NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

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Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

RE: CIS No. 2653-19; DHS Docket No. USCIS-2019-0024; RIN 1615-AC40
Comments in Response to Proposed Rulemaking "Employment Authorization for Certain Classes of Aliens with Final Orders of Removal" ("Proposed Rule").

To Whom It May Concern:

The National Immigrant Justice Center (NIJC) submits this comment opposing most changes proposed in the aforementioned rule. As a legal service organization that serves individuals in removal proceedings, we are deeply concerned about the proposed revisions and urge that the Department of Homeland Security (DHS) rescind large segments of this Proposed Rule that will unfairly and unnecessarily deprive individuals subject to removal orders of work authorization.

Headquartered in Chicago, with additional offices in Indiana, Washington D.C., and San Diego, NIJC is a legal service provider and advocacy organization. Each year, NIJC provides legal services to more than 10,000 immigrants, refugees, and asylum seekers applying for lawful status or facing removal. NIJC has provided these services for more than 30 years. All NIJC clients live at or below 200% of the federal poverty line. NIJC provides legal services to many of them on a completely *pro bono* basis[1] and processes countless employment authorization requests on their behalf. Finally, NIJC represents many individuals subject to final orders of removal for whom the Department of Homeland Security (DHS) is unable to effectuate removal or who are challenging their final orders. For our clients, work authorization is no luxury; it is a lifeline. Every day, our clients must rely on work authorization to feed, clothe, and house themselves and their families in a deeply backlogged and precarious system.

[1] *See* 8 C.F.R. § 1292.11 (recognition requires proof that organization "provides immigration legal services primarily to low-income and indigent clients" within the United States, and, if the organization charges fees, has a written policy for accommodating clients unable to pay fees for immigration legal services).

NIJC opposes this Proposed Rule because (1) its rushed nature deprives stakeholders from a reasonable opportunity to comment; (2) this rule is cruel; (3) DHS proposes changes to circumvent constitutional protections; (4) DHS offers scant economic justification while proposing significant costly changes; and (5) this rule betrays concerning racial animus. As we state in closing (6), we urge DHS to rescind this rule in its entirety, but for its narrow, proposed change impacting torture survivors.

1) **The rushed nature of the Proposed Rule denies stakeholders a reasonable opportunity to comment, a requirement under the Administrative Procedures Act (APA).**

The APA requires DHS to provide notice of its proposed rules and the proposed legal bases for those rules.[2] Notice must afford interested parties "a reasonable and meaningful opportunity to participate in the rulemaking process."[5] Though the Proposed Rule affects the principal route to achieve adjustment of status (i.e., family-based adjustments), the Department has issued the Proposed Rule on an expedited timeframe, with no justification.

According to the eRulemaking Management Office, which provides access to and collects comments on proposed regulations, "Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods."[3] Here, the Department has allowed only 30 days for comments for a significant rule change to long-standing regulations. NIJC joined a coalition of nearly 60 organizations requesting an extension to the full 60-day comment period to no avail.[4] Not only did this coalition receive no response, DHS failed to provide any rationale for this shortened comment period. This silence is puzzling, as there is no basis to support hasty implementation of the Proposed Rule and a shortened comment period.

Due to this timeframe, NIJC was unable to conduct the thorough review and analysis the Proposed Rule merits, due to the sweeping changes USCIS contemplates. This Proposed Rule is just one of several proposed rules published during the past several months in which NIJC, and the many other stakeholders to this Proposed Rule, is an interested party. NIJC, and other similarly situated stakeholders, are put in the untenable position of attempting to carry on day-to-day advocacy for clients while also devoting sufficient time to responding to the many rushed proposed rules that directly threaten its clients.

Overlay this with the global pandemic, with over one million people in the United States infected with COVID-19 per week, nearly 18 million confirmed cases in total, and over 300,000 fatalities in the United States due to this virus.[5] NIJC's entire staff, like the staff of many other stakeholders,

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[2] *See* 5 U.S.C. § 553.
[3] Regulatory Timeline, Regulations.gov, *available at* https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf (last accessed Oct. 15, 2020).
[4] *See Request for 60-Day Comment Period for DHS Proposed Rule on Employment Authorization for Certain Classes of Aliens With Final Orders of Removal, 85 Fed. Reg. 224 (November 19, 2020),* emailed to Chief McDermott and Acting Administrator Ray (Dec. 9. 2020).
[5] *See* Johns Hopkins University, *Coronavirus Resource Center, World Map* (last accessed on Dec. 21, 2020), https://coronavirus.jhu.edu/map.html.

currently is required to work remotely, disrupting typical work practices and, notably, attorney-client communication. Finally, this pandemic has resulted in an economic recession and record job losses, housing and food insecurity, and gaping holes in government assistance for millions in the U.S., including clients NIJC serves.[6]

The use of a truncated comment period to strip work authorization from over 12,000[7] noncitizens under supervision, while the United States grapples with a historic crisis, raises concerns regarding the Department's motivation to skirt appropriate scrutiny of the changes under the Proposed Rule.

