RE: DHS Docket No. USCIS-2019-0024

Opposition to Proposed Rule on Employment Authorization for Certain Classes of Aliens With Final Orders of Removal


DATE: Dec. 18, 2020

Dear Mr. McDermott,

We write to oppose the proposed regulation on employment authorization for people on Orders of Supervision (OSUP). The proposed regulation is an unnecessary harm designed only to punish migrants without adequate regard for the logical outcome and harm it will cause. The proposed rule impinges on the rights of migrants and their families, will harm torture survivors, and shifts the cost to organizations like ours, communities and the taxpayer all with the only purpose of implementing harsh immigration policies that do not serve the goal they espouse.

1. Information about the Organization Submitting this Comment

The Advocates for Human Rights (“The Advocates” or “AHR”) is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights’ mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, The Advocates regularly engages UN human rights mechanisms. The Advocates has provided free legal representation to asylum seekers for nearly four decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. In addition to legal representation, The Advocates also works with women’s and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. The Advocates is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women’s human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. The Advocates has worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, The Advocates helps draft laws that promote the safety of women and has provided commentary on new and proposed domestic violence laws in nearly 30 countries. The Advocates works with host country partners to document violations of women's human rights, including domestic violence, and to train police, prosecutors, lawyers, and judges to implement effective domestic violence laws. In addition, The Advocates’ Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working
with the UN, The Advocates developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

1. Release on OSUP Avoids Violations of Human Rights through Indefinite Detention

Rather than keep a person with a deportation order locked in immigration detention indefinitely, U.S. Immigration and Customs Enforcement (ICE) must release the person on an Order of Supervision (OSUP). Contrary to the Department’s contention that it was the Supreme Court that ordered such releases, that decision was based on the Constitutional analysis done by the Supreme Court in determining that the Constitution requires such release. Moreover, human rights principles—and U.S. treaty obligations—guard against prolonged and indefinite detention. The U.S. is, thus, required to refrain from prolonged detention of individuals. Furthermore, Release on OSUP also results in cost savings to the taxpayers as it allows ICE to monitor individuals with deportation orders without holding them in jail.

Once the Constitution and treaty obligations require the release of a person, our obligations to that person do not end. The U.S. is not served by creating a class of individuals unable to provide for themselves or their families. And, the Department may not use—as it proposes to do herein—these basic needs to punish such individuals. Communities and the country are weakened where whole classes of persons are kept in limbo and unable to take care of themselves. In many instances, community groups and organizations like our will step-in to ensure these basic needs. This is an unnecessary harm the Department proposes to perpetrate on individuals and communities.

While DHS does not make clear in this proposed regulation whether it would prefer to hold people in detention rather than release them on OSUP, it does state that a purpose of this regulation is to encourage people to self-deport. This is improper. The Department must achieve its purposes through the law; not by creating circumstances so harmful as to punish people Congress allowed to be protected, and further harming family members and the community at-large.

2. The Rule is Contrary to Congressional Intent and Arbitrary and Capricious

The Immigration and Nationality Act specifically allows work authorization for individuals released on OSUP if either they cannot secure travel documents or work authorization is in the public interest. The public interest is a broad grant through which Congress has recognized humanitarian cases that will not fit within the narrow confines of the law but nonetheless require discretion. For example, in the past, ICE has chosen not to detain or deport people with complicated medical issues that can only be treated in the United States, or single parents with U.S. citizen children. The Trump Administration has chipped-away other means of protecting such cases—increasing enforcement operations to include anyone in the U.S. without status and, therefore, forcing such individuals into removal proceedings; barring administrative closure of most cases in immigration court; attempting to change and increase standards for various forms of relief; and denying more cases for immigration benefits even for those who meet the standards. As a result, OSUP may be the only means of relief for many such cases. Here, however, the Department—relying on its own executive orders rather than Congressional intent and constitutional principles—proposes to bar the most basic protections for such cases with the
stated aim of making life so unbearable as to encourage people to depart the U.S. This aim contravenes the explicit language of the INA.

a. The Proposed Rule Misrepresents the Issue

Additionally, the Department improperly proposes that allowing employment for OSUP unfairly encourages unlawful migration. This argument is attenuated at best. In order for one to be on OSUP, they must have been apprehended by ICE, detained, ordered removed, have no immigration relief, and have some humanitarian reason or inability to depart. All of these factors would require incredible foresight on the part of migrants and tremendous risk taking. As the Department itself notes, the number of persons in such situations is incredibly small.

