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RE: DHS Docket No. USCIS– 2019–0024, Public Comment Opposing the Majority of the Proposed Rules on Employment Authorization for Certain Classes of Aliens With Final Orders of Removal

I. Introduction

The Catholic Legal Immigration Network, Inc. (CLINIC)[1] submits these comments in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (NPRM) entitled "Employment Authorization for Certain Classes of Aliens With Final Orders of Removal" published on November 19, 2020.

CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 380 affiliates in 48 states and the District of Columbia. Through its affiliates, CLINIC advocates for the just and humane treatment of immigrants through direct representation, pro bono referrals, and engagement with policy makers.

There is no justification for implementing a rule change that would increase economic hardships for immigrants who cannot be removed, the employers they work for, and the communities in which they live. Therefore, DHS should withdraw the NPRM "Employment Authorization for Certain Classes of Aliens With Final Orders of Removal" with the exception described in Section XV below.

CLINIC appreciates the opportunity to provide comments on this proposed rule. CLINIC believes that U.S. policies on immigration should reflect the country's core moral values and historical

[1] These comments were primarily authored by Elizabeth Crivaro, Legal Fellow with CLINIC's Defending Vulnerable Populations (DVP) Program. Consulting attorney Benjamin Apt, and Victoria Neilson, Managing Attorney of CLINIC's Defending Vulnerable Populations (DVP) Program, also wrote or contributed to sections of the comment.

practice of welcoming immigrants and refugees fleeing persecution. Immigration policies should ensure justice, offer protection, and treat immigrants humanely. People of faith have consistently stood by the principle that all immigrants, especially the most vulnerable among us, deserve an immigration system that is fair and humane. As Pope Francis has said, "I ask leaders and legislators and the entire international community to confront the reality of those who have been displaced by force, with effective projects and new approaches in order to protect their dignity, to improve the quality of their life and to face the challenges that are emerging from modern forms of persecution, oppression and slavery."[2]

CLINIC likewise believes that the most vulnerable among us need greater protections and opportunities, including the ability to work to support themselves and their families. In this vein, CLINIC submits the following comments in opposition to most the proposed changes.

II. DHS Should Not Have Issued an NPRM of this Complexity with a Mere 30-Day Comment Period in the Midst of a Global Pandemic and Between Major Holidays.

In addition to the substance of the comments we submit below, CLINIC adamantly opposes the process of publishing this proposed rule. The NPRM is very complex, purportedly relying on economic concerns and complicated areas of immigration law. A proposed rule of this complexity should have given the public a 60-day comment period rather than this 30-day period.

The Administrative Procedures Act (APA) § 553 requires that "interested persons" from the public have "an opportunity to participate in the rule making." In general, the agencies, must afford "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[3] Courts have found that for the agencies to comply with this participation requirement the comment period they give must be "adequate" to provide a "meaningful opportunity."[4] Given the importance of the public's participation in the rule-making process, Executive Order 12866 specifies that "in most cases should include a comment period of not less than 60 days."[5]

While the NPRM acknowledges that this rule is a significant rule pursuant to Executive Order 12866,[6] it is completely silent on why it is only offering 30 days to comment rather than the 60 days required by Executive Order. Executive Order 13563 explicitly states, "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."**[7]

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[2] Pope Francis, *Address to Participants in the Plenary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People*, (May 24, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/may/documents/papa-francesco_20130524_migranti-itineranti.html.

[3] *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

[4] *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

[5] *See* Exec. Order No. 12866, § 6(a), 58 Fed. R. 51,735 (Oct. 4, 1993).

[6] 85 Fed. Reg. 74196, 74216 (Nov. 19, 2020).

[7] *See* Exec. Order No. 13563, 3 C.F.R. 13563 (Jan. 18, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review. [emphasis added].

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the challenges to timely respond to the NPRM are currently magnified by the ongoing COVID-19 pandemic. The Centers for Disease Control and Prevention (CDC) have acknowledged the added stress of performing job functions during COVID-19.[8] Just two weeks after the NPRM was issued, the United States posted its largest single-day death rate in COVID-19 cases.[9] As the public seeks to comment on this proposed rule, it is dealing with massive increases in COVID-19 throughout the country.[10]

In the context of issuing financial regulations, agencies have granted the public extra time to comment based solely on the challenges imposed by COVID-19. For example, the Bureau of Consumer Financial Protection extended a comment period from an initial 60 days to add 90 days more for the public to comment. The agency published a new NPRM in the Federal Register stating:

> The SNPRM [Supplemental Notice of Public Rulemaking] provided a 60-day public comment period that was set to close on May 4, 2020. In light of the challenges posed by the COVID-19 pandemic, and in response to requests from stakeholders to give interested parties more time to conduct outreach to relevant constituencies and to properly address the many questions presented in the SNPRM, the Bureau extended the comment period until June 5, 2020. Since extending the comment period, the Bureau has received requests from a consumer advocacy group, a debt collection trade association, and three State Attorneys General to extend the comment period for an additional 60 day period. These stakeholders state that the COVID-19 pandemic continues to make it difficult to respond to the SNPRM thoroughly. **The Bureau agrees that the pandemic makes it difficult to respond to the SNPRM thoroughly** and to determine when stakeholders will be able to do so. To ensure that stakeholders have the time they need to provide such responses, the Bureau concludes that an extension of the SNPRM comment period to August 4, 2020, is appropriate. This extension should allow interested parties more time to prepare responses to the SNPRM without delaying the rulemaking on this topic. The SNPRM comment period will now close on August 4, 2020.[11] [Emphasis added].

In that rulemaking, the agency provided 150 days for the public to comment on a proposed rule, yet here, DHS has given the public a meager 30-day comment period.

Additionally, the NPRM's comment period spans over major public and religious holidays. The NPRM was published on November 19, 2020 and comments are due on December 21, 2020. The comment period encompasses the Thanksgiving holiday (November 26, 2020), as well as the entirety of Hanukkah, a major religious holiday, which begins on December 10, 2020 and ends on December 18, 2020. These comments are also due immediately before the Christmas holiday,

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[8] *See* Ctrs. for Disease Control and Prevention, *Employees: How to Cope with Job Stress and Build Resilience During the COVID-19 Pandemic* (May 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/mental-health-non-healthcare.html.

[9] Nick Cumming-Bruce, *Grim Day in U.S. as Covid-19 Deaths and Hospitalizations Set Records*, THE NEW YORK TIMES, Dec. 3, 2020, https://www.nytimes.com/live/2020/12/02/world/covid-19-coronavirus.

[10] Ctrs. For Disease Control and Prevention, Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory (Dec. 8, 2020) https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases.

[11] 85 Fed. Reg. 30890, 30891 (May 21, 2020).

which is a public and religious holiday celebrated on December 25, 2020. At least one court has found a 30-day comment period spanning holidays to likely be inadequate.[12]

For these procedural reasons alone, we urge the administration to rescind the proposed rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.[13] The purpose of notice and comment is to allow the public a meaningful opportunity to comment. The government should welcome suggestions from experts in the field; instead the complexity of the proposed rule coupled with the brevity of the comment period has left experts unable to comment on most of the substance of the proposed changes.

