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Submitted via <http://www.regulations.gov>

**RE: Brief Comments Regarding DHS Proposed Rule on Employment Authorization for Certain Classes of Aliens With Final Orders of Removal, 85 Fed. Reg. 74,196 (November 19, 2020)**

Dear Chief McDermott and Acting Administrator Ray:

The American Immigration Council, the American Immigration Lawyers Association, and Immigrant Legal Defense (collectively Commenters) write to voice their strenuous objection to the above-captioned rule proposed by the Department of Homeland Security (Department or DHS), which would severely and unduly restrict or outright prohibit access to work authorization for vulnerable individuals with final orders of removal.

First, the Department's proposed rule conflicts with statutory provisions under the Immigration and Nationality Act (INA) that govern work authorization as well as substantive provisions for the release of individuals with final orders of removal. The proposed rule's requirement that foreign governments affirmatively decline to issue a travel document and the elimination of work authorization based on the public interest conflict with 8 U.S.C. § 1231(a)(7) and (b), which in turn implicate provisions at 8 U.S.C. § 1231(b) and the Department's well-established authority to exercise prosecutorial discretion.

The proposed rule also disrupts settled practice and expectations for individuals with final orders of removal who were previously released from government custody on Orders of Supervision because their removal was not in the public interest. These individuals have relied, many for years, on the government's past determination that they should not be removed as a matter of prosecutorial discretion.

Commenters are further concerned about the real-life consequences of the Department's interpretation of the proposed rule, as well as its unabashed purpose of punishing individuals for being present in the U.S. under a final order of removal by depriving them of the ability to earn a livelihood. This ignores the many justifiable public policy reasons why this population of individuals should be permitted – and encouraged – to be lawfully employed in the United States. This is especially the case when there is no clear link between the rationale by the Department – to disincentivize individuals from avoiding removal and to free up jobs for U.S. citizens – and the true impact of the proposed rule.

Commenters have previously requested that the agency extend the public comment period from 30 days to the standard 60-day period. To the extent that the agency declines to extend the comment period, Commenters maintain that the proposed rule is promulgated without observance of law. Given the rule's length, the many other laws in addition to the immigration statute that it invokes, and the extensive economic projections contained within the rule that can implicate other violations that are beyond Commenters' ability to assess within the abbreviated comment period set by the Department.

Commenters agree with only one aspect of the proposed rule. This relates to its amendment at 8 C.F.R. § 274.12(a)(10) to include individuals granted deferral of removal under the Convention Against Torture (CAT). This section of the proposed rule is logical and clarifies an area of confusion in the current regulations. The amendment will improve the efficient adjudication of employment authorization for this category of noncitizens.

#### **I. The Proposed Rule Exceeds the Bounds of the Immigration Statute**

The proposed rule will eliminate work authorization pursuant to 8 C.F.R. § 274a.12(c)(18), except in the case of individuals “for whom DHS has determined that their removal is impracticable because all countries from whom DHS requested travel documents have affirmatively declined to issue such documents.” 85 Fed Reg at 74,197. DHS states that the statutory basis for this rule is 8 U.S.C. § 1231(a)(7), which governs the availability of work authorization for individuals with final removal orders. However, the proposed rule effectively re-writes the statute by eliminating the circumstances that Congress explicitly contemplated were allowable considerations for individuals in this posture to receive authorization. Further, as to the prong that survives – individuals for whom removal is impracticable – the rule's requirement of “affirmative” refusal by foreign governments to issue travel documents conflicts with the statute.

8 U.S.C. § 1231(a)(7) allows for the issuance of work authorization to individuals with final removal orders in two circumstances. The first, where removal is not possible because the countries selected by the individual subject to a removal order or by the Department in accordance with the statute refuse to receive the individual. 8 U.S.C. § 1231(a)(7)(A). The second instance is when the removal of the individual “is impracticable or contrary to the public interest.” 8 U.S.C. § 1231(a)(7)(B).