2) The Proposed Rule codifies a cruel premise that would endanger the livelihood of most noncitizens under supervision.

In this nation, the right to work for noncitizens amounts to the right to exist. Without access to public benefits, noncitizens can only survive if they sustain themselves through their own labor. This includes asylum seekers with prior removal orders, such NIJC's client Maurice.[8] When Maurice came to the U.S. to seek asylum with his young daughter, DHS reinstated his removal order but released him from custody with his daughter on an order of supervision. Following his release, he had to wait more than one year to be scheduled for a reasonable fear interview. During this time, Maurice was able to seek employment authorization based on his release on an order of supervision, which was critical to his ability to support his family during this time. Beyond incentivizing vulnerable clients such as Maurice to return to their country of persecution before reaching a decision on their claim, this Proposed Rule would create conditions for homelessness, labor exploitation, and prosecution just because people will have no means to sustain themselves. There is no justification for inflicting this cruelty.

Furthermore, there is no rationale for introducing this Proposed Rule during a global pandemic. Individuals subject to orders of supervision are well-aware of the precarious character of their lives. In NIJC's experience, individuals subject to removal orders include some of the most vulnerable populations, such as stateless individuals and children whose birth were never registered in their home country.[9] Most individuals subject to this Proposed Rule live with the possibility of re-detention at every moment in unsafe congregate detention centers, the

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[6] *See* Center on Budget and Policy Priorities, *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships* (last accessed Dec. 19, 2020), *available at* https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and.

[7] 85 FR 74210 (Table 7 finding that 12,412 and 13,766 were respectively released on supervision in 2018 and 2019).

[8] Pseudonym used to protect confidentiality.

[9] There are an estimated 218,000 people who are potentially stateless or at risk of statelessness in the U.S. *See* David Kerwin et al., *Statelessness in the United States: A Study to Estimate and Profile the US Stateless Population*, Center for Migration Studies of New York (2020), *available at* https://cmsny.org/publications/stateless-in-the-united-states/. United Stateless, an organization of stateless people in the United States, explains, this rule would have a devastating impact on those stateless individuals with final orders. *See* Press Release, United Stateless, WASHINGTON DC - United Stateless Urges Department of Homeland Security to Rescind New Rule Denying Work Authorization for People Under Order of Supervision (Dec. 21, 2020) (on file with author).

finalization of travel documents for their removal, and/or the risk that their appeals will be dismissed. DHS should not further penalize this small class of noncitizens and their relatives.

3) The Proposed Rule betrays faulty adherence to basic principles of due process.

The Proposed Rule undermines due process principles in at least three ways. First, the rule blames individuals subject to indefinite detention for DHS' failure to remove them. Those individuals are rightfully entitled to release under the Due Process Clause. Nevertheless, DHS faults them for the extraneous hurdles that often impede removal. Second, DHS fails to consider that many individuals subject to removal orders are challenging their orders. Short-circuiting their access to benefits also obstructs their access to justice in impermissible ways. Last, this Proposed Rule erects near-insurmountable barriers for individuals who seek work authorization and thus interferes with individuals' opportunity to obtain fair adjudications.

a. With this proposed rule, DHS undermines Supreme Court precedent protecting due process.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court set a clear limit on the government's power when it infringes on noncitizens' liberty interests. The Court focused on noncitizens that the government "finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States."[10] The Court set a clear six-month limit on noncitizens' detention, soundly rejecting the government's rationale for holding noncitizens in perpetuity. In other words, *Zadvydas* protects the right of noncitizens from indefinite detention where DHS fails to remove them in reasonable time.

