 2025. Extensions below 540 days would stand to generate larger numbers of potential lapses. Therefore, DHS did not consider lower extensions as alternatives.<sup>316</sup>

DHS has not quantified the net benefits from an alternative of granting extensions greater than 540 days to all or some EAD categories. Qualitatively, although Table 14 shows the approximate number of EADs that could lapse is further reduced using a 720-day bridge (540 temporary extension + the existing 180 days) and thus attending benefits would be greater, policy and operational constraints exist. As discussed earlier in this preamble, a longer automatic extension period would result in a larger number of employers using 720 or 730 days as their Form I-9 reverification date, even though only one-third of affected applicants could need longer than 540 days. Additionally, TPS designations, and thus associated-EAD benefits cannot be granted for longer than 18 months (approximately 540 days). In addition, the Department believes that a longer period could cause confusion and potential mistakes in employer verification. While a hypothetical carve out might allow for all non-TPS EAD extensions of greater duration, DHS has limited information on the potential burdens such a carve out could create by deviating from the 540-day extension that applicants and their U.S. employers are familiar with from the 2022 TFR. Operationally, while managing 540- and 730-day extensions might be feasible and could mitigate harms projected after October 2025, the additional complexity to both USCIS and employers of administering two different automatic extension durations could delay issuing or implementing this TFR to address imminent lapses in employment authorization and EAD validity. Accordingly, USCIS is proposing an automatic extension totaling 540 days, consistent with the FY 2022 TFR and TPS EAD limitations and will evaluate the public comments and consider further action as appropriate, while at the same time working to reduce the number of EAD renewal applicants that

may still have their EADs lapse as a result of processing backlogs.

#### 4. Future Regulatory Action

This rule temporarily amends existing DHS regulations to provide that the automatic extension period applicable to expiring 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. DHS is soliciting public comment on this TFR as well as potential alternatives, such as a permanent increase in the automatic extension period from up to 180 days to up to 540 days or a longer extension period for certain populations, such as non-TPS EAD renewal applicants.

Qualitatively, a permanent provision for increasing the automatic extension period to up to 540 days would provide long-term predictability for applicants and relieve DHS from the pressure of having to promptly respond to unexpected changes in circumstances that may result in spikes in USCIS processing times and lapses in employment authorization and/or documentation for renewal EAD applicants. As previously discussed, recent unexpected increases in EAD applications, such as initial EAD applications by individuals with pending asylum applications (C08) and EAD applications for adjustment of status (C09), have contributed to a growing backlog. Should there again be unexpected increases in EAD applications for reasons unknown at this time, USCIS would have greater flexibility to temporarily reallocate adjudicative resources to other product lines because it would have a longer period to process renewal EAD applications before applicants would be adversely affected by a delay in the processing of their renewal EAD application. A permanent rule would also mitigate the number of potential lapses in employment authorization and/or documentation for renewal EAD applicants that may otherwise occur after the current TFR expires if processing times were to spike again in the future.

A future temporary or permanent rule might also include an extension period of greater than 540 days for non-TPS EAD renewal applicants, but although such a longer period would reduce the number of EADs that could still lapse with a 540-day extension period, among other potential effects, such bifurcated automatic extension periods may result in some confusion among employers, who have become familiar with either a

180-day period or a 540-day period. DHS welcomes public comments on any potential benefits and burdens from a permanent increase of the automatic extension period, longer extension period for non-TPS applicants, or other measures that would create more certainty for this population of renewal EAD applicants and their employers.

#### 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 or any other law. *See* 5 U.S.C. 604(a). As discussed previously, DHS 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 251 of SBREFA, Public Law 104-121, 110 Stat. 847, 868, *et seq.* OIRA has determined that this TFR meets the criteria in 5 U.S.C. 804(2). 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 V.A of this preamble, DHS has found that there is good cause to make this rule effective immediately upon publication.<sup>317</sup>

#### 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, which 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

<sup>316</sup> DHS emphasizes that these figures are only approximations. The reason is that the percentages for lapses (column 2) are the OCB ventiles (percentiles at 5 percent increments) for the extensions below 360 days. But they do not align exactly with the day extensions (column 1). Because of the way the data are produced, we chose the percentile closest to the true extension value.

<sup>317</sup> *See* 5 U.S.C. 808(2).

governments, in the aggregate, or by the private sector.<sup>318</sup> The inflation adjusted value of \$100 million in 1995 is approximately \$200 million in 2023 based on the Consumer Price Index for All Urban Consumers (CPI-U).<sup>319</sup> This rule is exempt from the written statement requirement, because DHS did not publish a notice of proposed rulemaking for this rule.

