DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 106, 241 and 274a

[CIS No. 2653–19; DHS Docket No. USCIS–2019–0024]

RIN 1615–AC40

Employment Authorization for Certain Classes of Aliens With Final Orders of Removal

AGENCY: Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) is proposing to eliminate employment authorization eligibility for aliens who have final orders of removal but are temporarily released from custody on an order of supervision with one narrow exception. DHS proposes to continue to allow employment authorization for aliens for whom DHS has determined that their removal is impracticable because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document and who establish economic necessity. DHS intends for this rule to reduce the incentive for aliens to remain in the United States after receiving a final order of removal and to strengthen protections for U.S. workers.

DHS is also proposing to clarify that aliens who have been granted a deferral of removal based on the United States' obligations under the United Nations (U.N.) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are similarly situated to aliens granted withholding of removal under the Immigration and Nationality Act (INA) and regulations implementing CAT, in that they cannot be removed to the country in question while the order deferring their removal is in place. As such, DHS is proposing to treat aliens granted CAT deferral of removal as employment authorized based upon the grant of deferral of removal.

DATES: Written comments on this proposed rulemaking must be submitted on or before December 21, 2020. Comments on the collection of information (see Paperwork Reduction Act section) must be received on or before January 19, 2021. Comments on both the proposed rulemaking and the collection of information received on or before December 21, 2020 will be considered by DHS and USCIS. Only comments on the collection of information received between December 21, 2020 and January 19, 2021 will be considered by DHS and USCIS. *Note:* Comments received after December 21, 2020 on the proposed rulemaking rather than those specific to the collection of information will not be considered by DHS and USCIS.

ADDRESSES: You may submit comments on the entirety of this proposed rulemaking package, identified by DHS Docket No. USCIS–2019–0024, through the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, will not be considered comments on the proposed rule and may not receive a response from DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. Due to COVID–19, USCIS is also not accepting mailed comments at this time. If you cannot submit your comment by using *http://www.regulations.gov,* please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721–3000 for alternate instructions.

FOR FURTHER INFORMATION CONTACT: 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, MD, Camp Springs 20746; Telephone (240) 721–3000.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

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Table of Abbreviations

AEDPA—Anti-Terrorism and Effective Death Penalty Act
ASC—Application Support Center
BAHA—Buy American and Hire American (Executive Order 13788)
BIA—Board of Immigration Appeals
BLS—Bureau of Labor Statistics
CAT—Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFR—Code of Federal Regulations
DCAT—Deferral of Removal Under the Regulations Implementing the Convention Against Torture
DHS—U.S. Department of Homeland Security
DOJ—U.S. Department of Justice
DOL—U.S. Department of Labor
DOS—Department of State
E.O.—Executive Order
EAD—Employment Authorization Document
EOIR—Executive Office for Immigration Review
E-Verify—Employment Eligibility Verification System
FARRA—Foreign Affairs Reform and Restructuring Act of 1988
FBI—The Federal Bureau of Investigation
Form I–9—Employment Eligibility Verification
Form I–765—Application for Employment Authorization

Form I–765WS—Form I–765, Employment Authorization Worksheet
FY—Fiscal Year
ICE—U.S. Immigration and Customs Enforcement
IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996
IJ—Immigration Judge
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
LCA—Labor Condition Application
LPR—Lawful Permanent Resident
MOU–Memorandum of Understanding
NAICS—North American Industry Classification System
NEPA—National Environmental Policy Act
OMB—Office of Management and Budget
PRA—Paperwork Reduction Act
RFA—Regulatory Flexibility Act
RFE—Request for Evidence
Secretary—Secretary of Homeland Security
SSA—Social Security Administration
TLC—Temporary Labor Certification
TNC—Tentative Non-Confirmation
U.N.—United Nations
U.S.C.—United States Code
USCIS—U.S. Citizenship and Immigration Services

I. Public Participation

All interested parties are invited to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, legal, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to U.S. Citizenship and Immigration Services (USCIS) in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

Instructions: If you submit a comment, you must include the agency name and the DHS Docket No. USCIS–2019–0024 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice that is available via the link in the footer of *http://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS–2019–0024. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

DHS seeks 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, which include the prompt removal of aliens who have received a final order of removal from the United States,[1] and the Administration's efforts to strengthen protections for U.S. workers. DHS is proposing to modify its regulations in the following areas:

• *Employment authorization eligibility for aliens temporarily released on orders of supervision:* DHS 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. DHS intends to require such aliens to establish economic necessity for employment during the period of the order of supervision.[2] Consistent with 8 CFR 274a.12(e), USCIS would use the Federal Poverty Guidelines under Title 45 of the U.S. Code to determine whether there is an economic necessity for employment authorization. Additionally, DHS proposes to expand the current nonexhaustive list of factors it considers when adjudicating an application for employment authorization for aliens temporarily released on an order of supervision to include: (1) The alien's compliance with the order of supervision conditions and (2) the alien's criminal history, including but not limited to any criminal arrests, charges, or convictions subsequent to the alien's release from custody on an order of supervision.

• *Additional requirements for renewal employment authorization for aliens temporarily released on orders of supervision:* DHS further proposes to allow aliens temporarily released on an order of supervision who apply for a renewal of their employment authorization to have it renewed only if the alien: (1) Continues to meet the exception noted above, (2) demonstrates economic necessity, (3) establishes that he or she warrants a favorable exercise of discretion, *and* (4) establishes that he or she is employed by a U.S. employer who is a participant in good standing in DHS's employment eligibility verification system (E-Verify) by providing the U.S. employer's name as listed in E-Verify and the employer's E-Verify Company Identification Number. An alien who fails to establish that he or she is employed by an E-Verify employer would not be eligible for a renewal EAD. DHS will consider an E-Verify employer to be a participant in good standing if, at the time of filing of the application for renewal of employment authorization, the employer: (1) Has enrolled in E-Verify with respect to all hiring sites in the United States that employ an alien temporarily released on an order of supervision who has received employment authorization under this rule; (2) is in compliance with all requirements of E-Verify, including but not limited to verifying the employment eligibility of newly hired employees at such hiring sites; and (3) continues to be a participant in good standing in E-Verify at any time during the employment of the alien temporarily released on an order of supervision who has received employment authorization pursuant to this rule.

• *Limit the Employment Authorization Document (EAD) validity period for aliens temporarily released on orders of supervision:* DHS proposes to limit the validity period for an EAD issued under 8 CFR 274a.12(c)(18) (''(c)(18) EADs'') to one year, regardless of whether the alien seeks an initial or renewal EAD.

