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Michael J. McDermott
Chief
Security and Public Safety Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive, MD Camp Springs 20746

DHS Docket No. USCIS-2019-0024

Public Comment of the Immigration Reform Law Institute Re: Employment Authorization for Certain Classes of Aliens With Final Orders of Removal

Dear Chief McDermott,

The Immigration Reform Law Institute ("IRLI") submits the following public comment to the Department of Homeland Security ("DHS") in response to the Department's Notice of Proposed Rulemaking ("NPRM") as published in the Federal Register on November 19, 2020. *See Employment Authorization for Certain Classes of Aliens With Final Orders of Removal*, (85 Fed. Reg. 74,196-253).

IRLI is a nonprofit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI fully supports DHS's proposed amendments to the regulations, which would:

- restrict employment authorization eligibility to aliens who: (1) have final orders of removal but are temporarily released from custody on an order of supervision; (2) for whom removal is

impractical because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document; and (3) who establish economic necessity;

- require aliens who are subject to a final order of removal and temporarily released on an order of supervision pay a $30 biometric services fee in addition to the filing fee for an application for employment authorization;
- remove obsolete references to the former Immigration and Naturalization Service ("INS") agency titles from certain regulations relating to the detention and supervision of aliens during the removal period and replace those references with the appropriate DHS component names; and
- clarify that aliens who are granted deferral of removal under the regulations implementing the Convention Against Torture fall within a class of aliens who are employment authorized based solely on the grant of deferral of removal and are not required to apply for employment authorization.

Before addressing the reasons why IRLI supports the proposed amendments to the regulations governing employment authorization, IRLI would like to point out that there appears to be a typographical error in the revised paragraph (c)(18) as printed in the NPRM. In subparagraph (c)(18)(i), the proposed regulation refers to "section 241(a)(**3**) of the Act," but the appropriate reference appears to be to "section 241(a)(**7**) of the Act." *See* 85 Fed. Reg. at 74,253 (emphasis added).

Section 241(a)(7) of the INA provides:

> No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the [DHS] makes a specific finding that—
>
> (A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or
>
> (B) the removal of the alien is otherwise impracticable or contrary to the public interest.

8 U.S.C. § 1231(a)(7).[1] The current regulation simply restates the statutory language above and lists the following discretionary factors which may be considered in adjudicating the application for employment: (i) the existence of economic necessity to be employed; (ii) the existence of a dependent spouse and/or children in the United States who rely on the alien for support; and (iii) the anticipated length of time before the alien can be removed from the United States. *See*

[1] The authority described as having been exercised by the Attorney General now reside in the Secretary of Homeland Security. *See* Homeland Security Act of 2002, § 441(2), 116 Stat 2192, 2193, 6 U.S.C. § 251(2).

8 C.F.R. § 274a.12(c)(18). Aliens who qualify for employment authorization under 8 C.F.R. § 274a.12(c)(18) will hereinafter be referred to as "(c)(18) workers."

In the NPRM, DHS has declined to make a finding under either subparagraph (A) or the "public interest" clause of subparagraph (B) of section 241(a)(7) of the INA. *See* 85 Fed. Reg. 74,210-211. Instead, for purposes of determining employment eligibility only, DHS proposes to clarify that an alien's removal is "otherwise impracticable" under section 241(a)(7)(B) of the INA when DHS determines that all countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document. *Id.* at 74,211. DHS is also proposing to make economic necessity, which is currently only a discretionary factor, a mandatory eligibility requirement for employment authorization. In addition, DHS proposes to expand the list of factors to be considered in determining whether an applicant for employment authorization warrants a favorable exercise of discretion to include: (1) whether the alien is complying with the order of supervision; and (2) the alien's criminal history, including but not limited to whether the alien has been arrested for or convicted of any crimes after having been ordered removed from the United States and released from custody on an order of supervision. Finally, DHS proposes to make it mandatory for an alien applying to renew his or her employment authorization to show that he or she is employed by a U.S. employer who is a participant in good standing in E-Verify.

IRLI fully endorses the NPRM as a whole, and in particular supports these proposed amendments to the regulation governing employment authorization for (c)(18) workers. First, IRLI agrees that authorization to work within the United States is a major incentive for aliens to both enter and remain in the United States. By restricting employment authorization only to aliens for whom removal is impractical because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document, who establish economic necessity, and who otherwise demonstrate that they warrant a favorable exercise of discretion, the proposed regulation will encourage aliens who fail to meet these criteria to depart the United States on their own accord. Further, for those aliens who cannot or will not voluntarily comply with their order of removal due to lack of travel documents, the denial of employment authorization will encourage the alien to make good faith efforts to assist in obtaining travel documents from their home country. As DHS noted in the NPRM, to the extent that aliens voluntarily comply with their removal orders or assist in obtain travel documents, government resources expended on enforcing removal orders and monitoring aliens released on orders of supervision will be conserved.