III. The NPRM Does Not Provide the Necessary Information that Would Allow the Public to Meaningfully Comment.

The language of the NPRM states that the rule:

> proposes to eliminate eligibility for discretionary employment authorization under 8 CFR § 274a.12(c)(18) for aliens who have final orders of removal and are temporarily released from custody on orders of supervision pending removal *except* for aliens 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"[14] and who "establish economic necessity.[15]

However, the NPRM does not provide any data showing how many people with orders of supervision pursuant to Immigration and Nationality Act (INA) § 241(a)(3) would actually be affected by the proposed rule. The NPRM includes some statistics but they are not helpful in even providing an estimate on how many noncitizens have orders of supervision pursuant to INA § 241(a)(3), i.e., the number of people who would ultimately be affected by the revised employment authorization document (EAD) regulations. Indeed, the proposed rule admits that DHS "cannot determine the number of (c)(18) alien workers who could be removed from the labor force"[16] as a result of this rule.

DHS cannot determine how many noncitizens in the United States with an order of supervision under INA § 241(a)(3) would actually qualify for an EAD under the proposed regulations. Specifically, DHS cannot calculate how many people would qualify under the requirement that it is impracticable for a noncitizen to be deported. The NPRM includes a table (Table 3) that shows that DHS could not obtain travel documents for an average of 459 noncitizens per year with orders of supervision under INA § 241(a)(3) in the last five fiscal years.[17] From the provided table, it is

[12] *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 20-CV-07721-SI, 2020 WL 6802474, at *23 (N.D. Cal. Nov. 19, 2020).
[13] In other contexts, the administration has extended existing 60-day regulatory comment periods by an additional 60 day or more citing the coronavirus as the reason for additional time. *See* 85 Fed. Reg. at 30891.
[14] 85 Fed. Reg. at 74197 [emphasis in original].
[15] *Id.*
[16] *Id.* at 74230.
[17] *Id*. at 74227.

unclear whether this number accounts for noncitizens for whom travel documents had been requested during that year or if it accounts for all noncitizens for whom their home countries previously denied the issuance of travel documents. It is also unclear whether this number only accounts for cases where DHS had affirmatively requested travel documents that were then actually denied by the foreign country. If the average 459 noncitizens per year accounts only for cases where DHS affirmatively requested travel documents and received affirmative denials, this fact would skew the actual number of people affected by the rule downward because, as shown in Section IV below, there are many countries from which DHS cannot request travel documents and there are also many countries that do not provide travel documents without affirmatively denying their issuance. Therefore, it is possible that there would be significantly more noncitizens who would be affected by the rule because they have orders of supervision under INA § 241(a)(3) but DHS cannot deport them.

Contrary to DHS's assertion that very few noncitizens would be affected by the proposed rule,[18] the fact that there are more than three times as many annual EAD renewals than new applications for EADs demonstrates that most people released on orders of supervision remain in the United States for an extended period of time.[19] Even the Office of the Inspector General (OIG) has found that "DHS does not have reliable statistics on removal challenges" and conducted its own factfinding in 2017 to "better understand the delays and barriers" to removing detained noncitizens with final orders of removal.[20] DHS found that 31 percent of the noncitizens (representing 948 out of 3,053) with final orders of removal in Immigration and Customs Enforcement (ICE) detention in December 2017 could not be removed because their travel document requests were still pending 90 days after they received a final order of removal. Presumably, many of these noncitizens were released under orders of supervision.[21] These statistics only account for detained noncitizens with final removal orders, not the number of non-detained noncitizens with orders of supervision. Thus, there is a strong possibility that there are many more noncitizens with final removal orders released on orders of supervision whom DHS cannot deport than the proposed rule notes since it is unclear what the 459 number actually accounts for. Likewise, there is also a strong likelihood that the OIG's previous case study undercounts those with final orders of removal since the study examines only people in ICE detention.

Because DHS itself cannot determine how many people would be affected by the proposed rule, DHS cannot estimate the costs of the NPRM without astronomical margins of error that render the calculated costs meaningless. The NPRM states that the estimated "costs of [the] rule would range from $940,239 to $14,722,941,163."[22] Because DHS cannot determine how many people the rule affects and cannot calculate a cost estimate without a margin of error of over $14 billion, DHS's conclusions regarding the overall impact of this rule demand extreme skepticism. Additionally, the public cannot meaningfully comment on this rule without knowing for certain how many noncitizens the rule ultimately affects or what the ultimate costs of the rule may be.

[18] *Id.*
[19] *Id.* at 74226.
[20] Off. of Inspector Gen., *ICE Faces Barriers in Timely Repatriation of Detained Aliens* 3 (2019) [hereinafter OIG Report].
[21] 8 CFR § 241.4(g)(iii) (the removal period shall run for a period of 90 days).
[22] 85 Fed. Reg. at 74199.

IV. The Proposed Rule's Stated Goal to Eliminate Incentives for People to Remain in the United States After Receiving a Final Order of Removal Is Irrational.

The proposed rule seeks to amend 8 CFR § 274a.12(c)(18) to provide that noncitizens with orders of supervision under INA § 241(a)(3) would be ineligible for EADs unless "all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents."[23] The purported goal of this requirement is to encourage "aliens who do not fall within the exception provided in this rule to timely depart the United States."[24] However, this rule affects many noncitizens who simply cannot obtain travel documents to travel outside of the United States and are thus stranded indefinitely here. Therefore, the primary justification for the rule—to eliminate the incentive for people to remain in the United States—is irrational.

There are many noncitizens in the United States from countries that do not comply with deportation attempts from the United States and that do not go through the steps of affirmatively denying applications for travel documents. First, there are countries with which the United States has no diplomatic relations.[25] Having no diplomatic relations means that DHS cannot request travel documents from these countries in the first place, by definition making noncitizens from countries with whom the United States does not have diplomatic relations ineligible for an EAD under the proposed rule. Second, ICE has identified countries that are uncooperative in issuing travel documents so that the United States may not effect deportations.[26] Third, ICE has identified a number of countries that do not always comply with removals of their citizens from the United States.[27] Fourth, the U.S. government has identified certain countries as recalcitrant to deportations and implemented visa sanctions against nationals of these countries.[28] Some of these sanctions have been in place for over two years and have not had any effect in allowing the United States to conduct deportations.[29] Fifth, because of the COVID-19 pandemic, some countries are not accepting deportations or placing caps on deportations from the United States.[30]