• *Biometrics submission by aliens temporarily released on orders of supervision:* DHS proposes to require that biometrics be submitted and a biometric services fee be paid for by aliens seeking discretionary employment authorization under 8 CFR 274a.12(c)(18) (''(c)(18) EAD applicants''). Currently, all (c)(18) EAD

[1] This proposed rule does not affect DHS's authority to release aliens from detention or to remove aliens from the United States pursuant to sections 235, 236, 238, 240, and 241 of the INA, 8 U.S.C. 1225, 1226, 1228, 1229a, and 1231.

[2] Currently, economic necessity is only a discretionary factor. *See* 8 CFR 274a.12(c)(18)(i).

applicants submit biometrics to USCIS [3] to, among other things, assist in identity verification and facilitate (c)(18) EAD card production. This rule proposes to codify that requirement and require that they pay a biometric services fee of $30. *See* proposed 8 CFR 106.2(a)(32)(i)(C).[4] In addition, DHS proposes to use biometrics submitted by (c)(18) EAD applicants to screen for criminal history. *See* proposed 8 CFR 241.4(j)(3).

• *Provide aliens granted deferral of removal under the regulations implementing the CAT employment authorization based on the grant of deferral:* Finally, DHS proposes to amend its regulations at 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 CAT [5] 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.[6] Currently, aliens who are granted withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or CAT under 8 CFR 208.16 and 1208.16, are employment authorized based solely on the grant of withholding. They are not required to apply for employment authorization but may obtain an EAD if they wish to have a document reflecting that they are employment authorized by virtue of the grant of withholding. However, DHS's regulations do not clearly indicate that aliens who are granted CAT deferral of removal [7] fall within the category of aliens who should be employment authorized based on the grant of deferral rather than having to apply for employment authorization like other aliens under 8 CFR 274a.12(c). DHS proposes to amend the regulations to make this clarification.

• *Specify the effective date:* DHS proposes to apply changes made by this rule only to initial and renewal applications filed on or after the effective date of the final rule. DHS proposes to allow aliens temporarily released on an order of supervision who are already employment authorized prior to the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless their employment authorization is terminated or revoked earlier than the expiration date. USCIS would continue processing any pending application for a replacement EAD received prior to the effective date and would continue to receive new applications for replacement EADs because those adjudications are not considered a new grant of employment authorization but a replacement of an EAD based on a previously authorized period of employment prior to the effective date of the final rule.

A. Major Provisions of the Regulatory Action

DHS proposes the following regulatory amendments:

• *8 CFR 106.2, Fees.* DHS proposes to amend 8 CFR 106.2(a)(32)(i) to require that aliens who are subject to a final order of removal and temporarily released on an order of supervision pay a $30 biometric services fee in addition to the filing fee for an application for employment authorization under 8 CFR 274a.12(c)(18).

• *Several provisions in subpart A of part 241.* DHS is amending 8 CFR 241.4, 241.5, and 241.13 to remove obsolete references to former Immigration and Naturalization Service (INS) agency titles and replace them with the appropriate DHS component names. The amendments also update the section to correctly reflect the DHS components with authority over orders of supervision and issuance of EADs. The amendments to 8 CFR 241.4 would also codify requirements for aliens who are applying for initial and renewal employment authorization under the (c)(18) category to submit biometrics at an ASC and pay the associated biometric services fee.

• *8 CFR 274a.12, Classes of aliens authorized to accept employment.* The amendments to this section clarify that 8 CFR 274a.12(a)(10) covers aliens granted withholding of removal either based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or on the regulations implementing U.S. obligations under the CAT. The amendments to this section also add aliens granted deferral of removal based on the regulations implementing CAT to the current regulation at 8 CFR 274a.12(a)(10) as aliens who are employment authorized based solely on the grant of withholding or deferral and are not required to apply for employment authorization. This section also revises 8 CFR 274a.12(c)(18) to reflect that eligibility for employment authorization based on a final order of removal and temporary release from custody on an order of supervision is limited to aliens whose removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents and who establish economic necessity.

• *8 CFR 274a.13, Applications for employment authorization.* This section adds a new paragraph specifically addressing the filing procedures and evidentiary requirements for aliens temporarily released from custody on an order of supervision who are seeking an initial EAD or renewing an EAD, including the new requirements to: (1) Submit the Form I–765WS, Employment Authorization Worksheet (or successor form), (2) establish the alien's economic necessity for employment, (3) provide the E-Verify Company Identification Number for the alien's U.S. employer that participates in E-Verify and the employer's name as listed in E-Verify on the application for employment authorization (renewal applicants only), and (4) submit a copy of their current U.S. Immigration and Customs Enforcement (ICE) Form I–220B, Order of Supervision (or successor form), with a copy of the complete Personal Report Record. The amendments also provide that the validity period for employment authorization under 8 CFR 274a.12(c)(18) will not exceed increments of one year.

B. Summary of Costs, Benefits, and Transfer Payments

This proposed rule is estimated to result in a reduction in the number of aliens on orders of supervision who are eligible for employment authorization, which could result in lost earnings for those no longer eligible. This loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits or third-party organizations to provide for the alien and any dependents. In addition, DHS estimates increased filing burdens associated with the proposed rule for those who remain eligible for employment authorization. Employers

[3] At present, biometrics collection generally refers to the collection of fingerprints, photographs, and signatures. *See https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment* (describing biometrics as including fingerprints, photographs, and digital signature) (last visited May 15, 2020).

[4] *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR 46788 (Aug. 3, 2020) (Fee Rule). The Fee Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this proposed rule as a result of the litigation.

[5] *See* 8 CFR 208.16–208.18 and 1208.16–1208.18.

[6] If the alien wants a document to reflect that he or she is employment authorized pursuant to the grant of deferral, the alien will need to apply for an EAD with USCIS.

[7] CAT deferral of removal is a form of protection from removal similar to withholding under the regulations implementing CAT in that an alien cannot be removed to the country with respect to which a deferral order is in place.

that currently hire workers who would no longer be eligible to renew under this rule could experience new costs due to employee turnover and the need to comply with the proposed E-Verify requirement. Finally, the proposed rule may result in a loss of tax revenue.