With this Proposed Rule, DHS appears disgruntled that it failed to prevail nearly twenty years prior in holding noncitizens indefinitely—as if DHS' duty to protect the constitutional rights of individuals in its custody were still up for debate.[11] Even worse, the Proposed Rule suggests a backdoor avenue to force the removal of individuals released on supervision by taking away the primary vehicle for their livelihood. DHS suggests that work authorization incentivizes noncitizens to remain and thus proposes to strip them of that "incentive" to promote their self-deportation. In essence, this proposal substitutes noncitizens' right to live—inevitably entangled with the right to work given the penalties for unauthorized work—for the right to be free from detention. Individuals bear no responsibility to effectuate their own removal from the United States when DHS or their country of removal fail to do so. By ascribing noncitizens blame for working while these governments fail to agree on the logistics of their removal, DHS is trying once again to obstruct their right to exist freely in the United States.

[10] 533 U.S. at 695.
[11] 85 FR 74208.

b. This rule would interfere with noncitizens' right to appellate review challenging their final orders.

DHS oddly fails to account for a significant segment of individuals subject to removal orders and orders of supervision—i.e., those seeking reversal of their removal orders on appeal before the Board of Immigration Appeals (BIA) or federal circuit courts. NIJC represents countless individuals subject to supervision while challenging their removal orders. Those individuals have every right to pursue review and finality on their claim to remain in the U.S. Under this proposed rule, DHS would strip most of their right to work—effectively ushering them out of the U.S. before they reach a final decision.

In effect, DHS is weaponizing work authorization as it did detention. NIJC attorneys are keenly aware that individuals subject to indefinite detention often give up meritorious claims because they can no longer bear being imprisoned. Similarly, withholding employment authorization in most cases undermines individuals' right to provide for themselves—which is a foundation for their ability to pursue judicial review. With this proposed rule, DHS not only fails to account for those individuals' existence; it also interferes with their access to justice and finality.

c. The Proposed Rule manufactures adjudicative guidelines that would result in the summary denial or disqualification of most noncitizens.

A basic Due Process principle is fundamental fairness. Here, DHS injects a host of disqualifying factors and barriers to granting employment authorization that would ensure the denial of most applicants. Specifically, the Proposed Rule refuses to consider noncitizens for work authorization unless DHS determines that the noncitizen's country affirmatively declined to issue documents and noncitizens demonstrate economic necessity.[12] In addition, DHS requires adjudicators to review compliance with orders of supervision, arrest and conviction history, economic necessity, as well as ensuring that the noncitizens' employer is in good standing with E-Verify. Even individuals who meet this hefty burden are not guaranteed employment authorization, as adjudications are "completely discretionary" and subject to the "sole decision" of DHS.[13] A favorable exercise of discretion would only result in work authorization "for a period that USCIS determines is appropriate at its discretion, not to exceed one year."[14]

There are many alarming aspects to this proposed standard. First, DHS intentionally slashes the pool of eligible applicants to a fraction. By its own estimates, only about 4.9% of noncitizens on orders of supervision would lack the travel documents requisite for their removals. DHS presumes that the remaining portion—i.e., 95%—"fail[] or refuse[] to make timely application in good faith for travel or other documents necessary. . . or conspires to act to prevent" their removal.[15] DHS

[12] 85 FR 74210.
[13] 85 FR 74252.
[14] 85 FR 74253.
[15] 85 FR 74211.

offers no evidence for this sweeping condemnation and arbitrarily proceeds to propose a barrier it knows most cannot meet.

Additionally, DHS would impose bright line requirements that would disqualify countless more. Failing to comply with an order of supervision or being subject to an arrest or conviction are automatic grounds for denial—even though neither are *per se* evidence that an individual poses a flight risk or danger to others. DHS already has the right to re-detain individuals who pose those risks. At best, such new standard would duplicate efforts within DHS; at worst, this standard would obstruct fair, individualized review.

Finally, DHS proposes tethering the right to work to two things that noncitizens fundamentally do not control: whether their employer uses E-Verify; and whether they are in good standing with E-Verify. DHS offers no explanation for stripping work authorization from employees who cannot meet this burden. Purportedly only 16-40% of employers use E-Verify in each state.[16] In other words, DHS stacks the deck against the vast majority of noncitizens; even where they are among the minority who work for an employer using E-Verify, they cannot guarantee that such employer is in good standing. Barring that, they are automatically excluded from the right to work. Proposing a rule that would ensure the denial of employment requests the vast majority of noncitizens cannot comport with basic principles of fairness.

4) DHS offers specious economic justification for this proposed rule.