The Department relies on the work authorization provision for individuals with final removal orders to essentially override the scenarios in which Congress contemplated that individuals could not or should not be removed. In its proposed rule, the Department collapses 8 U.S.C. § 1231(a)(7)(A) and (B) to define “impracticable” exclusively by the affirmative refusal by foreign governments to accept an individual with a final order of removal. By eliminating work authorization on the basis of the “public interest” prong, 8 U.S.C. § 1231(a)(7)(B), the Department’s proposed rule intentionally restricts its well-established authority to exercise prosecutorial discretion in immigration cases, whereby agency officials make the determination that an individual’s removal is not in the public interest.<sup>1</sup>

It is clear that the Department intends through this substantive requirement to target individuals released on Orders of Supervision (OSUPs) in accordance with the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, the Supreme Court examined the constitutionality of prolonged post-removal immigration detention as authorized by 8 U.S.C. § 1231(a)(6). *Zadvydas v. Davis*, 533 U.S. at 682. The Court concluded that civil detention without an end in sight would conflict with the U.S. Constitution and construed the statute to encompass a temporal limitation. *Id.* at 699. The Court held that a reasonable period of post-removal detention is six months. *Id.* Contrary to the Department’s suggestion that individuals with final removal orders must be released within six months, the Department, via Immigration and Customs Enforcement (ICE), routinely extends the six-month presumptively reasonable removal period on the premise that removal is likely because efforts are being made to obtain a travel document. Where individuals in post-removal detention seek release through habeas corpus petitions, in Commenters’ experience, district courts routinely defer to ICE representations that a travel document is forthcoming, even if the detention has extended well-beyond six months.

To implement the Supreme Court’s *Zadvydas* decision, the Department has promulgated a process known as the “Post-Order Custody Review” (POCR). This process includes, among others, the requirement that individuals and ICE seek a travel document to the country designated for removal, or other countries as selected by the individual or ICE deportation officers, in keeping with 8 U.S.C. § 1231(b). See 8 C.F.R. § 241.4; 241.13. Removal efforts must be

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<sup>1</sup> American Immigration Council, *Understanding Prosecutorial Discretion in Immigration Law* (September 2011), [https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC\\_Prosecutorial\\_Discretion\\_090911\\_FINAL.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/IPC_Prosecutorial_Discretion_090911_FINAL.pdf).

made in accordance with the designation of countries for removal outlined at 8 U.S.C. § 1231(b), which is the provision referenced by the work authorization provision that the Department purports to interpret. This former provision outlines the appropriate countries for removal. Importantly, nothing in 8 U.S.C. § 1231(b) requires that a foreign government *affirmatively* refuse to issue a travel document for an individual to qualify for work authorization. Rather, various provisions anticipate that “refusal” can occur when a foreign government fails to timely respond. See 8 U.S.C. § 1231(b)(2)(C)(ii)(designation may be “disregard[ed]” when “the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country”).

This is an important distinction because, in Commenters’ experience, foreign governments rarely affirmatively refuse to issue a travel document to an individual, even where the foreign government may have no intention of issuing the document. This may occur despite extraordinary efforts by an individual, as exemplified in the case of Michael<sup>\*</sup>:

- Michael was released from immigration detention after more than a year in post-removal-order custody, when a judge determined that his detention had become indefinite. During that time, he and ICE made extensive efforts to secure travel documents for him. Those efforts included speaking to the consulate of the designated country over half a dozen times and several attempts to convince alternative countries to accept him. Throughout Michael’s interactions with the designated country’s consulate, the consulate did not issue travel documents based on the information provided but claimed that it was continuing to conduct additional investigation. At the same time, the consulate admitted that it could not give any timeline for when the investigation would conclude. Now, almost two years after Michael’s removal order became final, there has been no indication that the designated country is any closer to issuing travel documents.

Since ICE released Michael, he has been checking in regularly with his assigned deportation officer. The deportation officer has indicated that Michael will be arrested if he does not provide evidence of continued efforts to obtain a travel document. After speaking with ICE and with the consulate, Michael was advised that he may have to travel to the nearest consulate to make progress on getting a travel document. The nearest consulate is in a different city, several hours away. Additionally, Michael was advised that he may have to hire a lawyer in the designated country to obtain the evidence of identity that the consulate requires. Even then, there is no guarantee or even likelihood that the consulate will ever issue a travel document. But the consulate has never affirmatively

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\* Commenters have used pseudonyms to protect the identities of impacted individuals referenced in these comments. Information related to these case stories is on file with the American Immigration Council.

refused to provide a travel document and so, under this proposed rule, Michael would not be eligible for work authorization.