Under the proposed rule, DHS anticipates there would be six types of impacts that DHS can estimate and quantify: (1) Potential lost earnings for alien workers temporarily released on orders of supervision who may no longer be eligible for employment authorization; (2) increased time burden for applicants to submit forms; (3) added time and costs for applicants to submit biometrics; (4) labor turnover costs that employers of alien workers with orders of supervision could incur when their employees' EADs expire and are not renewed; (5) costs to employers to enroll in and maintain an E-Verify account as a participant in good standing to retain workers with orders of supervision who are applying for renewal EADs; and (6) potential employment tax losses to the Federal Government.

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.[8] The ten-year undiscounted costs would range from $940,239 to $14,722,941,163. DHS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

Table 1 provides a summary of the proposed regulatory changes and the estimated impacts of the proposed rule.

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[8] DHS estimates some of the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect understated costs associated with biometrics fees and overstated benefits associated with filing Form I–765.

Table 1: Summary of Impacts and Estimated Cost and Benefits of the Proposed Rule

Provisions	Regulatory Changes	Estimated Impact of Regulatory Change
Amending 8 CFR 241.5	DHS proposes to update the current language of the regulation to reflect that the Secretary of Homeland Security (Secretary) or the Secretary's designee can issue orders of supervision.	This change would give DHS the flexibility to delegate the authorities under the provision without requiring additional rulemaking in the future.
Amending 8 CFR 241.4(j)(3), 8 CFR 241.5(c) and 8 CFR 241.13(h)(1)	DHS proposes to remove language that authorized designated ICE officers to grant employment authorization for aliens temporarily released on orders of supervision. ICE no longer grants employment authorization and USCIS has primary jurisdiction over EAD issuance.	These changes propose to codify current policy and reduce confusion for aliens temporarily released on orders of supervision who apply for employment authorization.
Amending 8 CFR 241.4(j)(3) and 8 CFR 106.2(a)(32)(i)(C)	DHS proposes to add language to codify biometrics collection for (c)(18) applicants. Aliens on orders of supervision applying for initial and renewal (c)(18) employment authorization must submit biometrics at a scheduled biometrics services appointment and pay a $30 fee.	This change would require aliens temporarily released on orders of supervision submit their biometrics to USCIS at an ASC. Quantified Impacts Costs for aliens temporarily released on orders of supervision would range from $83,148 to $552,741 with a primary estimate of $317,945 (annualized 7%). Qualitative Benefits Enables DHS to vet an applicant's biometrics against government databases to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate secure card production.
Amending 8 CFR 274a.12(a)(10)	DHS proposes to revise the (a)(10) employment authorization category, which currently covers those granted withholding of removal under section 241 of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT under 8 CFR 208.16 or 1208.16, to include aliens who are granted CAT deferral of removal as employment authorized based solely on the grant of deferral. Aliens granted withholding of removal under INA sec. 241(b)(3) and the regulations implementing CAT currently are employment authorized by virtue of the grant of withholding.	This change proposes to revise current policy to reduce confusion for aliens who are granted CAT deferral and would ensure consistency in adjudication for this population. Quantified Benefits Aliens granted deferral of removal who do not apply for an EAD card would save time and money ranging from $0 to $105,690 annually.
Amending 8 CFR 274a.12(c)(18)	DHS proposes to: • Eliminate eligibility for employment authorization for aliens with final orders of removal who are released from custody on orders of supervision except for those aliens for whom DHS determines their removal is impracticable because all	Quantified Costs and Transfers • Lost earnings for aliens temporarily released on orders of supervision would range from $614,037,170 to $1,495,358,741 with a primary estimate of $1,054,697,955 (annualized 7%).

	countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document. • Add new discretionary factors USCIS will consider when deciding whether to grant employment authorization including whether: 1. the alien complies with the conditions for release specified in the order of supervision, and 2. the alien has any criminal history, including but not limited to criminal activities subsequent to release from detention; • Add a requirement that the alien be employed with an E-Verify employer in good standing, if the alien is seeking renewal of an EAD issued based on an order of supervision; and • Add a requirement that the alien establish economic necessity for employment when filing an initial and renewal EAD application.	• DHS acknowledges that businesses that have hired (c)(18) workers who are no longer eligible for work authorization due to this proposed rule would incur labor turnover costs earlier than without this rule. • If employers are unable to find replacement workers, reduction in federal employment taxes paid would range from $93,947,687 to $228,789,887, with a primary estimate of $161,368,787 (annualized 7%). • Employer costs related to enrolling in E-Verify and maintaining an account would cost $113.65 for new E-Verify participants in the first year and $53.71 in subsequent years for training with an additional cost of $6.14 per query for every company employee – both citizen and non-citizen. Employer costs related to labor turnover for employers who are not enrolled and opt not to enroll in E-Verify would cost between $7,168 and $15,621 per worker, depending on the wage of their (c)(18) alien worker. 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. In the current environment with COVID-19-related layoffs and unemployment, there is the potential that the costs of the rule will be lower than they would otherwise have been. <u>Qualitative Costs and Transfers</u> • Those who are currently employment authorized, but who would no longer qualify for employment authorization under the proposed rule could experience other impacts possibly involving personal and family-related hardships and disruptions to the individual, U.S. citizen, or LPR spouses and/or children dependent on the income currently earned by the affected alien. • Additional unquantified Federal, state, and local income tax revenue also could be lost. A loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits, or third-party

		organizations to provide for the alien and any dependents. Qualitative Benefits • 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 on monitoring and tracking aliens temporarily released on orders of supervision.
8 CFR 274a.13(a)(3)	DHS proposes to: • Add requirements for aliens on orders of supervision seeking initial employment authorization and renewals to include: 1. A copy of the decision by the Immigration Judge (IJ) or DHS of the final order of removal, 2. Form I-765WS to show economic necessity, and 3. A copy of their current Order of Supervision (Form I-220B) with a copy of the complete Personal Report Record reflecting the alien's compliance with the conditions for release from the date of release. • Add a requirement for aliens on orders of supervision seeking renewal of their employment authorization to also submit their U.S. employer's E-Verify Company Identification number and employer's name as listed in E-Verify.	Quantified Costs • Costs to applicants who submit Forms I-765 and I-765WS, would range from $11,721 to $105,459 with a primary estimate of $58,590 (annualized 7%). Qualitative Benefits • Enables DHS to determine if there is an economic necessity for employment authorization and ensures that aliens on orders of supervision who renew their EAD are having their employment authorization verified by their employer.