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[23] *Id*. at 74213.
[24] *Id*.
[25] These countries include Iran, Bhutan, Syria, North Korea, and Venezuela. U. S. Dep't. of State, *U.S. Relations with Iran Bilateral Relations Fact Sheet* (2018); U. S. Dep't. of State, *U.S. Relations with Bhutan Bilateral Relations Fact Sheet* (2020); U. S. Dep't. of State, *U.S. Relations with Syria Bilateral Relations Fact Sheet* (2020); U. S. Dep't. of State, *U.S. Relations with North Korea Bilateral Relations Fact Sheet* (2018); U.S. Dep't. of State, *U.S. Relations with Venezuela Bilateral Relations Fact Sheet* (2020) (United States suspended diplomatic relations with Venezuela in March of 2019 but maintains a relationship with a leader not currently in power).
[26] *See* OIG Report, *supra* note 20, at 9. These countries include Cuba, Eritrea, Iran, Pakistan, Bhutan, China, Hong Kong, Laos, Vietnam, and Cambodia. Congressional Research Service, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals* 1 (2020) https://crsreports.congress.gov/product/details?prodcode=IF11025 [hereinafter CRS "Recalcitrant" Countries Report].
[27] *See* CRS "Recalcitrant" Countries Report, *supra* note 26, at 1. These countries include the Dominican Republic, Venezuela, Sierra Leone, Liberia, Ghana, Gambia, Togo, Cape Verde, Mauritania, Algeria, Egypt, Uganda, Ethiopia, Ukraine, Iraq, Armenia, Uzbekistan, Kazakhstan, Russia, Burma, Lebanon, Israel, and Cameroon. *Id.*
[28] U.S. Immigration and Customs Enforcement, *Visa Sanctions Against Two Countries Pursuant to Section 243(d) of the Immigration and Nationality Act* (2020). These countries include Burundi, Ethiopia, Cambodia, Eritrea, Sierra Leone, Burma, Laos, Cuba, Ghana, and Pakistan. *Id.*
[29] *Id*. (Visa sanctions against Cambodia, Eritrea, Guinea, and Sierra Leone that were implemented in 2017 remain in effect).
[30] Monique O. Madan, *Guatemala limits deportations from the U.S. as coronavirus cases surge in both countries,* MIAMI HERALD, June 30, 2020, https://www.miamiherald.com/news/local/immigration/article243877427.html.

Additionally, bureaucratic and infrastructure issues in both the United States and countries of removal prevent the issuance of travel documents even when countries want to comply with deportations from the United States.[31] The OIG has noted that "ICE's challenges with staffing and technology… diminish the efficiency of the removal process."[32] Countries of removal face similar and often worse bureaucratic and infrastructural hurdles, making the acquisition of travel documents or even a response to a request for travel documents nearly impossible.[33]

Finally, there are an estimated de jure and de facto 218,000 stateless people in the United States who do not have citizenship in any country and therefore cannot be returned to their countries of origin. [34] De jure stateless people in the United States are those whose country of origin do not recognize them. [35] These include, for example, the Rohingya minority in Myanmar [36] and Haitians born in the Dominican Republic.[37] De facto stateless people in the United States [38] are stateless because their countries are not formally recognized, like Palestine, their countries have fragmented, like Yugoslavia, the Former Soviet Union, and Sudan,[39] or are stateless because they have no records or documentation from their countries of birth.[40] Due to their lack of legal status anywhere, stateless people cannot meet the requirements of the rule, since DHS cannot request travel documents from their "home" countries for their removal.

The classes of noncitizens described above cannot "timely depart the United States"[41] because their countries leave them stranded in the United States, often times without affirmatively denying travel document requests. Therefore, the major goal of the proposed regulation, to provide incentives for noncitizens under an order of supervision to "timely depart the United States,"[42] is irrational and impossible for many of the affected noncitizens. Whether or not these classes of noncitizens have an incentive or are motivated to leave the United States is irrelevant; they simply cannot.

V. The Proposed Rule Would Leave Particularly Vulnerable People Without Means to Support Themselves While They Are Indefinitely Stranded in the United States.

The classes of noncitizens described in Section IV who cannot return to their countries, regardless of any incentive to do so, are effectively rendered stateless. They do not enjoy the legal protections of citizens in the United States and cannot avail themselves of the rights associated with their

[31] *See* OIG Report, *supra* note 20, at 1, 7.
[32] *Id.* at 1.
[33] *Id.* at 7.
[34] U. S. Dep't. of State, *Statelessness* (2020), https://www.state.gov/*other*-policy-issues/statelessness/ [hereinafter State Department Statelessness Report]; John Corgan, *The Stateless in the United States*, Ctr. for Migration Studies (2014) (https://cmsny.org/the-stateless-in-the-united-states/ [hereinafter CMS Stateless Report].
[35] *See* CMS Stateless Report, *supra* note 34.
[36] *Id*.
[37] Organization of American States, *Denationalization and Statelessness in the Dominican Republic* (2016), http://www.oas.org/en/iachr/multimedia/2016/DominicanRepublic/dominican-republic.html.
[38] CMS Stateless Report, *supra* note 34.
[39] *Id.*; *See* OIG Report, *supra* note 20, at 7.
[40] *See* CMS Stateless Report, *supra* note 34.
[41] 85 Fed Reg. at 74213.
[42] *Id*.

citizenship because their countries would not allow them to be deported there.[43] The United States has pledged to support stateless people.[44] The United Nations High Commissioner for Refugees has recommended that, in order to achieve its goal to help end statelessness, the United States should "[establish] a procedure to determine whether an individual is stateless, automatically issuing a work permit and identity document once statelessness is established."[45] Clearly then, categorically excluding people whom the U.S. government cannot deport from being able to work does not align with the United States' goals to decrease statelessness and support stateless people.

Refusal to provide EADs to people whom the United States cannot deport also creates inhumane financial hardship to vulnerable people who have nowhere else to go. Many people with an order of supervision under INA § 241(a)(3) initially came to the United States to flee persecution, reunite with loved ones, and to escape dire circumstances. This proposed rule would most likely force these vulnerable classes of noncitizens into avoidable poverty.[46] Put simply, they would not be able to work under the rule but they would not be able to return to their home countries. So, they would suffer in the United States indefinitely without an ability to support themselves. Not only would they be unable to support themselves, these classes of noncitizens are prohibited from receiving federal public benefits and most state public benefits.[47] Thus with no safety net and no access to employment, noncitizens who cannot be removed would have no means of supporting themselves or surviving while remaining in the United States. This rule would also cause significant hardship to noncitizens' families and destabilize the financial and health situations of their children, spouses, parents, and other family members. Even worse, not issuing EADs to classes of noncitizens who are indefinitely stranded in the United States would make them more vulnerable to becoming victims of trafficking or other crimes.[48] Additionally, other noncitizens desperate to work may end up taking employment under the table, making them susceptible for

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[43] *See* State Department Statelessness Report, *supra* note 34.

[44] *Id.*

[45] United Nations High Comm'r for Refugees, *Stateless in the United States* (2020) https://www.unhcr.org/stateless-in-the-united-states.html.