In this regard, requiring that all countries affirmatively refuse to issue a travel document for work authorization purposes gives rise to a separate concern for Commenters, which is the likely possibility that ICE deportation officers will embed the requirement that countries “affirmatively” refuse to issue travel documents as a matter of practice into the POOCR process and apply a heightened standard by which individuals can be free from detention. The affirmative refusal by a foreign government to issue a travel document is not required for detained individuals to meet their burden under *Zadvydas* nor should it be.

To condition eligibility for work authorization on events over which individuals have no control - whether a foreign government will affirmatively deny a travel document rather than let the time period lapse to respond, as the statute currently permits - can have grave consequences for individuals. In essence, the Department will punish individuals where countries - often to which the removed individual has no ties or connection - do not affirmatively deny a travel document. Whether embedded into the POOCR or the employment authorization process, Commenters are extremely concerned that the requirement lends itself to potential abuse and coercion by ICE deportation officers. This is exemplified by various documented instances in which ICE deportation officers have engaged in unlawful or coercive tactics to attempt to secure travel documents for individuals with final removal orders.<sup>2</sup>

## II. The Proposed Rule is Arbitrary and Capricious

The Department’s proposed rule disrupts long-standing expectations by individuals with final removal orders that they will not be deported, creates unjustified procedural hurdles to lawful employment, fails to justify that its stated purposes – which is to punish individuals into self-

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<sup>2</sup> Human Rights Watch, *US: Protect Cameroonians From Deportation* (December 18, 2020), <https://www.hrw.org/news/2020/12/18/us-protect-cameroonians-deportation>; Letter from U.S. Senator Michael F. Bennet to Department of Homeland Security officials (November 23, 2020), [https://www.bennet.senate.gov/public/\\_cache/files/5/1/51ca3484-c808-4e19-bb7b-a1d49c632ab2/E6CC3BA9DE548214D971F992B9B36F51.asylum-seekers-from-cameroon.pdf](https://www.bennet.senate.gov/public/_cache/files/5/1/51ca3484-c808-4e19-bb7b-a1d49c632ab2/E6CC3BA9DE548214D971F992B9B36F51.asylum-seekers-from-cameroon.pdf); Human Rights Watch, *US Deporting Iraqis Without Valid Documents* (December 20, 2018), <https://www.hrw.org/news/2018/12/20/us-deporting-iraqis-without-valid-documents>; Noah Lanard, *Iraqi Detainees Say ICE Coerced Them Into Signing Documents That Could Get Them Deported*, Mother Jones (June 15, 2018), <https://www.motherjones.com/politics/2018/06/iraqi-detainees-say-ice-coerced-them-into-signing-documents-that-could-get-them-deported/>; see also *Cheshire v. Vigare et al.*, 16-cv-11220 (N.D. Ill. Dec. 9, 2016) (claim for monetary damages by individual alleging physical abuse by ICE in relation to securing a travel document).

deporting to free up jobs for U.S. citizens – can be achieved. Rather, the rule, based on penalizing vulnerable communities, only results in harm.

**A. The Proposed Rule Is a Drastic Change in Long-Standing Agency Policy Authorizing Employment for Individuals Whose Detention and Removal Are Not in the Public Interest**

For over two decades, federal immigration authorities have permitted individuals with final removal orders whose removal is “contrary to the public interest” and are released on OSUPs to work. 8 C.F.R. § 274a.12(c)(18) (1998). Likewise, for decades and under diverse presidential administrations, ICE has exercised prosecutorial discretion to release from custody and decline to remove individuals whose removal is not in the public interest. See Kate M. Manuel & Todd Garvey, Cong. Research Serv., R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues* 1 (Dec. 27, 2013) (discussing generally prosecutorial discretion exercised by the Immigration and Naturalization Service (INS) and later DHS). Under the current administration, ICE officers continue to have the authority to exercise prosecutorial discretion on a “case-by-case basis.” Memo. from John Kelly, Secretary, DHS, *Enforcement of the Immigration Laws to Serve the National Interest* 4 (Feb. 20, 2017). While it is unclear how many individuals are currently released on an OSUP because their removal is not in the public interest, based on the data provided by DHS in support of the proposed rule, it appears that there may be several thousand people who fall within this category. See 85 Fed. Reg. at 74,210 (reporting only a small percentage of individuals released on an OSUP for whom DHS could not obtain travel documents).