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The impacts of reducing the number of aliens temporarily released on orders of supervision that are eligible for EADs include both potential distributional impacts (transfers) and costs. USCIS uses the lost compensation to aliens temporarily released on orders of supervision that are no longer eligible for EADs as a measure of the impact of this change—either as distributional impacts (transfers) from these aliens to others or as a proxy for businesses' cost for lost productivity. 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, DHS estimates a maximum of $1,495,358,741 (annualized at 7%) would be transferred from these workers to others in the labor force (or induced back into the labor force). Under this scenario, there would be no federal employment tax losses. Conversely, if companies are unable to find reasonable labor substitutes for the position the aliens temporarily released on orders of supervision would have filled then a maximum of $1,495,358,741 (annualized 7%) is the estimated monetized cost of this provision, and $0 is the estimated monetized transfers from these aliens to other workers. In addition, under this scenario where jobs would go unfilled, there would be a loss of employment taxes to the Federal Government. USCIS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect employment eligibility for aliens temporarily released on orders of supervision. There are other costs of the rule, including E-Verify, biometrics, labor turnover, and additional form burdens. These costs exist under both scenarios described above, and thus $94,868 is the minimum cost of the rule (annualized 7%).

DHS is aware that the outbreak of COVID–19 will likely impact these estimates in the short run.[9] As discussed above, the analysis presents a range of impacts, depending on if companies are able to find replacement labor for the jobs alien workers temporarily released on orders of supervision would have filled. In September 2020, the unemployment rate

[9] On March 13, 2020, the President declared that the COVID–19 outbreak in the United States constitutes a national emergency. *See* 'Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak,' available at *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/*.

was 7.9 percent.[10] This is an improvement on April's 14.7 percent which marked the highest unemployment rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948).[11] By comparison, the unemployment rate for September 2019 was 3.5%.[12] DHS assumes that during the COVID–19 pandemic, with additional available labor nationally, companies are more likely to find replacement labor for the job the alien on an order of supervision would have filled.[13] Thus, in the short-run during the pandemic and the ensuing economic recovery, the lost compensation to EAD applicants as a result of this rule is likely to mean that the costs of the rule will be lower than they would otherwise have been. DHS notes that although the pandemic is widespread, the severity of its impacts varies by locality. Consequently, it is not clear to what extent the distribution of alien workers temporarily released on orders of supervision overlaps with areas of the country that will be more or less impacted by the COVID–19 pandemic. Accordingly, DHS cannot estimate with confidence to what extent the impacts will be transfers instead of costs.

DHS's assumption that all applicants with an EAD are able to obtain employment (discussed in further detail later in the analysis), also does not reflect impacts from the COVID–19 pandemic. It is not clear what level of reductions the pandemic will have on the ability of EAD holders to find jobs (as jobs are less available), or how DHS would estimate such an impact with any precision given available data. Consequently, the ranges projected in this analysis regarding lost compensation are expected to be an overestimate, especially in the short-run. The range of impacts described by the scenarios above, plus the consideration of the other costs, are summarized in Table 2 below.

[10] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_10022020.pdf.*

[11] In April 2020, the unemployment rate increased by 10.3 percentage points to 14.7 percent. Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_05082020.pdf.*

[12] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2019, Employment Situation Summary Table A. Household data, seasonally adjusted. Available at: *https://www.bls.gov/news.release/archives/empsit_10042019.pdf.*

[13] The Congressional Budget Office estimates the unemployment rate is expected to average close to 14 percent during the second quarter, See: CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021 *https://www.cbo.gov/publication/56335* April 24, 2020.

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Table 2: Summary of Range of Monetized Annualized Impacts

Table 2(A): Annualized Impacts at 7%

Category	Description	Scenario: No Replacement Labor found for Aliens Temporarily released on Orders of Supervision		Scenario: All Aliens Temporarily released on Orders of Supervision Replaced with Other Workers		Primary
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$614,037,170	$1,495,358,741	$747,679,371
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,947,687	$228,789,887	$0	$0	$114,394,944
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics)	$83,148	$552,741	$83,148	$552,741	$317,945
Forms	Opportunity cost of time (provisions: additional time for I-765 + Form I-765WS)	$11,721	$105,459	$11,721	$105,459	$58,590
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$614,037,170	$1,495,358,741	$0	$0	$747,679,371
Total Costs		$614,132,038	$1,496,016,941	$94,868	$658,200	$748,055,905

Table 2(B): Annualized Impacts at 3%						
Category	Description	Scenario: No Replacement Labor found for Aliens Temporarily released on Orders of Supervision		Scenario: All Aliens Temporarily released on Orders of Supervision Replaced with Other Workers		Primary
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$608,302,571	$1,482,047,682	$741,023,841
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,070,293	$226,753,295	$0	$0	$113,376,648
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics)	$82,732	$549,871	$82,732	$549,871	$316,302
Forms	Opportunity cost of time (provisions: additional time for I-765 + Form I-765WS)	$11,662	$104,912	$11,662	$104,912	$58,287
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$608,302,571	$1,482,047,682	$0	$0	$741,023,841
Total Costs		$608,396,966	$1,482,702,465	$94,395	$654,783	$741,398,430

In addition, Table 3 presents the prepared accounting statement, as required by the Office of Management and Budget (OMB) Circular A–4, showing the costs associated with this proposed regulation. Note that under costs, the primary estimates provided in the accounting statement are calculated based on the minimum cost from the scenario that all aliens temporarily released on orders of supervision are replaced with other workers and the maximum cost from the scenario that no aliens temporarily released on orders of supervision are replaced with other

workers (scenario presented in Tables 2(A) and (B)).

