



DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Parts 106, 241, and 274a

[CIS No. 2653-19; DHS Docket No. USCIS-2019-0024]

RIN 1615-AC40

Employment Authorization for Certain Classes of Aliens with Final Orders of Removal; Withdrawal

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

ACTION: Proposed rule; withdrawal.

SUMMARY: The U.S. Department of Homeland Security (DHS) is withdrawing a notice of proposed rulemaking (NPRM) that published on November 19, 2020. The NPRM proposed to revise DHS regulations governing employment authorization for individuals who have a final order of removal and are released from DHS custody on an order of supervision. The NPRM also proposed to amend DHS regulations to clearly indicate the employment eligibility of individuals who have been granted deferral of removal based on the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

DATES: DHS withdraws the NPRM as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The docket for this withdrawn proposed rule is available at <http://www.regulations.gov>. Please search for docket number USCIS-2019-0024.

FOR FURTHER INFORMATION CONTACT: Steven P. Kvortek, Acting Chief, Security and Public Safety Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, DHS, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240-721-3000 (this is not a toll-free number). Individuals with hearing or

speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION: On November 19, 2020, DHS published an NPRM titled “Employment Authorization for Certain Classes of Aliens With Final Orders of Removal.” (85 FR 74196). This NPRM proposed to eliminate employment authorization under 8 CFR 274a.12(c)(18) for individuals who have a final order of removal and are released on an order of supervision with a narrow exception. DHS also proposed to amend its regulations to clearly indicate that individuals who have been granted CAT deferral of removal would be employment authorized based on their grant of CAT deferral of removal.

In response to the NPRM, DHS received more than 302 comments during the 30-day public comment period. Nearly 98 percent of commenters opposed the proposed rule with several commenters specifically requesting that DHS withdraw the NPRM.¹ Less than 2 percent expressed support for the rule with such commenters generally supporting the rule because they believed it would deter illegal immigration and protect U.S. workers. The commenters who opposed the NPRM argued that it would significantly limit the ability of individuals who have a final order of removal and are released on an order of supervision to legally work, be self-sufficient, and support their families, which may include U.S. citizen children and lawful permanent resident spouses or partners. Several commenters also noted the proposed rule would impose exorbitant costs and burdens on U.S. employers related to labor turnover and the proposed E-Verify requirement. Various state and local agencies, including Attorneys General from 15 states, also opposed the rule on the basis it would decrease tax revenue, deny states various revenue streams, and increase costs related to state-funded public benefit

¹ Comments may be viewed at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2019-0024.

programs. Many commenters also disagreed with the NPRM's assertion that the proposed changes would incentivize individuals with final orders of removal to leave the United States. They argued that the majority of individuals who have a final order of removal and are released on an order of supervision are in the United States with DHS's acknowledgment, as reflected by their release on an order of supervision, and that DHS's inability to remove them primarily stems not from inaction on the individual's part but due to the unwillingness of foreign governments to issue them travel documents and cooperate in their repatriation.

The NPRM stemmed from two executive orders issued by President Trump, which have been revoked since the publication of the NPRM. DHS initiated the regulatory action pursuant to Executive Order 13768, "Enhancing Public Safety in the Interior of the United States" (Jan. 24, 2017) and Executive Order 13788, "Buy American and Hire American" (Apr. 18, 2017). These executive orders directed DHS to revise or rescind any regulations inconsistent with these orders. DHS issued the NPRM after determining that the current regulations at 8 CFR 274a.12(c)(18) could be inconsistent with the above-mentioned executive orders.

On January 20, 2021, President Biden issued Executive Order 13993, "Revision of Civil Immigration Enforcement Policies and Priorities," which revoked Executive Order 13768. Further, on January 25, 2021, President Biden issued Executive Order 14005, "Ensuring the Future Is Made in All of America by All of America's Workers," which revoked Executive Order 13788. Executive Orders 13993 and 14005 directed agencies to review, revise, or rescind any agency actions or guidance inconsistent with the executive orders.

Having reviewed the NPRM and the public comments in light of Executive Orders 13993 and 14005, DHS has decided to withdraw the NPRM. The original bases and rationale for promulgating the NPRM no longer align with the current

Administration's immigration enforcement priorities. This Administration is focused on protecting the interests of American workers by ensuring the "[Federal Government]. . . procure[s] goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America's workers thrive." By withdrawing the proposed rule, the Administration will allow individuals with final orders of removal who are released from DHS custody on an order of supervision, and are in a position to work, to continue to work for American businesses that provide services in key industries and to supplement the existing U.S. workforce.

As noted in Executive Order 13933, which articulates the Administration's overarching values and priorities on civil immigration enforcement, "the task of enforcing the immigration laws is complex and requires setting priorities to best serve the national interest."² DHS has been directed to focus its limited resources on national and border security, addressing the humanitarian challenges at the southern border, and ensuring public health and safety.³ In doing so, DHS must develop enforcement priorities and use its limited resources to pursue those priorities. Additionally, the limited resources of the agency and the significant operational challenges caused by the COVID-19 pandemic do not allow DHS to respond to all immigration violations or remove all individuals with a final order of removal.⁴ DHS's enforcement priorities, including removals, are to be focused on national security, public safety, and border security.⁵

DHS believes that continuing to provide employment authorization to individuals who have a final order of removal and are released from DHS custody on an order of supervision is consistent with this Administration's values and priorities on immigration

² See Exec. Order No. 13933, 86 FR 7051, Sec. 1 (Jan. 25, 2021).

³ *Id.*

⁴ See Acting ICE Director Tae Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities," Feb. 18, 2021, available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf (last visited March 3, 2021)

⁵ *Id.*

enforcement. It will allow individuals who do not fall within the Administration's enforcement priorities and who are still in the United States to continue to qualify for employment authorization, to legally work, remain self-sufficient, and support their families, which in many instances include U.S. citizen children.

This withdrawal notice does not affect the continued employment eligibility of individuals who have been granted CAT deferral of removal. Such individuals currently qualify for employment authorization under 8 CFR 274a.12(c)(18) and will continue to do so. The primary purpose behind the proposed regulatory amendments related to individuals with CAT deferral of removal was to clearly indicate in the regulations that individuals with CAT deferral of removal are eligible for employment authorization. Even though DHS is not pursuing the proposed regulatory amendments at this time, individuals who are granted CAT deferral of removal will continue to qualify for employment authorization under 8 CFR 274a.12(c)(18). DHS plans to consider similar regulatory amendments clarifying eligibility for employment authorization for individuals with CAT deferral of removal as part of future rulemaking efforts consistent with DHS's priorities, policies, and applicable law.

For all the reasons discussed above, DHS is withdrawing the NPRM.

Authority

As stated in the NPRM, DHS has general and specific statutory authority to detain individuals with final orders of removal, release such individuals from custody on an order of supervision, and grant them employment authorization. 85 FR 74211. DHS is withdrawing the NPRM using those same authorities. Executive Order 13993, "Revision of Civil Immigration Enforcement Policies and Priorities;" Executive Order 14005, "Ensuring the Future Is Made in All of America by All of America's Workers;" 8 U.S.C. 1324a(h)(3); and 8 U.S.C. 1231(a)(7).

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

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