Despite long-standing and consistent policy, DHS proposes to eliminate employment authorization for this population and addresses this drastic shift in policy in a single paragraph. See *id.* DHS suggests that “other avenues” for employment eligibility for this population—pointing to the possibility of seeking T, S, and U non-immigrant visas—make employment authorization under (c)(18) unnecessary. *Id.* The agency is incorrect. T, S, and U visas have high eligibility thresholds and are available only to a very narrow set of individuals who are the victims of, or witnesses to, crime, who cooperate with law enforcement, and who persuade law enforcement authorities to provide necessary documentation to support their visa applications. See 8 C.F.R. §§ 214.2(t), 214.11, 214.14. They also require lengthy application processes and in the case of U visas may require years-long delays before work authorization becomes available even to those who USCIS determinates are *bona fide* eligible for the visa. A contingent multi-year delay for work authorization is not a viable “other avenue.”

DHS also fails to consider or address the consequences for individuals who ICE has determined merit release in the exercise of prosecutorial discretion and who do not qualify for these narrow forms of relief. See 85 Fed. Reg. at 74,210. In this overlooked population are individuals in withholding-only proceedings pursuant to 8 C.F.R. § 1208.31(e), who ICE determined should not be detained while they pursue the protection to which they may be entitled. Also overlooked are

individuals with other compelling needs to remain in the United States, such as to care for especially vulnerable U.S. citizen children, who ICE has determined should not be removed.

As such, DHS has failed to adequately justify such a dramatic shift in long-standing policy.

## **B. The Proposed Rule Creates Unnecessary Obstacles to Work Authorization for Individuals Whose Removal is Impracticable**

Even for the people released on an OSUP whose removal is impracticable, DHS has proposed a series of hurdles that are unnecessary and contrary to law, as discussed in Part I.

First, DHS proposes requiring applicants to submit a copy of their OSUP, Form I-220B, with an annotation from ICE indicating that all countries from whom DHS has requested travel documents have affirmatively declined. *Id.* at 74,214. In essence, Commenters are concerned that the DHS rule will make ICE the official gatekeeper for employment authorization, an adjudicatory task that Congress has assigned to USCIS.<sup>3</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2195-2196 (2002); 6 U.S.C. § 271(b) (assigning all “adjudications” previously conducted by INS to USCIS). In addition, as discussed in Part I, this requirement is ripe for abuse by individual ICE officers, with no mechanism to challenge the determination.

Second, DHS proposes requiring applicants to submit a copy of their OSUP Personal Report Record to establish “compliance with the conditions for release.” *Id.* at 74,214. This requirement is unnecessary because, as the agency acknowledges elsewhere, DHS will vacate an OSUP and take an individual back into custody if he or she fails to comply with the conditions of his or her release. *Id.* at 74,211. Moreover, in Commenters’ experience, ICE does not reliably maintain or update the contents of the Personal Report Record, making the record unreliable. ICE further fails to provide proof of compliance when requested.

Third, DHS proposes adding a requirement that applicants show an economic necessity to work, as measured by the Federal Poverty Guidelines. 85 Fed. Reg. at 74,197, 74,214. While DHS maintains that individuals “who are financially able to support themselves” should not be eligible for an EAD, the agency provides no evidence to support the assumption that individuals who can otherwise financially support themselves would follow all the necessary (and under this proposed rule, extraordinarily onerous) steps to seek employment authorization. *Id.* at 74,214. It should be uncontroversial that living at or near poverty is not the exclusive measure for needing to work. Moreover, in Commenters’ experience, when evaluating Form I-765WS and economic

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<sup>3</sup> The proposed rule seeks to align adjudication for employment authorization with USCIS rather than ICE which was previously authorized. Despite the rule’s goal to place work authorization within the jurisdiction of USCIS, as noted previously, Commenters are concerned that procedural requirements that overlap with the POCR process will still result in ICE as the gatekeeper, implicating the already outlined concerns.