Table 3. OMB A-4 Accounting Statement (S, 2019)
Period of analysis: 2020 – 2029

Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS				
Monetized Benefits	This proposed rule would produce some benefits for aliens who are granted CAT deferral of removal, as this population would no longer need to submit Form I-765 in order to become employment authorized. DHS estimates the total benefits for this population would range from $0 to $105,690 annually.			RIA
Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	This proposed rule may allow U.S. workers to have a better chance of obtaining jobs that some (c)(18) alien workers currently hold. Additionally, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could save government resources expended on enforcing removal orders for such aliens.			RIA
COSTS				
Annualized monetized costs (discount rate in parenthesis)	(7%) $748,055,905	$94,868	$1,496,016,941	RIA
	(3%) $741,398,430	$94,395	$1,482,702,465	RIA
Annualized quantified, but un-monetized, costs	N/A	N/A	N/A	RIA
Qualitative (unquantified) costs	In cases where employers cannot find reasonable substitutes for the labor the aliens on orders of supervision would have provided, affected employers could also lose profits from lost productivity. In all cases, employers would incur opportunity costs by having to choose the next best alternative to immediately filling the job the alien who was temporarily released on an order of supervision would have filled. Employers may incur additional opportunity costs such as search costs and costs to enroll and participate in the E-Verify program should they choose to retain their eligible (c)(18) workers.			RIA
TRANSFERS				
Annualized monetized transfers: compensation	(7%) $747,679,371	$0	$1,495,358,741	RIA
	(3%) $741,023,841	$0	$1,482,047,682	

From whom to whom?	From employment authorized workers with orders of supervision to other available workers.				RIA
Annualized monetized transfers: taxes	(7%)	$114,394,944	$0	$228,789,887	RIA
	(3%)	$113,376,648	$0	$226,753,295	
From whom to whom?	A reduction in federal employment taxes from employers and employees to the Federal Government. Additional unquantified Federal, state, and local income tax revenue also could be lost.				
Category	***Effects***				***Source Citation (RIA, preamble, etc.)***
Effects on State, local, and/or tribal governments	DHS cannot determine the number of (c)(18) alien workers who could be removed from the labor force due to the proposed rule. Federal, state, and local income tax revenue also may be reduced. For the (c)(18) alien population that will not be able to renew their EAD or obtain an initial EAD, there would likely be an impact in terms of lost income which could pose economic hardships. Members of this population may need to rely on their support networks for financial and social assistance, which could involve, but which may not be limited to, family members and friends, religious and charitable organizations, private non-profit providers, and non-governmental organizations (NGOs).				RIA
Effects 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.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

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The benefits potentially realized by the proposed rule are both qualitative and quantitative. Under this proposed rule, a U.S. worker may have a better chance of obtaining jobs that some (c)(18) alien workers currently hold, as the proposal would reduce employment authorization eligibility for this population of aliens who have been ordered removed from the country. 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. Third, DHS clarifies that aliens granted CAT deferral of removal would no longer need to submit Form I–765 in order to become employment authorized after the effective date of the final rule. DHS estimates the total benefits for this population would range from $0 to $105,690 annually. Additional savings could also be accrued in the form of opportunity costs of time if applicants would have spent time submitting evidence under any of the (c)(18) considerations.

III. Purpose of the Proposed Rule

It is the Administration's policy to ensure the prompt removal of aliens who have been issued a final order of removal. In 2017, President Trump issued Executive Order (E.O.) 13768, ''Enhancing Public Safety in the Interior of the United States,'' 82 FR 8799 (Jan. 25, 2017). This E.O. noted that the enforcement of our immigration laws is critically important to the national security and public safety of the United States. The continued presence in the United States of aliens with final orders of removal, many of whom are criminals who have served time in our Federal, State, and local jails and who have been determined in immigration proceedings to be ineligible to remain in the country, is contrary to the national interest. For this reason, the E.O. directed the Secretary of Homeland Security (the Secretary) to prioritize the removal of aliens from the United States who have final orders of removal and to publish new regulations revising or rescinding any regulations inconsistent with this E.O.

It is also the policy of the Administration to administer our immigration laws to create higher wages and employment rates for workers in the United States. *See* Exec. Order No. 13788, ''Buy American and Hire American'' (BAHA), 82 FR 18837 (Apr. 18, 2017). E.O. 13788 directed the Secretary to propose new rules to supersede or revise current rules to protect the interests of U.S. workers in the administration of the immigration system. Given the significant disruptions COVID–19 has caused to the U.S. economy and labor market, the President also issued Proclamation 10052, ''Suspending Entry of Immigrants and Nonimmigrants Who Present a Risk to the U.S. Labor Market During the Economic Recovery following the 2019 Novel Coronavirus Outbreak'' 85 FR 38263 (June 22, 2020). Proclamation 10052, among other things, requires the Secretary to take appropriate steps ''to prevent certain aliens who have final orders of removal; . . . from obtaining eligibility to work in the United States.'' 85 FR at 38266.

Obtaining employment authorization in the United States has long been, and continues to be, a significant incentive for aliens to migrate to (legally and illegally) and remain in the United States. As such, employment authorization must be carefully regulated to maintain the integrity of the U.S. immigration system. Many aliens ordered removed have been released from DHS custody on OSUP because some countries unreasonably delay issuance of travel documents or due to lack of good faith efforts by the alien. In addition, because of the Supreme Court's decision in *Zadvydas,* DHS must release aliens within a presumptively reasonable 6-month period, which in many instances is not sufficient time for DHS to obtain the travel documents needed to remove the alien from the United States. Further, many of these aliens are criminals whose continued presence in the United States is not in the national interest. DHS has identified that providing an ''open market'' employment authorization to aliens with final removal orders exacerbates the challenges in effectuating removal by incentivizing such aliens to remain in the United States and possibly compete for jobs against U.S. workers instead of complying with their removal orders, working with the country of removal to obtain travel documents in a timely manner, and departing the United States.

Through this proposed rule, DHS seeks to promote the integrity of the immigration system by eliminating discretionary employment authorization for those who have a final order of removal and encouraging their efforts to obtain travel documents in timely manner and depart the United States. The proposed rule would also help strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers, especially as the U.S. economy and the labor market recover from the significant disruptions caused by the COVID–19 pandemic.

A. Enforcement Priorities

Enforcement of the nation's immigration laws is essential to the integrity of the immigration system. It ensures that only those who are legally qualified and lawfully in the United States are allowed to avail themselves of any benefits under the INA. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Public Law 104–132, title IV; 110 Stat. 1214 (Apr. 24, 1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, div. C; 110 Stat. 3009 (Sept. 28, 1996). AEDPA and IIRIRA made sweeping changes to U.S. immigration laws focusing on immigration enforcement, detention of aliens, and bars to certain types of relief or protection from removal and grants of legal status. IIRIRA expanded the Attorney General's (now Secretary's) authority [14] to detain aliens, including requiring mandatory detention of aliens convicted of aggravated felony offenses and the detention of aliens pending removal from the United States. It also created an expedited removal process for aliens seeking admission into the United States who do not have proper documents or who make material misrepresentations, and, as designated by the Secretary, aliens who have not been inspected and admitted or paroled into the United States and cannot prove they have been in the United States for at least two years.[15] By passing AEDPA and IIRIRA, Congress made clear that enforcement of the immigration laws is a priority and is critical for purposes of national security, public safety, and the integrity of the U.S. immigration system.

