

December 9, 2020

Michael J. McDermott, Chief
Security and Public Safety Division,
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive,
Camp Springs, MD 20746

Paul Ray, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

RE: 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)

Dear Chief McDermott and Acting Administrator Ray:

We, the undersigned organizations, write to respectfully request that the Department of Homeland Security (DHS) extend the review period from 30 days to 60 days in connection with its recent proposal to curtail employment authorization for certain individuals subject to final removal orders.

On November 19, 2020, shortly before the Thanksgiving holiday and in the midst of a nationwide surge in Covid-19 cases, DHS published a Notice of Proposed Rulemaking (NPRM) that would drastically restrict eligibility for employment authorization documents (EADs) pursuant to 8 C.F.R. § 274a.12(c)(18), the regulatory provision which permits individuals with final removal orders to be lawfully employed in the United States. DHS, Employment Authorization for Certain Classes of Aliens With Final Orders of Removal, 85 Fed. Reg. 224 (November 19, 2020).

The NPRM provides only 30 days for comment. We are writing to request a 60-day comment period, in keeping with standard practice to provide the public a 60-day period to review and comment, particularly for rules that would have a significant impact on the public. Executive Order 12866 states that agencies should allow “not less than 60 days” for public comment in most cases, in order to “afford the public a meaningful opportunity to comment on any proposed regulation.” Executive Order 13563 states that “[t]o 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.”

The proposed rule will have grave consequences for people with final orders of removal but who cannot, or should not, be removed. The rule would add significant new eligibility requirements for category (c)(18) EADs, including a showing that the applicant cannot be removed because *all* the countries DHS has contacted have *affirmatively* declined to issue the necessary travel documents for the individual. Upon initial review of the rule in the limited time available, it appears that the new requirements will be insurmountable for most individuals, leaving them unable to support themselves and their families.

Given these significant consequences, there is no justification for deviating from the 60-day standard for comment periods, as designated in EO 12866 and EO 13563.

In its proposed rule, DHS provides no justification whatsoever for deviating from these executive orders. We request this extension of the comment period to allow our organizations and the public adequate time to review the proposed changes and provide meaningful feedback. This is especially important where the short 30-day window encompasses a national holiday and comes at a time when the nation is suffering from a wave of Covid-19 cases that has impacted all sectors of the U.S. public, including organizations and individuals who may be harmed by this rule and who would otherwise provide critical comments.¹

A 60-day comment period would allow more organizations and affected groups to carefully examine the changes and weigh in, in turn providing DHS with more meaningful information to better address and consider the scope of related issues, assess unintended consequences, and prevent potential waste of resources. The NPRM for this rule is lengthy (58 pages) and includes a great deal of information for the public to process. In particular, the NPRM includes statistical and economic data that warrant additional time to review and assess.

Further, this proposed rule is one of multiple proposed rules issued by the federal immigration agencies that impact similar sectors of the U.S. public (including many of the signatories to this extension request). See Executive Office for Immigration Review, *Motions To Reopen and Reconsider; Effect of Departure; Stay of Removal*, 85 Fed. Reg. 229 (November 27, 2020) (comments due December 28, 2020); Executive Office for Immigration Review, *Good Cause for a Continuance in Immigration Proceedings*, 85 Fed. Reg. 229 (November 27, 2020) (comments due December 28, 2020); Department of Homeland Security, *Collection of Biometric Data From Aliens Upon Entry to and Departure From the United States*, 85 Fed. Reg. 224 (November 19, 2020) (comments due December 21, 2020). The virtually simultaneous issuance of related immigration agency rules undermines the impacted public's ability to devote adequate time and resources to comment on any one rule in a 30-day period.

In a recent decision, the court noted the insufficiency of a 30-day comment period in similar circumstances. *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 20-CV-07721-SI, 2020 WL 6802474, at *20–22 (N.D. Cal. Nov. 19, 2020) (finding a 30-day comment period “spanning the holidays” likely violated the notice and comment requirements of the Administrative Procedure Act).

Given the nature of the proposal and populations involved, we believe that these drastic changes warrant additional time for review and comment.

Please contact Claudia Valenzuela at cvalenzuela@immcouncil.org or 202-507-7540 with any questions.

Sincerely,

¹ Noah Higgins-Dunn, *Dr. Fauci warns the U.S. will see a 'surge upon a surge' of Covid cases following the holidays*. CNBC (Dec. 1, 2020 5:15 PM), <https://www.cnbc.com/2020/12/01/dr-fauci-warns-the-us-will-see-a-surge-upon-a-surge-of-covid-cases-following-the-holidays.html>; Donald G. McNeil Jr., *The Long Darkness Before Dawn*, N.Y. Times (Dec. 1, 2020), <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccines-treatments.html>.

Alianza Americas
Alianza Nacional de Campesinas
American Gateways
American Immigration Council
American Immigration Lawyers Association
Asian American Resource Workshop
Asian Outreach Unit, Greater Boston Legal Services
Asylum Seeker Advocacy Project (ASAP)
Boston University Law Immigrants' Rights and Human Trafficking Program
Brooklyn Defender Services
Catholic Legal Immigration Network, Inc.
Center for Gender & Refugee Studies
Central West Justice Center
Church World Service
Coalition for Humane Immigrant Rights (CHIRLA)
Detention Watch Network
Disciples Refugee & Immigration Ministries
Families Belong Together
Federal Defenders of San Diego, Inc.
Freedom Network USA
Gibbs Houston Pauw
HIAS Pennsylvania
Human Rights First
Immigrant Advocates Response Collaborative
Immigrant Defenders Law Center
Immigrant Legal Defense
immigrant legal Resource Center
Immigration Equality
Immigration Hub
International Refugee Assistance Project
Just Neighbors
Kentucky Coalition for Immigrant and Refugee Rights
Las Americas Immigrant Advocacy Center
Law Office of Matthew J Olsman, APC
Mariposa Legal, program of COMMON Foundation
Mekong NYC
National Association of Social Workers
National Center for Lesbian Rights
National Immigrant Justice Center
National Immigration Forum
National Immigration Law Center
NETWORK Lobby for Catholic Social Justice
New Jersey State Bar Association, Immigration Section
New Sanctuary Coalition
New York Immigration Coalition
Northwest Immigrant Rights Project
Oasis Legal Services
Poder Latinx

Ramirez & Kain LLC
Rocky Mountain Immigrant Advocacy Network
Russell Immigration Law Firm
Safe Horizon
Santa Fe Dreamers Project
Service Employees International Union
Southeast Asia Resource Action Center
Southeast Asian Defense Project
The Florence Immigrant & Refugee Rights Project
U.S. Committee for Refugees and Immigrants
Wind of the Spirit Immigrant Resource Center