In addition, the Department fails to consider the data that shows the number of people on OSUP who have bona fide needs for protection from removal. Many people on OSUP were in the U.S. as refugees or asylees with a proven fear of persecution or torture. Yet, due to stringent immigration laws with harsh penalties for crimes and bars to relief, many people—often, due to mental health issues caused by persecution or torture—are placed in removal proceedings and released on OSUP. This group of people certainly does not form some throng that wishes to abuse the system for the benefit of work permission, as the Department incorrectly alludes. Rather, these are people who have or will experience harms but are ineligible for other protections. Everyone has the right to seek and enjoy protection from torture and persecution. Doing so is not an abuse of U.S. immigration laws and most certainly is not done for employment reasons.

Notwithstanding, the Department proposes to explicitly and deliberately harm this group of people for the alleged purpose of discouraging others. Yet, such aim is arbitrary and capricious given the people impacted by this rule will be a small group that is on OSUP and unable to depart or be removed within the statutory and constitutional timeline. The Administration’s continuous *argumentum in terrorum* relies solely on unsubstantiated arguments about the numbers of undocumented people in the U.S., its own policies aimed at harsh and unrealistic immigration policies, theories that all migrants are in the U.S. for employment-based reasons rather than basic human rights protections, and argumentative policy that any humanitarian policies create incentives and flows of migrants.

b. The Proposed Rule Violates Congressional Intent to Protect Families and Individuals

Congress, in allowing employment authorization for people on OSUP, recognized that people released into the community need to be able to support themselves and their families for as long as they remain in the United States. In many instances, removal will mean uprooting years (sometimes, decades) of life in the U.S. In some instances, the person may have a real fear of harm if they return to their country but may have been denied protections for being unable to meet the increasingly impossible bars set for humanitarian relief. Similarly, while they may have family in the U.S., they may be barred from relief for various reasons. Thus, the ability to work on OSUP allows time for a person to put their affairs in order to prepare for a significant move and change in life. Additionally, the ability to work means many will be more likely to be able to effectuate their return—and ensure that it is safe as possible.

c. The Proposed Rule Provides Too Much Discretion to DHS
While the Department does exempt a narrow class of individuals, such exceptions are far too narrow and allow exceedingly expansive discretion. First, the proposed regulation places the applicant at the mercy of DHS to apply for and determine whether someone is unable to obtain travel documents from any country—without providing guidance on how such determinations will be made or timelines. Second, the proposed rule makes economic necessity a mandatory condition and places in DHS’ unreviewable discretion such determinations—again, without providing guidance on how such determines will be made. And, the proposed rule allows DHS to determine whether the applicant merits an exercise of discretion based on a number of vague factors.

The proposed rule improperly empowers DHS with control over determinations and efforts to obtain travel documents. The proposed rule does not clarify a timeframe or numerical limitations for these efforts. In our experience, we have seen that it is highly unlikely for someone to obtain travel documents from any country if their country of nationality or citizenship is unwilling/unable to provide them. However, we have also had stateless clients who have lived in the U.S. for decades being forced to continually attempt to obtain documents from any number of countries, despite such demands being in vain. Under the proposed rule, those few who are eligible for employment authorization would be at the mercy of DHS to apply for travel documents—this, despite a continually noted overload and lack of resources—and determine when one was unable to obtain such documents. So doing, the rule provides no timeline or guidance as to when such efforts will be enough. This is an unjust and illogical policy.