[46] Catalina Amuedo-Dorantes & Francisca Antman, *Can Authorization Reduce Poverty among Undocumented Immigrants? Evidence from the Deferred Action for Childhood Arrivals Program*, Inst. for the Study of Labor (2016) http://ftp.iza.org/dp10145.pdf (work authorization for Deferred Action for Childhood Arrivals (DACA) program immigrants "reduced the likelihood of life in poverty of households headed by eligible individuals by 38 percent"); Human Rights Watch, *At Least Let Them Work: The Denial of Work Authorization and Assistance for Asylum Seekers in the United States*, *Human Rights Watch*, (2013), https://www.hrw.org/report/2013/11/12/least-let-them-work/denial-work-authorization-and-assistance-asylum-seekers-united.

[47] Tanya Broder, Avideh Moussavian, and Jonathan Blazer, Nat'l. Immigration Law Ctr., *Overview of Immigrant Eligibility for Federal Programs* (Dec. 2015), https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf; Holly Straut-Eppsteiner, Nat'l. Immigration Law Ctr., *Immigrant Workers in Low-Wage Frontline Jobs Need COVID-19 Workplace Protections Now* (Apr. 10, 2020), https://www.nilc.org/2020/04/10/immigrant-workers-on-frontlines-need-covid-protections-now/.

[48] *See, e.g.*, American Civil Liberties Union, *Human Trafficking: Modern Enslavement of Immigrant Women in the United States* (2020), https://www.aclu.org/other/human-trafficking-modern-enslavement-immigrant-women-united-states (In the United States, victims of trafficking are almost exclusively immigrants, and mostly immigrant women… because they often work in jobs that are hidden from the public view and unregulated by the government"); Int'l Labour Org. & Walk Free Found., *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* 52–53 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf . ("[I]n countries of destination . . . the identification and protection of those deemed most at risk of modern slavery should considered part of the response to influxes of asylum seekers.").

workplace abuse.[49] Such outcomes are clearly contrary to the United States' interest in supporting stateless people.

VI. The Proposed Rule Would Punish Noncitizens For Exercising Their Statutory Rights to Pursue Meritorious Relief from Removal.

Additional classes of noncitizens who would be affected by the NPRM include noncitizens released on orders of supervision under INA § 241(a)(3) who still have a statutory right to assert meritorious claims for relief from removal. The proposed rule would unjustifiably punish noncitizens pursuing valid claims for relief in the United States by not issuing them EADs. Preventing noncitizens from working makes it more difficult for them to pay for attorneys and to pay legal fees and support themselves while pursuing meritorious immigration claims.

First, noncitizens with stays of removal technically have a final order of removal,[50] and some may be released on orders of supervision. Noncitizens receive stays of removal by proving to the Board of Immigration Appeals or a federal appellate court that they would likely be successful on the merits of their immigration case.[51] Thus, these noncitizens categorically have meritorious claims for relief from removal.

Second, many noncitizens with orders of supervision under INA § 241(a)(3) have strong claims to reopen their final removal order. The Supreme Court has found that a motion to reopen is a statutory right that a noncitizen may exercise to ensure "proper" disposition of immigration proceedings.[52] Noncitizens released on orders of supervision may have strong arguments for motions to reopen because they may not have received notice of the removal order,[53] there may be changed country conditions that warrant reopening to address a fear of persecution,[54] or they may be domestic violence survivors.[55]

With no ability for these noncitizens with meritorious claims to work, they would be unable to support themselves and pay attorneys and legal fees to pursue their claims. This outcome would be particularly problematic because the legal standards for noncitizens released under orders of supervision are particularly stringent[56] and require an attorney to help noncitizens decipher their obligations and ultimately comply with their orders of supervision. The proposed rule would create

[49] *See, e.g.*, Osama Ayyad and Duke Carter, *Hard Rock Hotel construction worker who spoke about unsafe conditions faces deportation*, WWL-TV, Nov. 24, 2019, https://www.wwltv.com/article/news/local/hard-rock-hotel-construction-worker-who-spoke-about-unsafe-conditions-faces-deportation/289-428f1c28-2664-4b63-8262-c72d4cba81a2.

[50] *Nken v. Holder*, 556 U.S. 418, 425 (2009).

[51] *Id.* at 434. In assessing whether to grant a stay, the Board generally considers (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

[52] *See Reyes Mata v. Lynch*, 135 S. Ct. 2150, 2153 (2015); *Dada v. Mukasey*, 554 U.S. 1, 4–5 (2008).

[53] 8 U.S.C. § 1229a(b)(5)(C).

[54] 8 U.S.C. § 1229a(c)(7)(C)(ii).

[55] 8 U.S.C. § 1229a(c)(7)(C)(iv).

[56] *See* 8 U.S.C. § 1231(a)(3), requiring noncitizens released on orders of removal to appear before an officer periodically for identification; submit medical and psychiatric examinations; testify about their nationalities, circumstances, and activities; and obey written restrictions on conduct.

an impossible situation for vulnerable noncitizens: they may choose not to invoke their statutory rights to pursue relief in their cases because they cannot support themselves or they do exercise their rights to pursue relief in their cases but are unable to pay for the assistance needed to effectuate their legal claims and support themselves. DHS should not coerce noncitizens into making this impossible choice, but the NPRM does just that.

VII. The Proposed Rule's Requirement that Noncitizens Under Orders of Supervision Under INA § 241(A)(3) Do Not Qualify for EADs Unless Their Home Country Affirmatively Denies Issuance of Travel Documents Creates an Incentive for DHS to Not Seek Travel Documents for Noncitizens It Knows It Cannot Remove.

Under the proposed revisions to 8 CFR § 274a.13(a)(3), "ICE [a DHS component] will make the appropriate determination as to whether the alien's removal is impracticable at the time of the alien's initial temporary release on an order of supervision and thereafter when the alien is required to report to ICE consistent with the conditions of release."[57] However, if DHS's goal with this NRPM is to "administer our immigration laws to create higher wages and employment rates for workers in the United States,"[58] ICE does not have an incentive to request travel documents for noncitizens who are from countries that would likely not issue travel documents because those individuals would then qualify for EADs. If the country affirmatively denies travel documents, then a noncitizen with an order of supervision under INA § 241(a)(3) would be stranded in the United States indefinitely and likely qualify for an EAD, undermining the goal of protecting U.S. workers. If a noncitizen's home country would likely deny issuance of a travel document and ICE knows it likely would deny the documents, then ICE may not put in any effort to remove the noncitizen, leaving the individual with no ability to seek an EAD.

This perverse incentive is particularly problematic given the fact that ICE is already struggling to effect deportations to certain countries. The OIG has found that acquiring travel documents from certain countries is time-consuming and difficult.[59] The process requires ICE to thoroughly interview the person it is seeking to remove, compile a number of legal and identifying documents, review country specific removal guidelines, reach out to foreign governments to request travel documents, and submit a travel packet to the embassy of the country to which the noncitizen is being removed.[60] If the attempt at procuring travel documents ultimately ends with an individual not being removed and thereby triggering eligibility to seek an EAD while stranded in the United States, ICE does not have an incentive to attempt to acquire travel documents. Indeed, this rule would provide ICE with little incentive to try to obtain travel documents for those ICE knows cannot be removed, in order to evade the exception to the general rule that noncitizens released on orders of supervision cannot qualify for EADs.