The Office of Management and Budget (OMB) has published a primer that summarizes what is involved in a cost-benefit analysis as required under Executive Order 13563, Executive Order 12866, and OMB Circular A-4.[17] This primer states that agencies must produce:

> an estimate of the benefits and costs —both quantitative and qualitative—of the proposed regulatory action and its alternatives: After identifying a set of potential regulatory approaches, the agency should conduct a benefit-cost analysis that estimates the benefits and costs associated with each alternative approach. The benefits and costs should be quantified and monetized to the extent possible, and presented in both physical units (e.g., number of illnesses avoided) and monetary terms. When quantification of a particular benefit or cost is not possible, it should be described qualitatively. The analysis of these alternatives may also consider, where relevant and appropriate, values such as *equity, human dignity, fairness, potential distributive impacts*, privacy, and personal freedom. The agency's analysis should be based on the best available scientific, technical, and economic information. To achieve this goal, the agency should generally rely on peer-reviewed literature, where available, and provide the source for all original information. In cases of particular complexity or novelty, the agency should consider subjecting its analytic models to peer review. In cases in which there is no reliable data or research on relevant issues,

[16] *See* E-Verify.gov, E-Verify USAGE STATISTICS (last accessed Dec. 19, 2020), *available at* https://www.e-verify.gov/about-e-verify/e-verify-data/e-verify-usage-statistics (data table for activity per state).
[17] Office of Information and Regulatory Affairs, *Regulatory Impact Analysis: A Primer, N-d,* https://reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf (emphasis added).

the agency should consider developing the necessary data and research.[18]

DHS has failed to meet this regulatory standard. Among DHS's most glaring omissions is an analysis of disqualifying 95% of noncitizens from work authorization. Though they (nominally) consider loss of their wages, they ignore the reverberating impact on noncitizen families and communities, including U.S. citizens and lawful permanent residents who rely on those wages to survive. DHS accepts the risk of up to $14 million in lost revenue[19] merely because a "U.S. worker *may* have a better chance of obtaining jobs that *some* (c)(18) alien workers currently hold."[20] They offer no analysis or evidence of such probability. DHS also offers no factfinding that the U.S. workforce is actually deprived of employment due to this small population's employment. Yet, they eschew the very factors of equity, human dignity, fairness, potential distributive impacts that OMB requires them to consider.

What's worse, they do so in the midst of an economic recession and pandemic of historic proportions. At various points, DHS admits that it "cannot estimate with confidence to what extent the impacts will be transfers instead of costs" due to the unpredictable impact of the pandemic. It is unclear why a crisis of this magnitude did not bring DHS to pause; given DHS's own projections of millions of dollars in lost income, this Proposed Rule would swell unemployment numbers and subject thousands more to insecurity.

5) This Proposed Rule preys on historically marginalized groups who already suffer from systemic racism.

DHS paints a grim picture of noncitizens whom it seeks to deprive of work authorization. According to DHS, many are "criminals whose continued presence in the United States is not in the national interest." DHS reaches this broad generalization by relying on Immigration and Customs Enforcement's (ICE) "system of record at the time of the enforcement" leading to the noncitizen's apprehension.[21] It is unclear which ICE system DHS references here, and whether the Proposed Rule considered concerns of widespread error in ICE criminal data.[22] Though approximately 38% meet this characteristic in 2019, DHS also includes individuals with pending charges and immigration violations (which are civil in nature) in the larger category of "criminals."[23] DHS proceeds to paint this population as opportunistic, obstructive of DHS's plans to remove them, and somehow lacking good faith when their country of origin "unreasonably delay" issuance of travel documents.[24]

[18] *Id.*
[19] 85 FR 74233
[20] 85 FR 74207 (emphasis added).
[21] 85 FR 74209 n.21.
[22] *See generally Gonzalez v. ICE*, 975 F.3d 788, 821 (9th Cir. 2020) (after district court found that 6 ICE databases were error-laden, remanding for district court to assess to make findings regarding remaining 10 of 16 databases).
[23] 85 FR 74208 (Table 4).
[24] 85 FR 74208.