The proposed rule further improperly allows DHS to make determinations of financial need once one has already cleared the incredibly high bar of proving they fall within the narrow exception to the new bars on employment for those on OSUPs. In our experience, DHS has been arbitrary and capricious in determinations of financial need—utilizing such standards to bar relief or dissuade bona fide applicants. For example, victims of trafficking are eligible for a fee waiver of USCIS fees. In recent years, applicants who have no income or financial support have received denials of fee waiver requests without explanation by DHS. Subjecting applicants for employment authorization on OSUP to such arbitrary standards means that many applicants may be unable to obtain employment authorization despite being eligible for such. Additionally, the arbitrary nature of DHS’s implementation of these standards results in increased expenditures for the Agency as they must process appeals of such denials and may face litigation. And, because the proposed rule seeks to limit employment authorization to one-year periods, an applicant will arbitrarily be required to apply for renewal early or face gaps in employment where DHS determinations are not timely or require appeal.

Finally, the proposed rule places significant discretion in DHS on a number of vague factors. Under the proposed rule, DHS may deny an application for employment based on: “(A) Whether the alien is the primary provider of economic support for a dependent U.S. citizen or lawful permanent resident spouse, child(ren), and/or parent; (B) Whether the alien is complying with the order of supervision; (C) The anticipated length of time before the alien can be removed from the United States; and (D) The alien’s criminal history, including but not limited to whether the alien has been arrested for or convicted of any crimes after having been ordered removed from the United States and released from custody on an order of supervision.” Even where the applicant is not the primary provider for a family, loss of economic support will most certainly
mean that LPR and U.S. citizen family members may become dependent on community organizations or government benefits to fill the gap. The Department also provides no guidance as to how it will make determinations regarding the length of time before an alien can be removed and what lengths of time will be sufficient to merit discretion. Will long lengths of time merit discretion due to need for financial support, or are shorter lengths rewarded in-line with the overarching policy of facilitating removal? Finally, the proposed rule creates a vague and arbitrary standard, proposing to consider the alien’s criminal history in general. Such a factor also serves as a purely punitive element. For many on OSUP, criminal history may be the reason they are ineligible for immigration benefits and are facing removal at all. Yet, in our experience, we have seen that mental health due to torture or other harms contribute to many criminal histories. The proposed rule provides no guidance for how officers may analyze such factors or other issues, nor why criminal history will be a discretionary factor given the interplay of OSUP and criminal histories. The proposed rule further unlawfully condemns people for arrests. As we have seen—and the U.S. courts have continually held—arrests are insufficient for proof of criminal culpability. In many cases, migrants are targets of unlawful arrests or criminal reporting due to racial profiling. Denying the right to basic economic needs and the ability to support one’s family—family who are often U.S. citizens or LPRs—on the basis of such actions is unlawful, unjust and illogical.

d. The Requirements Regarding E-Verify are Arbitrary and Capricious

Finally, the standards for renewal of applications are arbitrary and capricious. The Department proposes to require that renewal of employment authorization—limited to only one-year timeframes, despite renewal processing taking more than six months at present without any delays due to improper rejection or denial—to depend on one’s proof that they are employed by an E-Verify employer. This is improper for a number of reasons. First, it presupposes that one who is applying for renewal authorization is employed. Some people on OSUP are not able to work due to age, disability, or other reason. Yet, employment authorization documents are necessary for an identification document or driver’s license. For example, a minor on OSUP may be unable to work but might require or desire an EAD for identification purposes or to comply with driver’s license laws to get to school. Alternatively, elderly persons on OSUP may be unable or not in need of work, but may wish to have some proof of identification or immigration status. Therefore, tying EAD renewal to employment is impermissible. Yet, even for those who do need to work, this standard is improper. E-Verify is rife with documented issues. Moreover, numerous employers are either unable or unwilling to participate. Small businesses, for example, may find compliance with E-Verify too costly, but many rely on those who work on OSUP. Denying renewal in such instances not only harms migrants and their families but will harm U.S. business and restrict the free market access to labor.

For the foregoing reasons, therefore, The Advocates for Human Rights calls on the Department to withdraw its shortsighted, punitive and illegal proposed rule. Should you require further information, please contact me.

Sincerely,

Michele Garnett McKenzie
Deputy Director, The Advocates for Human Rights