[57] 85 Fed. Reg. at 74214.
[58] *Id.* at 74207.
[59] *See* OIG Report, *supra* note 20, at 32.
[60] *Id.*

VIII. Economic Necessity Should Not Be a Requirement to Grant an EAD Because There Are a Variety of Reasons Noncitizens Seek Employment Authorization, Besides Supporting Themselves.

Proposed regulation 8 CFR § 274a.12(c)(18)(i) would require noncitizens with an order of supervision under INA § 241(a)(3) to prove that their home country and other countries have affirmatively denied travel documents to DHS and that they have an "economic necessity" to work in the United States. The economic necessity requirement is misguided. While many noncitizens may face economic necessity,[61] there are other reasons noncitizens rely on EADs. Noncitizens applying for employment authorization using Form I-765 may receive a social security number along with their EADs.[62] This enables noncitizen workers to pay taxes[63] and open bank accounts.[64] Further, EADs often times may be the only available photo identification for noncitizens in the United States, particularly those who are stateless or who are from a country with whom the United States does not have diplomatic relations. Having access to a photo identification through an EAD is crucial because photo identification allows noncitizens access to the limited programs and services for which they are eligible, in addition to being able to board domestic carriers to travel within the United States. In the asylum context, many child asylum seekers who are too young to lawfully undertake paid work apply for EADs exclusively for these non-employment purposes.

IX. The Proposed Rule's Addition of Criminal History as an Explicit Discretionary Factor for Denying an EAD Does Not Promote Public Safety and Unjustifiably Punishes Vulnerable Noncitizens.

Proposed regulation 8 CFR § 274a.12(c)(18)(ii)(D) would allow United States Citizenship and Immigration Services (USCIS) to evaluate "criminal history" as a discretionary factor in determining whether a person qualifies for an EAD.[65] The proposed regulation's goal is purportedly to enhance public safety and "prevent…aliens with significant criminal histories from obtaining a discretionary benefit."[66] This discretionary provision is seriously flawed. First, barring legal employment to noncitizens stranded in the United States for minor criminal conduct and/or an arrest before a conviction does not enhance public safety. Rather, allowing people with criminal history opportunities to contribute to society and support themselves enhances public safety.[67] Second, the proposed rule would allow USCIS officers unfettered discretion to deny EAD applications from deserving applicants who meet extremely strict requirements already based on

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[61] *See supra* Section V, discussing how noncitizens stranded in the United States often exhibit economic necessity and may face extreme poverty if they are not authorized to work.

[62] Soc. Sec. Admin., *Apply For Your Social Security Number While Applying For Your Work Permit* (2020) https://www.ssa.gov/ssnvisa/ebe.html.

[63] *Id.*

[64] Roberto Gonzales, Veronica Terriquez, Stephen Ruszczyk, *Becoming DACAmented: Assessing the short-term benefits of Deferred Action for Childhood Arrivals (DACA)*, AM. BEHAVIORAL SCIENTIST (2014) https://www.researchgate.net/publication/277490551_Becoming_DACAmented_Assessing_the_Short-Term_Benefits_of_Deferred_Action_for_Childhood_Arrivals_DACA.

[65] 85 Fed. Reg. at 74253.

[66] *Id.* at 74214.

[67] Lucius Couloute and Daniel Kopf, Prison Policy Initiative, *Out of prison & out of work: unemployment among formerly incarcerated people*, (July 2018). https://www.prisonpolicy.org/reports/outofwork.html ("[e]mployment helps formerly incarcerated people gain economic stability after release and reduces the likelihood that they return to prison, promoting greater public safety to the benefit of everyone").

any minor exposure to the law, effectively based on the rationale of punishment. Punishing people stranded in the United States indefinitely and not allowing them to support themselves for the purpose of punishment goes against all of the United States' commitments surrounding stateless people.[68] Third, the rule would likely plummet noncitizens into avoidable poverty,[69] thus making them more susceptible to prosecution under vagrancy laws, thus making them less likely to receive EADs. Fourth, this rule would add the burden of implementing a vague rule on already over-burdened USCIS service center officers. Given that there is already a substantial backlog of EAD applications at USCIS,[70] requiring USCIS officers to evaluate an extremely nebulous discretionary factor such as "criminal history" would likely only increase the backlog for all EAD applications. Given the importance of noncitizens' ability to work,[71] particularly noncitizens who are stranded in the United States, DHS should avoid adding EAD requirements that would create an additional backlog in EAD application determinations.

X. The Proposed Rule's Renewal Requirements Are Unduly Onerous on Both Noncitizens and Businesses.

Proposed 8 CFR § 274a.13(a)(3)(ii) would require applicants for EAD renewals to meet all of the baseline requirements for initial EADs listed in 8 CFR § 274a.13(a)(3)(i) and additionally would require noncitizens to prove they are employed by U.S. employers enrolled and in good standing with E-verify.[72] The proposed rule seems to require that a noncitizen actually be employed when applying for an EAD renewal. This requirement would present problems for noncitizen workers struggling to make ends meet with seasonal or temporary positions. Additionally, given the historic layoffs due to the COVID-19 pandemic,[73] many noncitizen workers may not be able to prove employment at all, regardless of whether or not that employer is enrolled in E-verify. Further, as discussed in Section VIII *supra*, there are myriad reasons for noncitizens to seek EADs as identification documents separate and apart from the need to work.

Additionally, this proposed rule makes noncitizen workers vulnerable to exploitation by unscrupulous employers. For example, if a noncitizen works for an employer who uses E-verify they may feel that they cannot look for a better job because they would not know if the new employer complies with E-verify. Noncitizen workers may be afraid to take any steps to report unsafe conditions at their current place of employment[74] because, if they lose their jobs, they would be unable to renew their EADs.

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[68] *See supra* Section V.

[69] *See id.*

[70] Immigration advocates have reported that USCIS has slowed processing for many application types since 2017. *See* American Immigration Lawyers Association, *Deconstructing the Invisible Wall: How Policy Changes by the Trump Administration Are Slowing and Restricting Legal Immigration*, Mar. 19, 2018, https://aila.org/infonet/aila-report-deconstructing-the-invisible-wall.

[71] *Id.*

[72] 85 Fed. Reg. at 74253.

[73] Congressional Research Service, *Unemployment Rates During the COVID-19 Pandemic: In Brief* 1 (Dec. 7, 2020) https://fas.org/sgp/crs/misc/R46554.pdf ("[t]he unemployment rate peaked at an unprecedented level, not seen since data collection started in 1948, in April 2020 (14.7%) before declining to a still-elevated level in November(6.7%)").