Unfortunately, DHS is not always able to promptly remove aliens with final orders of removal. Sections 241(a)(1) and (2) of the INA, 8 U.S.C. 1231(a)(1), (2), provide for a 90-day removal period in which the Secretary is authorized to detain the alien and within which the Secretary shall remove the alien. However, the removal of aliens from the United States and repatriation [16] to their home countries can be a difficult and time-consuming process that can be further complicated and impeded by a lack of sufficient agency resources or legal constraints. Delays in removal also can occur because some countries unreasonably delay the issuance of travel documents, or unreasonably delay accepting the repatriation of their nationals.[17] Based on data on removals executed by DHS, it may take DHS 6 months or longer to obtain travel documents and remove an alien from the United States. For example, in Fiscal Year (FY) 2017, the average time for DHS to remove an alien who had a final order and was temporarily released on an order of supervision was 321.39 days.[18] However, in FY 2018, the number of days it took DHS to remove an alien who had a final order and was temporarily released on an order of supervision decreased to just over 6 months (average time to remove was 187.19 days).[19]

While DHS has authority to detain aliens with final orders of removal during the removal period, if DHS cannot effectuate an alien's removal in a presumptively reasonable 6-month removal period, DHS must generally release such aliens from detention. *See generally Zadvydas* v. *Davis,* 533 U.S. 678 (2001).[20] Due to the U.S. Supreme Court's decision in *Zadvydas,* DHS has had to release thousands of aliens from detention as illustrated in Table 4, including aliens convicted of aggravated felonies and other serious crimes.

TABLE 4—ALIENS RELEASED FROM ICE CUSTODY ON ORDER OF SUPERVISION *

Category	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Convicted Criminals [21]	3,692	3,179	2,815	4,233	5,269
Pending Criminal Charges	N/A	N/A	N/A	431	993
Other Immigration Violator	3,080	4,381	3,502	7,748	7,504
Total	6,772	7,560	6,317	12,412	13,766

Note: In FY 2018, ICE redefined categorization of immigration violator's criminality. Therefore, the categories changed from ''criminal'' and ''noncriminal'' to ''convicted criminal alien,'' ''pending criminal charges,'' and ''other immigration violators.''

* Data from ICE Enforcement and Removal Operations, Law Enforcement Systems and Analysis (ERO, LESA) (FY 2015 to FY 2019).

[14] On March 1, 2003, the functions of the former Immigration and Naturalization Service related to border security were transferred to the Secretary. The Homeland Security Act, Public Law 107–296, 441(c) (6 U.S.C. 251(2)).

[15] *See, e.g.,* H.R. Conf. Rep. 104–828, title III, subtitle A (1996).

[16] Repatriation includes repatriation of aliens to the country of nationality or citizenship as well as to the country of last habitual residence.

[17] *See* DHS Office of Inspector General Report, ''ICE Faces Barriers in Timely Repatriation of Detained Aliens,'' OIG–19–28 (Mar. 11, 2019).

[18] *Id.*

[19] *Id.*

[20] *See infra* Section IV, paragraph B for additional discussion of the *Zadvydas* decision.

When aliens with final removal orders are released from DHS custody, they are released on orders of supervision. These orders of supervision contain conditions for release, such as requiring aliens to assist with efforts to procure travel documents and present themselves for removal in the event removal can be arranged. Once temporarily released on an order of supervision, an alien may apply for employment authorization under 8 CFR 274a.12(c)(18). Each year, USCIS approves thousands of initial requests for employment authorization and renewals of such authorization for aliens released from DHS custody on orders of supervision as shown in Table 5.

TABLE 5—ALIENS TEMPORARILY RELEASED ON ORDERS OF SUPERVISION GRANTED EMPLOYMENT AUTHORIZATION *

Category	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Initials	8,748	7,499	5,273	3,433	4,071
Renewals	21,236	24,464	21,274	20,151	21,350

* Data obtained from the USCIS Office of Performance and Quality (OPQ).

As noted above, E.O. 13768 made the prompt removal of aliens ordered removed a priority for the Administration and directed the Secretary to publish new regulations revising or rescinding any regulations that are inconsistent with the E.O. As a result of its regulatory review, DHS examined the current regulation at 8 CFR 274a.12(c)(18) governing employment eligibility for aliens with a final removal order and temporarily released on orders of supervision. DHS determined that this regulation is inconsistent with the Administration's enforcement priorities because it allows virtually any alien temporarily released on an order of supervision to qualify for employment authorization and, as such, incentivizes such aliens to remain in the United States instead of complying with their removal order and departing the United States.

The current regulation simply restates the language of INA section 241(a)(7), 8 U.S.C. 1231(a)(7) and does not clearly place the burden on the alien to establish that he or she warrants a favorable exercise of discretion to obtain employment authorization. It also does not require an alien who has a final order of removal and has been temporarily released on an order of supervision to clearly establish on what basis he or she is seeking employment authorization, either under INA section 241(a)(7)(A), because every country designated by the alien or under that section has refused to receive the alien, or under INA section 241(a)(7)(B), because removal is impracticable or against the public interest. The burden is on the alien, not the U.S. Government, to establish that he or she is eligible for a discretionary benefit. Further, the current regulation does not put the public on notice of when DHS will deem the removal of an alien to be impracticable or what DHS has determined to be in the public interest for the purpose of granting employment authorization to aliens with final orders of removal.

As previously stated, the ability to obtain employment authorization provides aliens a significant motivation to remain in the United States. DHS has determined that providing employment authorization to aliens who have final orders of removal, except in very limited circumstances, undermines the removal scheme created by Congress and incentivizes such aliens to remain in the United States instead of complying with their removal orders, working with the country of removal to obtain travel documents in a timely manner, and departing the United States. The revisions under this proposed rule will address these concerns and align the issuance of employment authorization with the Administration's enforcement priorities.

B. Strengthening Protections for U.S. Workers

DHS also wants to ensure that any discretionary grant of employment authorization to aliens is consistent with the Administration's efforts to strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers.

As noted above, E.O. 13788 directed DHS to propose new rules to supersede or revise current rules to protect the interests of U.S. workers [22] in the administration of the immigration system. More recently, the President issued Proclamation 10052, which describes that significant disruptions COVID–19 has caused to the U.S. economy and the detrimental impact of foreign workers on the U.S. labor market during the high domestic unemployment. To address this concern, Proclamation 10052, in addition to suspending the entry of certain immigrants and nonimmigrants into the United States, requires the Secretary to take appropriate steps to prevent certain aliens who have final orders of removal from obtaining eligibility to work in the United States.