There are at least two alarming aspects of DHS' rationale related to the intent and impact of this proposed rule. First, DHS relies on the racially laden concept of "criminal alien." This concept leans on the criminalization of migration, penned into law by a proud defender of lynching and segregation in the early twentieth century.[25] The decades that followed compounded this myth that migrants were criminals who deserve no mercy: first, the infamous "Operation Wetback" racially dehumanized a million Mexican laborers before deporting them; then, the War on Drugs reinvented immigration control and kickstarted the infrastructure to summarily deport noncitizens with minor offenses; more recently, programs such as the Criminal Alien Program (CAP) and Secure Communities program, leaning on the premise that immigration control is a matter of criminal concern, ushered in close collaboration between local law enforcement and ICE to deport noncitizens.[26] Immigrants have not changed since those policies were implemented; but this concept of "criminal alien" has bolstered repressive, dehumanizing enforcement practices that particularly penalized Black and Brown noncitizens.[27] This Proposed Rule is no exception to this alarming pattern.

This rule not only intentionally hinges on racist ideology; it also disproportionately impacts Black and Brown noncitizens. As a threshold matter for employment authorization eligibility, this Proposed Rule zeroes in on noncitizens whose countries either refuse or delay issuance of travel documents. Those countries, dubbed "recalcitrant" or "at risk of noncompliance," comprise nations predominantly from Africa, the Middle East, Latin America, and East Asia.[28] In other words, this rule is meant to protect the "U.S. labor force" by stripping work permits from predominantly Black and Brown noncitizens. In addition to the concerning nativist, racist ideology denounced prior, this rule would further compound the racial inequities that are symptomatic of immigration enforcement.[29]

6) DHS should rescind this rule, with the exception of the proposed change affecting individuals who won deferral under the Convention Against Torture (CAT).

For the foregoing reasons, NIJC urges DHS to rescind the near entirety of this proposed rule. The only aspect we urge DHS to preserve is the change for individuals who won deferral under CAT. The Proposed Rule proposes a fix that is long overdue: clarifying that deferral grantees should

[25] *See* NIJC, *A Legacy of Injustice: The U.S. Criminalization of Migration*, July 2020, *available at* https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-07/NIJC-Legacy-of-Injustice-report_2020-07-22_FINAL.pdf.
[26] *See* Kelly Lytle Hernández, *Amnesty or Abolition? Felons, illegals, and the case for a new abolition movement* (Winter 2011), *available at* https://urbanresearchnetwork.org/wp-content/uploads/2014/07/Amnesty-or-Abolition_Dec-2011_BOOM.pdf.
[27] *See* NIJC, *5 reasons to end immigration detention* (Sept. 14, 2020) https://immigrantjustice.org/research-items/policy-brief-5-reasons-end-immigrant-detention.
[28] *See* Jill H. Wilson, *Immigration: "Recalcitrant" Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals*, Congressional Research Service (January 23, 2020), *available at* https://fas.org/sgp/crs/homesec/IF11025.pdf.
[29] *See generally*, Black Alliance for Just Immigration & New York University School of Law's Immigrant Rights Clinic, *The State of Black Immigrants*, (last accessed Dec. 21, 2020), *available at* http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf.

apply under 8 C.F.R. § 274a.12(a)(10), as do those who won withholding of removal under CAT.[30] This would impact individuals such as:

- Asha,[31] who fled to the United States after she was tortured by government officials. An immigration judge granted Asha deferral of removal under CAT based on her past torture and likelihood of future torture if she were to be deported back to her home country. Aster was never detained and thus, does not have an order of supervision. Although she cannot be deported to Ethiopia and has indefinite permission to remain in the United States, her eligibility for employment authorization is unclear.
- Sidney,[32] who fears torture in his home country. Like Asha, the immigration judge granted Sidney deferral under CAT after determining it was more likely than not that he'd be tortured if deported. While Sidney has indefinite permission to remain in the United States, he is only able to request employment authorization under the (c)(18) category; a process that is frequently delayed. In the past, NIJC has had to ask USCIS to expedite the adjudication of his application to renew his employment authorization after his employer threatened to fire him due to the lengthy delays.

NIJC supports the discrete proposed change that would streamline access to employment authorization for many torture survivors such as Asha and Sidney. Currently, the process is extremely harsh for them. While granted protection, they face chronic barriers to their employment authorization. The proposed change affecting individuals granted deferral under CAT would improve the process significantly for this neglected population.

Thank you for the opportunity to submit comment on the NPRM. Please do not hesitate to contact Azadeh Erfani at aerfani@heartandalliance.org or (202) 827-5166 for further information.

/s/
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[30] 85 FR 74215.
[31] Pseudonym used to protect confidentiality.
[32] Pseudonym used to protect confidentiality.