This TFR does not contain a Federal mandate as the term is defined under UMRA.<sup>320</sup> 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)

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 and its components analyze proposed actions to determine whether the National Environmental Policy Act

(NEPA), 42 U.S.C. 4321 *et seq.*, applies to them and if so, what degree of analysis and documentation is required. DHS Directive 023–01 Rev. 01 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual)<sup>321</sup> establish the policies and procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA.<sup>322</sup> The CEQ regulations allow Federal agencies to establish, in their NEPA implementing procedures, categories of actions (“categorical exclusions”) that experience has shown do not, individually or cumulatively, have a significant effect on the human environment and, therefore, do not require preparation of an environmental assessment or environmental impact statement.<sup>323</sup> The Instruction Manual, Appendix A lists the DHS categorical exclusions.<sup>324</sup>

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.<sup>325</sup>

This rule amends DHS’s existing regulations under 8 CFR 274a.13(d) to temporarily increase the period of time that the employment authorization of certain eligible renewal EAD 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 applicants who have filed renewal EAD applications will be increased from up to 180 days to up to 540 days.

DHS finds no significant impact on the environment, or any change in environmental effect that will result from the rule amendments being promulgated in this temporary final rule. Accordingly, DHS finds that the promulgation of this temporary final rule’s amendments clearly fits within categorical exclusion A3 established in

the Department’s NEPA implementing procedures as an administrative change with no change in environmental effect.

This TFR is limited to increasing the automatic extension period applicable to expiring EADs for certain renewal applicants who have filed a renewal EAD application and is not part of a larger DHS rulemaking action. In accordance with DHS’s NEPA implementing procedures, DHS has reviewed the rule and finds no extraordinary circumstances associated with this TFR exists that may give rise to significant environmental effects requiring further analysis and documentation. Therefore, this action is categorically excluded and no further NEPA analysis or documentation is required.

#### 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,<sup>326</sup> enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.<sup>327</sup> 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. DHS believes that this TFR will create positive effects on the family by mitigating uncertainty about continued employment authorization for renewal applicants.

#### J. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, “collection[s] of

<sup>318</sup> See 2 U.S.C. 1532(a).

<sup>319</sup> See BLS, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. city average, all items, by month,” <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202312.pdf> (last visited Jan. 17, 2024). Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2023); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2023—Average monthly CPI-U for 1995) ÷ (Average monthly CPI-U for 1995)] × 100 = [(304.702 – 152.383) ÷ 152.383] = (152.319/152.383) = 0.99958001 × 100 = 99.96 percent = 100 percent (rounded). Calculation of inflation-adjusted value: \$100 million in 1995 dollars × 2.00 = \$200 million in 2023 dollars.

<sup>320</sup> The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate. See 2 U.S.C. 1502(1), 658(6).

<sup>321</sup> The Instruction Manual contains the Department’s procedures for implementing NEPA and was issued November 6, 2014. Available at <https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catecx>.

<sup>322</sup> 40 CFR parts 1500 through 1508.

<sup>323</sup> 40 CFR 1507.3(e)(2)(ii) and 1501.4.

<sup>324</sup> See Appendix A, Table 1.

<sup>325</sup> See Instruction Manual section V.B(2)(a) through (c).

<sup>326</sup> See 5 U.S.C. 601 note.

<sup>327</sup> Pub. L. 105–277, 112 Stat. 2681 (1998).



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 EAD application or to collect additional information beyond that already collected on the EAD application.

**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, 1105a, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599; Title VII of Pub. L. 110–229, 122 Stat. 754; Pub. L. 115–218, 132 Stat. 1547; 8 CFR part 2.

■ 2. Effective April 8, 2024, through October 15, 2025, amend § 274a.13 by revising the heading of paragraph (d)(5) to read as follows:

**§ 274a.13 Application for employment authorization.**

\* \* \* \* \*

(d) \* \* \*

(5) *Temporary increase in the automatic extension period for renewal applications properly filed on or before October 26, 2023.* \* \* \*

■ 3. Effective April 8, 2024, through September 20, 2027, amend § 274a.13 by adding paragraph (d)(6) to read as follows:

The revisions and additions read as follows:

**§ 274a.13 Application for employment authorization.**

\* \* \* \* \*

(d) \* \* \*

(6) *Temporary increase in the automatic extension period for renewal applications properly filed on or after October 27, 2023.* The authorized extension period stated in paragraph

(d)(1) of this section, 8 CFR 274a.2(b)(1)(vii), and referred to in paragraph (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) of this section who properly filed their renewal application on or after October 27, 2023, and on or

before September 30, 2025. 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 September 30, 2025. 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)(6) have been met, notwithstanding any notations on such notice indicating an automatic extension of up to 180 days. Nothing in this paragraph (d)(6) 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.*

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