This proposed rule aligns with the Administration's goals of protecting U.S. workers in the labor market, particularly as the economy recovers from the extraordinary disruptions resulting from the COVID–19 outbreak. The U.S. unemployment rose to a record high of 14.7 percent in April 2020 [23] but declined to 7.9 percent in September.[24] However, it remains above 3.5%, which was unemployment rate for the same month last year (*i.e.,* September 2019).[25] DHS asserts it is likely that some aliens with final orders of removal and temporarily released on an order of supervision may compete for, and potentially occupy, jobs that U.S. workers might have applied for and been offered, particularly during this period of high unemployment. Aliens temporarily released on an order of supervision who apply for employment authorization under the current regulatory scheme receive an ''open market'' EAD, meaning they may accept employment in any field and may be hired by any U.S. employer without the U.S. employer having to demonstrate that there were no available U.S.

[21] ''Convicted criminal'' means an immigration violator with a criminal conviction entered into ICE's systems of record at the time of the enforcement action.

[22] Section 1(e) of E.O. 13788 refers to the definition for U.S. worker as either an employee who is a citizen or national of the United States; or is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207 of the INA, is granted asylum under section 208 of the INA, or is an immigrant otherwise authorized to be employed by the INA or the Attorney General. INA 212(n)(4)(E), 8 U.S.C. 1182(n)(4)(E).

[23] Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_05082020.pdf.*

[24] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2020. Available at: *https://www.bls.gov/news.release/pdf/empsit.pdf.*

[25] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2019, Available at: *https://www.bls.gov/news.release/archives/empsit_10042019.pdf.*

workers or to guarantee that it will pay the prevailing wage or maintain certain work conditions.

C. Exception to Employment Authorization Bars

DHS recognizes that there are certain times an alien cannot be removed from the United States because DHS is unable to obtain travel documents from a country of removal. Therefore, DHS is proposing to create a narrow exception to the bar to employment authorization. DHS will continue to allow aliens who are subject to a final order of removal to apply for discretionary employment authorization if (1) DHS has determined that their removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents and (2) the aliens establish economic necessity.

DHS anticipates that the number of aliens who are subject to a final order of removal for whom DHS has determined that their removal is impracticable will be relatively small. For example, in FY 2019, only about 4.8 percent (659) of aliens who were temporarily released on an order of supervision (13,766) could not be removed in that fiscal year due to DHS's inability to obtain travel documents during the fiscal year in which the aliens were counted (Table 6).[26] Additionally, the percentage of aliens for whom DHS cannot obtain travel documents has averaged about 5 percent of aliens temporarily released on an order of supervision since FY 2015. DHS believes that the number of aliens who would qualify for this exception will remain small because even after an alien is temporarily released on an order of supervision, DHS continues to work with the foreign governments to obtain travel documents and DHS sometimes receives travel documents for such aliens shortly after their release or within the following fiscal year.

TABLE 6—ALIENS TEMPORARILY RELEASED ON ORDER OF SUPERVISION—UNABLE TO OBTAIN TRAVEL DOCUMENTS

Fiscal year	Total number of aliens temporarily released on an order of supervision	Number of aliens on an order of supervision for whom DHS could not obtain travel docs	Approximate percentage of total (%)
2015	6,772	369	5.4
2016	7,560	411	5.4
2017	6,317	324	5.1
2018	12,412	530	4.3
2019	13,766	659	4.8
Average of During 5-Fiscal Year Period	9,365	459	4.9

* Data from ICE ERO, LESA Statistical Tracking Unit (FY 2015 to FY 2019).

Finally, DHS believes that allowing aliens who fall within the exception to be eligible for employment authorization is consistent with section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7). Section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7), bars employment authorization for aliens who have been ordered removed. No alien subject to a final order of removal has a right to apply for or obtain employment authorization from USCIS under U.S. law. Section 241(a)(7) of the INA, however, gives the Secretary the authority to grant employment authorization if the Secretary determines that: (1) An alien cannot be removed from the United States because all countries of removal as designated by the alien or delineated under section 241 of the INA, 8 U.S.C. 1231, have refused to receive the alien, or (2) the alien's removal is impracticable or contrary to the public interest. INA section 241(a)(7)(A) and (B), 8 U.S.C. 1231(a)(7)(A) and (B). The Secretary is not required to make a finding under either subparagraph (A) or (B) of section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7)(A), (B), nor is the Secretary required to make a specific finding under either clauses of subparagraph (B) (*i.e.* ''otherwise impracticable'' or ''contrary to the public interest''). The Secretary can choose to maintain the permanent bar on employment authorization for *all* aliens subject to a final order of removal without further action.

In this rulemaking, DHS is not making any findings under subparagraph (A). DHS does not believe any findings under subparagraph (A) are necessary or required because, consistent with the Administration's enforcement priorities, all aliens who have a final order of removal will be subject to removal from the United States, either to a country where the alien is a citizen, subject, or national, the alien was born, or the alien has a residence, or to any country that is willing to accept the alien.

DHS also is not making any findings or creating an exception based on the ''public interest'' clause of subparagraph (B) because other avenues for employment eligibility already exist for aliens whom DHS determines that their removal is contrary to the public interest. For example, when an alien with a final order of removal is actively assisting law enforcement entities, and the alien's removal is contrary to the public interest because of such assistance, there are avenues for such aliens to qualify for employment authorization, in part, based on their assistance to law enforcement. Such aliens assisting law enforcement may qualify for employment authorization if they are eligible for T non-immigrant status (trafficking victims),[27] U non-immigrant status (victims of criminal activity),[28] and S non-immigrant status (witnesses in criminal investigations or prosecutions).[29] These existing avenues reflect the public interest in strengthening cooperation with law enforcement and provide DHS with the appropriate framework to assess the nature of the alien's assistance to law enforcement.

Therefore, except for aliens for whom the Secretary has made a finding under the impracticability clause of section 241(a)(7)(B) of the INA, 8 U.S.C. 1231(a)(7)(B), no other alien with a final

[26] In certain instances, DHS was able to obtain travel documents for aliens in the next fiscal year.

[27] *See* INA sec. 101(a)(15)(T) (Eligibility requirements include compliance with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking).