necessity, USCIS has applied a more stringent standard than the Federal Poverty Guidelines, requiring further evidence, such as proof of rent or utilities expenses. This often entails the issuance of a Request for Evidence (RFE), which further delays the approval of work authorization. DHS's additional proposal to apply this requirement to EAD renewals is also potentially contradictory with the purported intent of the rule and could punish individuals who successfully obtain a high-paying job through the issuance of the EAD. DHS entirely fails to explain what would happen if a person obtains a job which provides them sufficient income to no longer fall within the Federal Poverty Guideline, and whether that could lead to a renewal being denied—thus forcing the applicant to reapply for an initial EAD after losing their job. This result would be manifestly arbitrary and capricious.

Fourth, DHS proposes requiring applicants to submit to biometric testing and mandating that USCIS consider the applicant's criminal history, including whether the applicant has been arrested for or convicted of any crimes since release on an OSUP. 85 Fed. Reg. at 74,197, 74, 214, 74,253. An applicant's criminal history is irrelevant to the applicant's need to financially support him or herself. Denying work authorization is a cruel measure and an unnecessary punishment on top of any penalty administered by the criminal justice system and the risk of being re-detained for violating the OSUP terms of release. The Department states that "many of these [noncitizens] are criminals whose continued presence in the United States is not in the national interest." This justification ignores systemic inequities in the criminal system that disproportionately impact communities, including immigrants, of color in the United States. Many individuals who were released on OSUPs because their countries would not accept them have now lived in the United States for decades following the issuance of a final removal order without incident. These individuals have proven themselves to be productive members of society, by working and contributing to the welfare of their families and communities, while also building long track records of rehabilitation.<sup>4</sup> To deny them work authorization as a form of punishment because they cannot or should not be removed is unconscionable.

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<sup>4</sup> See e.g., *Nak Chhoeun et al v. David Marin et al.*, 17-cv-01898-CJC, 20 (C.D. Cal. Jan. 25, 2018) (order granting preliminary injunction):

"When Petitioners were initially ordered removed to Cambodia, the Government was unable to carry out the deportations, determined that Petitioners did not pose a danger to society, and released them from custody to live at large in their communities for decades. It is disingenuous for the Government to claim that throughout the many years that Petitioners were permitted to live and work on supervised release, they should not have built up any expectation that they would be permitted to remain in the country. Petitioners should instead be commended for investing in and becoming productive members of our communities notwithstanding their removal orders. Because Petitioners did so, instead of wallowing in limbo while waiting to be deported, they have deepened their interest in remaining in this country. For the Government now to ignore Petitioners' strong ties and commitment to this country is deeply troubling."



Finally, but significantly, DHS proposes requiring renewal applicants to establish that their employer is a participant in good standing with E-Verify. 85 Fed. Reg. at 74,214, 74,253. Contrary to the agency’s arguments, this requirement is a burden that is not necessary to “ensure that U.S. employers . . . are complying with [] U.S. immigration laws.” 85 Fed. Reg. at 74214. In fact, E-Verify has an error rate of 0.15 percent, which results in a significant number of legally authorized workers wrongfully disqualified from work. Nat’l Immigration Forum, *Error Rates in E-Verify* (Aug. 14, 2018), <https://immigrationforum.org/article/error-rates-in-e-verify/>. Most importantly, the overwhelming majority of U.S. employers do not use E-Verify, and so the proposed rule would put nearly impossible employment restrictions on the few people still eligible to work while on an OSUP. See Nat’l Immigration Forum, *Fact Sheet: E-Verify* (Aug. 14, 2018), <https://immigrationforum.org/article/fact-sheet-e-verify/#:~:text=E%2DVerify%20is%20now%20available,in%20the%20E%2DVerify%20program>. In addition, this proposal is manifestly arbitrary and capricious because it would penalize some applicants purely because of the state they live in (and whether that state requires E-Verify) and the industry in which they work (and whether that industry general requires E-Verify). The rule is also arbitrary and capricious because it unlawfully imposes a burden on *employees* in order to incentivize *employers*—without any analysis as to how blocking a small population of people with these EADs from working those jobs would have any impact whatsoever on employers.