[74] Vulnerable noncitizen workers often suffer as a result of reporting unsafe conditions either by threats of deportation or firing. *See, e.g.*, *supra* note 49. *See* also, Osama Ayyad and Duke Carter, *Hard Rock Hotel construction worker who spoke about unsafe conditions faces deportation*, 4WWL TV, Nov. 24, 2019,

Finally, the proposed rule puts an unnecessary policy burden on vulnerable noncitizen workers to ensure that their employers are enrolled in and in good standing with E-Verify. Individual workers should not be forced to pressure their employers to enroll in government-approved programs that may affect their business. As explained further in Section XI below, businesses have valid reasons not to enroll in E-Verify.

XI. The Proposed Rule Would Shift Burdens and Costs to United States Taxpayers and Businesses.

The proposed rule would deny noncitizens indefinitely stranded in the United States the ability to support themselves. This rule would thereby punish U.S. citizens and other taxpayers. First, health insurance is tied to employment in the United States. So, if noncitizens are ineligible for EADs, and cannot work or receive health insurance, all costs for potential healthcare through emergency room visits or other medical emergencies would fall on the U.S. taxpayer. Second, the proposed rule also diverts taxes the affected noncitizens would pay away from U.S. citizens. The NPRM estimates that the U.S. could lose upwards of $228 million annually in tax revenue from noncitizens with orders of supervision who would be barred from working under the rule.[75] These workers do not receive most of the benefits that U.S. citizens do from paying taxes.[76] Therefore, their tax revenue primarily benefits the public. Diverting this tax revenue away from U.S. citizens would shift costs onto the U.S. taxpayer.

Additionally, U.S. businesses, especially U.S. small businesses, would ultimately suffer under the proposed rule. Small businesses employ approximately 50 percent of workers in the U.S.[77] However, these businesses are struggling immensely due to the COVID-19 pandemic.[78] Many small businesses are in crisis, and "will either have to dramatically cut expenses, take on additional debt, or declare bankruptcy" as a result of the COVID-19 pandemic.[79] The government should not create any additional barriers for U.S. businesses, especially small businesses, during this extraordinarily difficult economic time.

Under the proposed rule, businesses would no longer be able to hire or retain employees with orders of supervision who do not meet the strict and unusual requirements of the proposed rule, as described in Sections VII and VIII above. DHS cannot even determine how many noncitizens with

https://www.wwltv.com/article/news/local/hard-rock-hotel-construction-worker-who-spoke-about-unsafe-conditions-faces-deportation/289-428f1c28-2664-4b63-8262-c72d4cba81a2.

[75] *Id.* at 74244.

[76] Tanya Broder, Avideh Moussavian, and Jonathan Blazer, Nat'l. Immigration Law Ctr., *Overview of Immigrant Eligibility for Federal Programs*, (Dec. 2015) https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf; Holly Straut-Eppsteiner, Nat'l. Immigration Law Ctr., *Immigrant Workers in Low-Wage Frontline Jobs Need COVID-19 Workplace Protections Now*, (Apr. 10, 2020) https://www.nilc.org/2020/04/10/immigrant-workers-on-frontlines-need-covid-protections-now/.

[77] Alexander W. Bartika , Marianne Bertrandb, Zoe Cullenc, Edward L. Glaeserd, Michael Lucac ,and Christopher Stanton, *The impact of COVID-19 on small business outcomes and expectations* 11, PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. OF THE U.S. (2020) https://www.pnas.org/content/pnas/117/30/17656.full.pdf.

[78] *Id.* (The economy during the COVID-19 pandemic is "a shock to America's small firms that has little parallel since the Great Depression of the 1930s).

[79] *Id.*

employment authorization would no longer be eligible as a result of the final rule,[80] but has estimated that lost labor earnings for employers could be as high as $14 billion.[81] As a result, U.S. businesses would be forced to fire workers they chose to employ, presumably because these workers help advance the goals of the business. Additionally, these businesses would face serious opportunity costs of trying to replace and train new employees during a global pandemic. Forcing businesses into such a difficult situation is problematic at any time, but creates additional burdens on businesses struggling to survive during the COVID-19 pandemic and associated economic decline.

Toward the end of the proposed rule, DHS acknowledges the proposed rule's foreseeable, detrimental effect on small entities:

> However, DHS does not currently require information on the employer or employment status of the EAD holder [for businesses qualifying under the Regulatory Flexibility Act] and thus is unable to determine how many entities could be impacted by the proposed rule or whether the entities impacted would be considered small entities. This is because these EADs are open market EADs, and therefore DHS does not currently collect information on the employer or the employment status of the EAD holder. This proposed rule may cause some existing EAD holders to be ineligible to renew their EADs. In such cases, small entities may incur opportunity costs associated with having to choose the next best alternative to immediately filling a job an EAD holder would have filled in situations where eligibility for the EAD is not met. If entities cannot find reasonable substitutes for the labor the aliens temporarily released on orders of supervision would have provided, removing EAD eligibility for these aliens would result primarily in costs to those entities through lost productivity and lost profits.[82]

The NPRM claims that these losses would afflict businesses for only the first couple of years, but, even if that assessment is correct, those are the years during which businesses would be hardest hit from the effects of the COVID pandemic and the ensuing shutdowns. Additionally, the proposed rule goes on to admit to other burdens it would place on small businesses in the form of their costs from participating in the E-Verify program.

Furthermore, not all businesses that employ workers with orders of supervision would be able to implement E-Verify. The National Bureau of Economic Research has found that businesses could struggle significantly if forced or coerced into implementing E-Verify, specifically because "there are non-trivial set-up, training, and compliance costs to using E-Verify.[83] The Report continues, "[t]hese costs are particularly cumbersome for small firms, which a 2011 analysis suggested would spend $2.6 billion on compliance-related costs if forced to utilize E-Verify."[84] Therefore, U.S. businesses would be faced with the difficult and unnecessary choice of implementing a costly E-

[60] 85 Fed. Reg. at 74230.
[81] *Id.* at 74246.
[82] *Id.* at 74249.
[83] Shalise Ayromloo, *et al*., *States taking the reins? Employment verification requirements and local labor market outcomes* 7, NAT'L BUREAU OF ECON. RESEARCH (2020) https://www.nber.org/system/files/working_papers/w26676/w26676.pdf.
[84] *Id*.

Verify system or firing dedicated, qualified employees in order to comply with the proposed rule. For these reasons, the proposed rule puts unjustified strains on U.S. businesses.