IRLI also supports the proposed amendments to the regulation governing employment authorization for (c)(18) workers because the proposed restrictions on such authorizations will help protect American workers. The data shows that approximately 25,000 aliens with final removal orders who have been temporarily released on orders of supervision obtain employment authorization under the current program, the vast majority of these authorizations being renewals of previously granted employment authorizations. *See* 85 Fed. Reg. at 74,209 (Table 5). The data

also show that DHS is unable to obtain travel documents for only approximately 5% of aliens (or just under 500 aliens per year) with final orders of removal who are temporarily released on orders of supervision during the fiscal year in which the aliens were counted. *See* 85 Fed. Reg. at 74,210 (Table 6). Accordingly, there are well over 20,000 aliens who obtain employment authorization under the current program who would not be able eligible to obtain employment authorization under the proposed rule.[2] By eliminating these (c)(18) workers from the job market, U.S. workers would have a better chance of obtaining jobs that some (c)(18) workers currently hold. Further, the proposed restriction on employment authorization—limiting it to aliens for whom removal is impractical because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document—is entirely consistent with the statute, which prohibits employment authorization unless every country to which the alien could be removed refuses to receive the alien. *See* 8 U.S.C. § 1231(a)(7)

Similarly, by requiring would-be (c)(18) workers to demonstrate economic necessity in order to qualify for employment authorization, the proposed rule would help strengthen protections for U.S. workers. Aliens who are financially able to support themselves during their removal period should not be eligible for employment authorization because their participation in the labor market would compete directly with U.S. workers. Furthermore, making economic necessity a mandatory eligibility requirement is consistent with other discretionary employment authorization categories. *See*, *e.g.*, 8 C.F.R. § 274a.12(c)(14) (requiring economic necessity for employment authorization for aliens who qualify for deferred action).

DHS's proposal to expand the list of factors to consider in adjudicating an application for employment authorization to include the applicant's compliance with his or her order of supervision and to include any criminal history including any arrests, charges, or convictions subsequent to the alien's order of removal and release on an order of supervision is well grounded. Inasmuch as the ultimate decision whether to approve an application for employment authorization is discretionary, these factors go to the heart of whether the alien warrants a favorable exercise of discretion. If an applicant does not comply with the conditions set forth in his or her order of supervision (for example, by failing to make a good faith effort to assist in obtaining travel documents from his or her home country), he or she should not merit a favorable

[2] This number is over one-third of the total number of temporary foreign worker visas available under the H-1B visa program. *See* 8 U.S.C. § 1184(g)(1)(A)(vii) (establishing a 65,000 numerical limitation on the number of H-1B visas available each fiscal year). But unlike the H-1B visa program, which requires employers to pay temporary foreign workers the prevailing wage, employment authorization for (c)(18) workers is "open market" authorization. That is, (c)(18) workers may obtain employment on the open market without restriction.

exercise of discretion. Similarly, disrespect for the law as evidenced by an applicant's criminal history would be indicative that a favorable exercise of discretion is not warranted.[3]

Finally, IRLI supports DHS's proposal to require an applicant to demonstrate that he or she is employed by an employer who is a participant in good standing in DHS's E-Verify program in order to renew the applicant's employment authorization. Widespread use of the E-Verify system is one of the most important steps to protect U.S. workers by ensuring that U.S. employers are complying with our immigration laws and are not employing unauthorized workers. As DHS observed in the NPRM, certain states and localities already require certain employers to participate in the E-Verify system. *See* 85 Fed. Reg. at 74,240 n.104. Similarly, most federal contractors are required to participate in E-Verify. *See id.* By requiring employers who choose to employ (c)(18) workers to participate in the E-Verify program, the proposed rule will help protect U.S. workers who may be competing for jobs with unauthorized workers.

In conclusion, the continued presence of aliens who have been issued final orders of removal is not in the national interest, and Congress has broadly prohibited granting such aliens employment authorization. Granting employment authorization to such aliens only encourages them to remain in the United States pending DHS's enforcement of their removal orders. By restricting employment authorization only to aliens who establish economic necessity and for whom removal is impractical because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document, DHS's proposed rule will drastically reduce the number of (c)(18) workers who compete with U.S. workers on the open job market, encourage aliens to comply with their removal orders voluntarily or to make stronger efforts in assisting in obtaining travel documents from their home countries, and conserve sparse government resources. Similarly, by requiring employers who choose to hire such workers to participate in E-Verify, the proposed rule would reduce the number of foreign and unauthorized workers with whom U.S. workers would have to compete in the open marketplace. For these reasons, IRLI strongly supports the proposed rule.

Respectfully submitted,

Immigration Reform Law Institute
by Matt A. Crapo

[3] IRLI fully supports the proposed biometric fee of $30 because it would enable an updated criminal background check so that DHS can consider the applicant's current criminal history.