### C. The Proposed Rule Would Not Achieve its Stated Purpose

DHS offers two primary justifications for the proposed rule: to discourage individuals with removal orders from remaining in the United States and to protect U.S. citizen workers. 85 Fed. Reg. at 74207. To the extent that DHS’s stated purpose is to make living conditions for individuals on OSUPs so difficult that they self-deport, such a goal should be rejected as simply cruel. Additionally, if enacted, the rule would not achieve either goal.

DHS speculates, without pointing to any evidence, that individuals on OSUP remain in the United States because they obtain employment authorization. *Id.* at 74208. To the contrary, individuals released on a OSUP remain in the United States as a matter of necessity, either because they cannot be removed or because their personal circumstances are such that ICE has determined they should not be removed. See *id.* at 74211-12 (outlining the obstacles to obtaining necessary travel documents for individuals with final orders of removal). As DHS acknowledges, immigration law already incorporates significant disincentives to remaining in the United States on an OSUP. See *id.* at 74211. For individuals released under *Zadvydas*, a condition of release is their continued efforts to facilitate their own removal. *Id.* Individuals on OSUP must “appear periodically before an immigration officer and comply with the conditions” of the OSUP—if they do not, DHS may re-detain them. *Id.* Stripping this population of work authorization will not lead them to self-deport, but as discussed below in Part II.E, it will cause them tremendous hardship.

DHS likewise speculates that denying employment authorization to those on OSUP will “create higher wages and employment rates for workers in the United States.” *Id.* at 74208. According to DHS, there were approximately 25,000 individuals issued category (c)(18) EADs in Fiscal Year 2019. *Id.* at 74209. DHS offers no evidence that removing employment authorization from this relatively small population of workers, presumably spread across the fifty states, would have any appreciable or even measurable impact on the approximately 150 million people in the U.S. workforce. See Drew Desilver, *10 Facts about American workers*, Pew Research (Aug. 29, 2019), <https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/>. On the other hand, DHS does provide evidence that its new rule will have a significant impact on particularly vulnerable workers on OSUP. See 85 Fed. Reg. at 74204 (calculating lost income between \$600 million and \$1 billion). A rule which causes enormous harm to a small population may not be justified by an infinitesimal effect on a larger population.

**D. DHS Has Failed to Provide Adequate Information on the Burden the Proposed Rule Will Place on Small Businesses**

The rule contemplates a burden on small business and employers generally but is unable to predict the impact with reliability. 85 Fed. Reg. at 74,203. The rule relies on economic projections based on unclear methodology. Given this lack of clarity and reliability, the Department must release further information to explain this aspect of its rationale. Otherwise, Commenters object to the lack of information (in addition to the lack of an adequate period to more fully analyze and comment on the Department’s economic projections) as another reason why the rule should not be promulgated at this time.

**E. The Proposed Rule Will Harm Already Vulnerable People**

The proposed rule would have a profoundly cruel impact on individuals who would no longer be eligible for work authorization. They will lose the ability to support themselves and their family members, making it harder to pay for basics like food, shelter, and healthcare. In homes where that individual is the primary wage earner, families – including U.S. citizen spouses and children – will have no other means to support themselves. Individuals forced to work in the shadows are more vulnerable to workplace abuse by unscrupulous employers who may threaten them or underpay them due to their immigration status. In many states, without work authorization, individuals also will not be able to obtain driver’s licenses, preventing them from attending doctor’s appointments, picking their children up from school, or even buying groceries, particularly in rural areas and places without public transportation.

Often, these same individuals on orders of supervision have exigent, compelling circumstances that make it necessary for them to stay in the country. In granting these orders, DHS itself recognizes that it is in everyone's best interest for that person to remain in the country despite a final order of removal. For example:

- Tanya\* is a single mom with a now 8-year-old daughter, Becca.\* Becca has Down syndrome, and has required multiple surgical interventions for her eyes and ears. Tanya has been an integral part of the community – beloved by the school where she teaches tennis. Her ex-husband, Alex\* included her on an asylum application that was granted, but revoked years later due to fraud perpetrated by the attorney in their case. Alex immediately abandoned Tanya and Becca, who was an infant at the time, and went to Romania. Soon after, he divorced Tanya and quickly remarried. ICE has regularly renewed her stay of removal, recognizing that she was a victim of the fraud, not its perpetrator. Tanya is the sole breadwinner and caregiver for Becca – Alex does not pay child support.
- Michelle\* is a transgender woman with no criminal history who was recently released on an OSUP as required by *Zadvydas*. However, the country from whom DHS sought travel documents never affirmatively refused to issue those documents. Without any means of supporting herself, Michelle is currently relying on a church to provide housing and food, but the church’s resources are diminished. Michelle has applied for category (c)(18) work authorization along with a fee waiver, but if her fee waiver is denied, she risks losing the possibility of being lawfully employed and supporting herself altogether under the proposed rule..
- Laura\* entered the U.S. in 2014. She had a prior removal order and was placed in withholding only proceedings. Laura was held for nine months in family detention before being released in 2015 on an order of supervision while her withholding of removal appeal was pending. Soon after, the BIA remanded the case to the immigration to reconsider her withholding of removal claims related to the considerable abuse she suffered from her father and her brother. Her next master calendar hearing was set for 2021. Since being released in June 2015, Laura has worked through her (c)(18) EAD as a hotel housekeeper and is the primary provider for her family. Without work authorization, she could have been dependent on charities, homeless, and/or exploited.

Stripping these people of their ability to provide for their families, drive safely, and participate more fully in their communities defies logic and insults our shared humanity.

### III. The 30-day Comment Period is Insufficient and Should Be Extended to, at a Minimum, 60 Days to Allow for Meaningful Input From the Public

Finally, DHS failed to provide a sufficient period for interested parties to comment on the proposed elimination of work authorization for individuals with final removal orders as described above. By failing to set an adequate period for the public to consider the proposed rule and provide comment, DHS has denied the public and individuals impacted by the rule their statutorily guaranteed right to provide meaningful input.

It is well-established that agencies generally must provide public comment periods of at least 60 days. See, e.g., Exec. Order 12866, 58 Fed. Reg. 51735 §6(a)(1) (1993) (directing agencies to allow “not less than 60 days” for public comment in most circumstances); Exec. Order 13563, 76 Fed. Reg. 3821, 3821-22 (2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”) There is no indication that an exception to the 60-day minimum is warranted in the present case; in fact, the agency provided no justification for deviating from the Executive Orders’ guidance.

To the contrary, both current circumstances and the specific content of the proposed rule indicate that a period of 60 days or more is necessary to permit a meaningful opportunity for comment.

First, the proposed rule will have a significant impact on the public, especially, on people with final orders of removal who cannot or should not be deported and who will face new and likely insurmountable obstacles to obtaining work permits. See *supra* Part II. Given the potentially grave consequences of enacting the proposed rule, ensuring sufficient time to hear from impacted parties should be a priority for the agency.

Second, the timing of the shortened comment period made it especially difficult for the public to submit detailed comments. The 30-day window encompassed both Thanksgiving, a federal holiday, and the day after Thanksgiving, which is a public holiday observed in more than 20 states, thereby functionally shortening the comment period further and undercutting the purpose of the notice process to invite broad public comment. See *Pangea Legal Services v. DHS*, No. 20-CV-07721-SI, 2020 WL 6802474 at \*20-22 (N.D. Cal. 2020) (finding a 30-day comment period “spanning the holidays” likely violated the notice and comment requirements of the Administrative Procedure Act).

Third, the proposed rule was issued nearly simultaneous with several other proposed rules which will impact similar sectors of the U.S. public, which undermines the ability of interested members of the public to devote adequate time and resources towards commenting on any of the related proposals. See Executive Office for Immigration Review, *Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 229 (November 27, 2020) (comments due December 28, 2020); Executive Office for Immigration Review, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 229 (November 27, 2020) (comments due December 28, 2020); Department of Homeland Security, *Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States*, 85 Fed. Reg. 224 (November 19, 2020) (comments due December 21, 2020).

Finally, the comment period falls in the middle of an ongoing surge in the Covid-19 pandemic, impacting all sectors of the U.S. public, including organizations and individuals who may be harmed by this rule and who would otherwise provide critical comments. See, e.g., Tom Stelloh,

*U.S. Tops 14 Million Covid-19 Cases, Sets Daily Record for Deaths, Cases and Hospitalizations*, NBC News (Dec. 2, 2020, 11:21 PM).