XII. The Proposed Rule's Economic Analysis Is Unsubstantiated and So Broad that It Fails to Justify the Rule's Adoption.

DHS acknowledges that it is unable to calculate the costs its proposed rule would entail. It reinforces its admission by proposing an absurdly broad range of costs:

> DHS estimates that some aliens with final removal orders and temporarily released on orders of supervision would be ineligible for discretionary EADs due to this proposed rule. However, DHS cannot estimate with precision what the future eligible population would be because of data constraints and, therefore, relies on a range with an upper and lower bound. The estimated costs of this proposed rule would range from a minimum of about $94,868, (annualized 7%) associated with biometrics and added burdens for relevant filing forms to a maximum of $1,496,016,941 (annualized 7%) should no replacement labor be found for aliens on orders of supervision who would be ineligible for employment authorization under this rule.[85]

The range between $94,868 and $1,496,016,941 reveals DHS's uncertainty about the consequences of its proposed rule. These figures are too unbounded to be acceptable for determining a federal policy. The speculative span reveals that DHS has neither sufficient information nor an adequate method to evaluate any information to make plausible conclusions about the NPRM's economic effects. The costs could be in the tens of thousands, or in the billions of dollars; the minimum amount is 1/15,769th of the maximum. With this enormous range of potential economic effects, DHS is essentially admitting that it has no reliable idea of the proposed rule's economic impact.

Agencies must provide reasoned economic impact calculations whenever they propose a new or revised rule that is properly deemed "economically significant" under Executive Orders 12866 and 13563.[86] The Regulatory Flexibility Act of 1980 likewise demands that agencies complete economic analysis of a proposed regulation's import for small businesses.[87] DHS adjudged this NPRM to be economically significant.[88] Agencies are no more permitted to undertake this analysis

[85] 85 Fed. Reg. at 74199.
[86] Executive Order 12866, "Regulatory Planning and Review," 58 Fed Reg. 51735 (Oct. 4, 1993); Executive Order 13563, "Improving Regulation and Regulatory Review," 76 Fed.Reg. 3821 (Jan. 21, 2011). See Maeve P. Carey, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, CRS Report R.41974 (Dec. 9, 2014), https://fas.org/sgp/crs/misc/R41974.pdf ; Maeve. P. Carey, *The Federal Rulemaking Process: An Overview*, CRS Report RL32240 (Jun. 17, 2013), https://fas.org/sgp/crs/misc/RL32240.pdf.
[87] Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. Sections 601-612.
[88] 85 Fed. Reg. at 74216.

frivolously than they are to dispense with it. Nor may they be vague about the sources of their information and the processes of their analysis.[89]

Even if DHS could reliably count the number of noncitizens who would lose their employment authorization under the NPRM, which it has not, it remains unclear how the agency calculated the amount of their earnings. DHS purports to have calculated the "loss of earnings" of noncitizens who would be unable to received EADs under the proposed rule. But the calculations are both insubstantial and incomplete. Still worse, the agency fails to account for economic impacts other than earned wages. As discussed above, losing employment would affect the ability of noncitizens to access health insurance and would likely cost U.S. taxpayers more money as a result. Further, if substantial numbers of noncitizens are unable to work lawfully, they would have less money to spend, creating further ripple effects on the U.S. economy while increasing burdens on state and charitable social safety net structures.

XIII. The Data Relied upon in the NPRM Are Too Vague to Have Any Meaning.

The NPRM includes several tables that include greatly varying, ambiguous numbers based on assumptions that are never adequately explained. For example, Tables 2A and 2B, which differ only in the percentages of projected annualized economic impact, with Table 2A portraying 7 percent and Table 2B 3 percent, consists of two sections. One is entitled "Transfers," the second "Losses."[90] "Transfer" assumes that the new rule would precipitate no deterioration in productivity because employers would promptly replace the employees who had lost their EAD with new employees (presumably citizens).[91] "Losses" reprises these same amounts, but now as sheer economic destruction.

In Table 2A, the "Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)" would lie somewhere between $614,037,170 and $1,495,358,741. Under "Losses," that same range becomes simply "lost compensation." There is one perplexing difference between the two categories of Transfers and Losses in these tables, however, as neither table reproduces the "Taxes" line that appears under Transfers in the Losses section. At least, though, the tables do record the anticipated cost to the government of diminished revenue.

Neither of the two tables includes the actual broader economic cost wrought by a denial of employment authorization. A loss of earnings is a loss of purchasing power. When noncitizens are deprived of EADs and lose their jobs, they cannot participate in the economy. Their disappearance is felt by businesses in their neighborhoods, and beyond. In addition, companies incur more costs when they are driven to hire replacement employees. Although these economic harms are obvious, the NPRM's economic analysis completely ignores them.

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[89] U.S. Government Accountability Office, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could be More Transparent*, GAO-14-714, (Sept. 2014), https://www.gao.gov/products/gao-14-714.

[90] 85 Fed. Reg. at 74204-205.

[91] When considering replacement of workers, DHS's working assumption was, "If all companies are able to easily find reasonable labor substitutes for the positions the aliens temporarily released on orders of supervision would otherwise have filled,…" *Id.* at 74202.

While the NPRM includes numerous tables that appear to include hard data, the numbers do not hold up to scrutiny. For example, the rule refers to the effect on states and municipalities in Table 3, but merely to say that DHS was not in a position to calculate any reasonable outcomes. The same is true regarding the proposed rule's impact on small businesses:

> This proposed rule could result in indirect costs on entities, some of which could be small entities. DHS acknowledges that changing eligibility criteria for aliens on orders of supervision to obtain employment authorization could result in entities that have hired such workers incurring labor turnover costs. Entities may also incur costs related to using E-Verify.[92]

What the proposed rule is able to calculate, though, are the costs arising from its new biometric requirements. The affected noncitizens would face higher biometric costs of between $83,148 and $552,741.[93] It simply cannot be that the agency's main argument propelling the rule's adoption is its prospective gain from biometric fees.[94] Agency revenue from fees, without regard to the public impact of those fees, is not a valid foundation for a responsible public policy.

Whatever DHS might gain in fees is far less than what noncitizens would lose in income and governments would forfeit in tax revenue.[95] As the NPRM notes:

> As table 22 shows, the projected 10-year monetized undercounted costs of the proposed rule for the period fiscal year 2020 to 2029 could be as high as about $14.22 billion with a minimum cost estimate $6.04 billion under the assumptions relied on. The majority of the costs of this rule would result from lost labor earnings, if companies are unable to find reasonable labor substitutes for the position the aliens temporarily released on order of supervision would have filled. *DHS notes that that are unquantified costs not reflected in the estimates above.*[96]

The defense of the proposed rule is strained further by the information it displays in Table 18. This table tries to present the prospective wage losses of the affected class of noncitizens for each of the next ten years, until 2029.[97] Not only does the table fail to document the bases of these calculations, but it once again ignores the economic repercussions beyond just the losses in earnings. The NPRM similarly undercuts itself in Table 21, where, again, it lays out the losses in income and tax revenue that its adoption would precipitate (and this just within the narrow calculations of immediate income loss).[98] The economic data offered in the NPRM, vague as they are, argue against its adoption.

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[92] *Id.* Table 3, 74207. *See also Id.* Table 11 at 74223-24.
[93] *Id.* Table 9, 74217.
[94] *Id.* Table 19, 74235-36.
[95] These differences are set out in Table 22, *Id*. at 74246.
[96] *Id.* at 74247. [Emphasis added.]
[97] *Id.* Table 18, at 74232-33.
[98] *Id*. Table 21, at 74243-44.