For these reasons, we urge DHS to reopen the comment period for 30 days, extending the deadline for comments at least until January 18, 2020, to allow the public adequate time to provide detailed feedback on the proposed rule. We incorporate into our comments the December 9, 2020 letter requesting a full 60-day comment period to USCIS Office of Policy and Strategy, Security and Public Safety Division Chief Michael J. McDermott and Office of Management and Budget Office of Information and Regulatory Affairs Acting Administrator Paul Ray signed by more than 50 organizations, including the Council and AILA.

#### **IV. Commenters Approve of the Amendment to 8 C.F.R. § 274.12(a)(10) to Specifically Include Individuals Granted Deferral of Removal Under the Convention Against Torture**

At present, the DHS regulations do not clearly identify a regulatory basis for employment authorization for individuals granted CAT deferral. In contrast, individuals granted withholding of removal under CAT are easily able to seek employment authorization based solely on their status. 8 C.F.R. § 274a.12(a)(10) (The classes of aliens authorized to be employed in the United States includes “[a]n alien granted withholding of deportation or removal for the period of time in that status”). By definition, there is very little difference between withholding of removal under CAT and deferral of removal under CAT. For beneficiaries of either form of protection, the Executive Office for Immigration Review (EOIR) has determined that the United States cannot remove the individual from the country due to the clear probability of torture they face in the country of removal. Thus, the individual has permission to remain in the United States for an indefinite period of time. With this indefinite permission to remain in the United States, it is critical that CAT beneficiaries (whether under withholding of removal or deferral of removal) have access to employment authorization in order to support themselves and their families in the United States.

In Commenters’ experience, most beneficiaries of CAT deferral seek employment authorization under 8 C.F.R. § 274a.12(c)(18), in part because most CAT deferral beneficiaries were previously detained and then released on an OSUP after being granted CAT deferral. They are thus eligible for employment authorization under the (c)(18) category. Relying on the (c)(18) category for employment authorization, however, is problematic for two reasons. First, not all CAT deferral beneficiaries were previously detained and those who are not released on an OSUP are therefore left without any clear regulatory basis to seek employment authorization. Second, even if a CAT deferral beneficiary was released on an OSUP, the language in 8 C.F.R. § 274a.12(c)(18) is clearly not intended for the circumstances of a CAT deferral beneficiary, which makes USCIS’s adjudication of the employment authorization application more complicated and burdensome than it would be under the (a)(10) category.

For example, to obtain employment authorization under the (c)(18) category, an individual must provide evidence of factors such as “[t]he anticipated length of time before the alien can be removed from the United States.” 8 C.F.R. § 274a.12(c)(18)(iii). This factor is inapplicable to CAT deferral beneficiaries, since it has been determined that they cannot be removed from the United States. Likewise, the instructions for Form I-765 state that applicants for employment authorization under category (c)(18) must provide a copy of their Form I-220B, Order of Supervision if they have one. In Commenters’ experience, it is common for USCIS to request additional evidence from the applicant regarding the I-220B, demonstrating that the applicant has been compliant with all ICE supervision requirements.

Requiring CAT deferral beneficiaries to explain how their situation differs from other individuals released under an order of supervision, and for USCIS to review and understand the situation is inefficient and ineffective when a CAT deferral beneficiary – like a CAT withholding beneficiary – could much more easily be granted employment authorization simply on the basis of his or her status. Moreover, requiring these additional steps also causes delays in the adjudication of employment authorization. This in turn can result in gaps in employment authorization that result in job loss for the CAT deferral beneficiary. For example, due to delays in the adjudication of a (c)(18)-based employment authorization application, an AILA member’s client – a CAT deferral beneficiary – has repeatedly been at risk of losing his job and suffered other harm related to the gap in employment authorization, such as being unable to drive his children to school and to appointments because the validity of his driver’s license was connected to the validity period of his EAD. Changing the regulations so that CAT deferral beneficiaries could simply seek employment authorization based on their status, under the (a)(10) category, would streamline the application and adjudication process for both USCIS and the applicants, thereby minimizing the harm to employers, family, and community members that occurs due to gaps in employment authorization.

Sincerely,

THE AMERICAN IMMIGRATION COUNCIL

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

IMMIGRANT LEGAL DEFENSE