XIV. The Proposed Rule Does Not Have a Firm Policy Justification, Instead Relying on Unsupported Assertions that It Would Help U.S. Workers.

DHS proposes that the rule would return jobs to U.S. citizens by denying a group of noncitizens the opportunity to engage in the economy. The proposed rule contains no evidence for this claim; it is conjecture.[99] In fact, the NPRM recognizes that employers would suffer a loss of productivity because they may not find replacement workers.[100] As a result, federal payroll taxes, as well as the taxes paid by noncitizens who are employed, would decline.[101] The proposed rule says as much, "The restriction on income opportunities may increase the incentives for aliens with final orders of removal to depart the United States, which could save government resources expended monitoring and tracking aliens temporarily released on orders of supervision."[102]

In short, DHS is making the economic argument here that productivity is outweighed by government savings in a reduced need to track noncitizens. The figures do not correspond proportionately, because the tax revenue reduction significantly exceeds the alleged government savings.

The rule includes such vague justifications as, "DHS emphasizes that the costs of the rule in terms of lost labor earnings will potentially depend on the extent of surplus labor in the labor market."[103] This is not an argument that employers, retailers, landlords, or state and federal tax agencies would likely relish as employees and community members are no longer able to participate fully in the economy. The rule does not account for the economic effect on the broader community, instead seemingly blaming noncitizens for not leaving the United States after receiving a removal order, even though, as discussed above, noncitizens with removal orders fall into many different categories, including those who are stateless with no means to leave and nowhere to go.[104]

Perhaps aware that its claims to benefit U.S. workers are too insubstantial, DHS resorts to the assertion that it would enable the agency to "align its discretionary authority to grant employment authorization to aliens ordered removed and temporarily released on orders of supervision with its current immigration enforcement priorities."[105] Alignment with "priorities" is, by itself, neither a

[99] The proposed rule claims, without any evidence to support the claim, "The benefits potentially realized by the proposed rule are both qualitative and quantitative. Under the proposed rule, a U.S. worker may have a better chance of obtaining jobs that some (c)(18) aliens workers currently hold, as the proposal would reduce employment authorization eligibility for this population of aliens who have been removed from the country." *Id.* at 74207.
[100] *Id.* at 74204, Table 2.
[101] *Id*. Table 1, at 74200-74201.
[102] *Id.* 74202. The same point is asserted in Table 3 at 74206.
[103] *Id.* at 74201. Tables 9 and 10A and B, respectively at 74217-19 and 74221-22, reproduce much of the same information.
[104] DHS is confident that immigrants covered by the proposed restrictions on EADs would have no difficulties returning to their countries of origin, although, as discussed above, many noncitizens have no ability to return to their countries of origin and the proposed rule does not adequately assess who, if anyone, among this population could leave the United States but chooses not to do so. The passage from the NPRM quoted in footnote 94 above continues, "Second, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could reduce the amount of government resources expended on enforcing removal orders for such aliens as well as monitoring and tracking aliens temporarily released on orders of supervision." *Id.* at 74207.
[105] *Id*. at 74197.

cogent nor an adequate foundation for a rule change. Instead, the agency would punish vulnerable noncitizens by depriving them of the ability to support themselves while the United States seeks to effect their removal.

XV. CLINIC Supports DHS's Proposal in the NPRM Preamble to Treat Noncitizens Granted Convention Against Torture Deferral of Removal as Employment-Authorized Based upon the Grant of Deferral of Removal.

The NPRM preamble proposes to amend 8 CFR § 274a.12(a)(10) "to include aliens who have been granted deferral of removal based on the regulations implementing the United States' obligations under the [Convention Against Torture] in the category of aliens who are not required to apply for employment authorization to work, but will be recognized as employment authorized based on the grant of deferral of removal."[106] For the reasons described above, CLINIC strongly believes that vulnerable noncitizen populations deserve the opportunity to support themselves economically through employment, and thus strongly supports any regulation that would accomplish this goal. Therefore, CLINIC supports the NPRM'S apparent proposal in the preamble to allow noncitizens granted withholding of removal and Convention Against Torture protection to work incident to their status, without requiring them to apply for EADs.[107]

However, the proposed regulation itself does not match the intent set forth in the preamble. The proposed regulation states, "[a]n alien granted withholding of removal under section 241(b)(3) of the Act or pursuant to 8 CFR 208.16(c), 8 CFR 1208.16(c), and an alien granted CAT deferral of removal pursuant to 8 CFR 208.17, 1208.17, for the period of time in that status, as evidenced by an employment authorization document issued by USCIS" are authorized to work.[108] Thus, the proposed regulation would require that noncitizens granted withholding of removal and Convention Against Torture protection apply for EADs and possess valid EADs to work lawfully. This rule is contrary to DHS's intent expressed in the NPRM.[109]

Even assuming the language in the preamble is a mistake and the actual change in the proposed rule would be to make noncitizens who have been granted deferral of removal under the Convention Against Torture eligible for an EAD under the same category as those granted withholding of removal, rather than having to prove that they are under an order of supervision, CLINIC would support that change. Noncitizens granted protection through deferral of removal are permitted to remain in the United States indefinitely and there is no reason that they should have to have an ICE-issued order of supervision to seek employment authorization.

XVI. Conclusion

For all of the procedural and substantive reasons discussed above, CLINIC urges DHS to withdraw the NPRM "Employment Authorization for Certain Classes of Aliens With Final Orders of

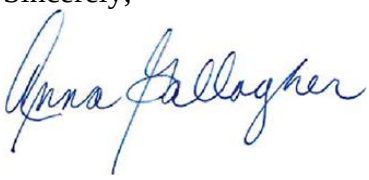
[106] *Id.* at 74198.
[107] *Id*.
[108] *Id.* at 74253.
[109] 85 Fed. Reg. at 74196, 74198, 74215.

Removal" other than proposed 8 CFR § 274a.12(a)(10) which would eliminate the requirement that those granted deferral of removal have an order of supervision to be work-authorized.

Overall, the NPRM would make it more difficult for noncitizens who cannot be removed, including those who are stateless, to support themselves in the United States. The NPRM's economic justifications for this proposed rule have such a wide margin of error that they are essentially meaningless. Further, the NPRM does not account for the unique struggles that small entities would face during, and in the aftermath of the global COVID-19 pandemic. The proposed rule would allow DHS to deny EADs to people with orders of removal, based on the actions of third parties whose actions the noncitizen cannot control. If ICE does not seek travel documents for the noncitizen, the noncitizen would be unable to obtain an EAD under this rule. Likewise, if the noncitizen's employer does not use E-Verify, or if the noncitizen is laid off, they would be unable to renew the EAD. This proposed rule would bring economic hardship and suffering to noncitizens in the United States with removal orders, as well as their families, and should be withdrawn, with the exception of proposed 8 CFR § 274a.12(a)(10).

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, should you have any questions about our comments or require further information.

Sincerely,



Anna Gallagher
Executive Director