[28] *See* INA sec. 101(a)(15)(U) (Eligibility requirements include helpfulness to law enforcement in the investigation or prosecution of a qualifying crime).

[29] *See* INA sec. 101(a)(15)(S) (Eligibility requirements include providing law enforcement critical, reliable information necessary to the successful investigation or prosecution of a criminal organization).

order of removal who has been temporarily released on an order of supervision will be eligible for employment authorization. This includes aliens who may have previously been eligible for employment authorization based on the public interest clause of section 241(a)(7)(B) of the INA, 8 U.S.C. 1231(a)(7)(B), or based section 241(a)(7)(A) of the INA, 8 U.S.C. 1231(a)(7)(A). Furthermore, for purposes of determining employment eligibility only, DHS further clarifies that an alien's removal is ''otherwise impracticable'' under section 241(a)(7)(B) of the INA when DHS determines that all countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document.

DHS believes that exercising its discretionary authority as provided in this proposed rule promotes the protection of U.S. workers while ensuring the faithful execution and enforcement of the immigration laws.

IV. Background

A. Legal Authority

DHS's authority to detain and release from custody aliens subject to final orders of removal on orders of supervision and to grant employment authorization is found in several statutory provisions. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107–296, 116 Stat. 2135), 6 U.S.C. 112 and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[30] In addition to establishing the Secretary's general authority to administer and enforce immigration laws, section 103 of the INA enumerates various related authorities including the Secretary's authority to establish regulations necessary for carrying out his authority. Section 241 of the INA, 8 U.S.C. 1231, governs the detention, release, and removal of aliens after they have received an administratively final order of removal. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed by statute or in the discretion of the Secretary and the requirements U.S. employers must follow to verify the identity and employment authorization of their employees. The authority to establish and operate E-Verify is found in sections 401–405 of IIRIRA, Public Law 104–208, 110 Stat. 3009–546. The Secretary proposes the changes in this rule under these authorities.

B. Detention and Release of Aliens Ordered Removed

Section 241 of the INA, 8 U.S.C. 1231, governs the detention, release, and removal of aliens who are subject to final orders of removal.[31] When an alien is issued a final order of removal, DHS generally has 90 days after issuance of the final order of removal to remove the alien from the United States.[32] This 90-day removal period can be extended if the alien fails or refuses to make timely application in good faith for travel or other documents necessary for the alien's departure or conspires or acts to prevent removal.[33] Section 241(a)(2) of the INA, 8 U.S.C. 1231(a)(2), requires detention during the removal period and specifically prohibits DHS from releasing an alien who has been found inadmissible under sections 212(a)(2) or 212(a)(3)(B), 8 U.S.C. 1182(a)(2), (a)(3)(B), or deportable under sections 237(a)(2) or 237(a)(4)(B) of the INA, 8 U.S.C. 1227(a)(2), (a)(4)(B).

In certain instances, DHS is not able to remove aliens within the 90-day period after issuance of the final order of removal. In such cases, DHS must comply with the U.S. Supreme Court's decision in *Zadvydas.*[34] In *Zadvydas,* the U.S. Supreme Court held that an alien with a final order of removal cannot be kept in detention (unless special circumstances exist) [35] once it has been determined that there is not a ''significant likelihood of removal in the reasonably foreseeable future.'' [36] The Court established six months as the ''presumptively reasonable period of detention.'' After the six-month period, once the alien provides good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with sufficient evidence to rebut that showing.[37] In the event DHS determines that removal is not likely to occur in the reasonably foreseeable future, the alien must generally be temporarily released on an order of supervision. During this period of release, the alien is required to continue to make efforts (or assist in efforts) towards his or her removal, and DHS will continue to pursue the alien's removal.[38]

If an alien is temporarily released on an order of supervision, the order of supervision will contain conditions for release including requiring the alien to appear periodically before an immigration officer and comply with the conditions prescribed in the order of supervision.[39] INA section 241(a)(3), 8 U.S.C. 1231(a)(3); 8 CFR 241.5(a). If an alien fails to comply with the conditions for release as specified in the order of supervision, DHS can take the alien back into custody and detain the alien until he or she is removed. Aliens who willfully fail to comply with an order of supervision can also be criminally prosecuted under section 243(b) of the INA, 8 U.S.C. 1253(b).

C. Repatriation of Aliens Ordered Removed

Once an alien has been issued a final order of removal, ICE is responsible for effectuating the alien's removal from the United States pursuant to section 241 of the INA, 8 U.S.C. 1231, and 8 CFR 241. Generally, a travel document must be obtained from a foreign government that will allow the alien to depart the United States and be repatriated either to the alien's country of birth, citizenship, nationality, or last habitual residence or to an alternate country that has agreed to accept the alien. As indicated earlier, based on data on removals for FY 2018, it takes DHS an average of a little over 6 months to obtain travel documents and remove an alien from the United States.[40]

However, obtaining travel documents is not always easy. Some countries refuse or unreasonably delay the issuance of the necessary travel documents to aliens who have been issued a final order of removal. Countries that unreasonably delay

[30] Public Law 104–208, div. C, at secs. 401–405.

[31] Aliens subject to an expedited removal order, however, are not subject to release on an order of supervision. INA sec. 235(b)(1)(B)(iii)(IV), 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (an alien subject to expedited removal under section 235 ''shall be detained pending a final determination of credible fear [ ] and, if found not to have such a fear, until removed).''

[32] INA sec. 241(a)(1)(A), (B)(i), 8 U.S.C. 1231(a)(1)(A), (B)(i).

[33] INA sec. 241(a)(1)(C), 8 U.S.C. 1231(a)(1)(C).

[34] 533 U.S. 678 (2001).

[35] Under 8 CFR 241.14, aliens with ''special circumstances'' are those: (1) That have a highly contagious disease that threatens public safety; (2) whose release would have serious adverse foreign policy implications; (3) who present a significant threat to national security or significant risk of terrorism; or (4) who are specially dangerous.

[36] *Zadvydas,* 533 U.S. at 701.

[37] *Id.; see also* 8 CFR 241.13(d).

[38] *See* 8 CFR 241.5(a).

[39] DHS may also require that an alien temporarily released on an order of supervision to post a bond of a sufficient amount to ensure that the alien complies with the terms for release, including surrendering him or herself to DHS custody for removal. 8 CFR 241.5(b).

[40] Furthermore, it should also be noted that even though the average time to obtain travel documents across all countries was a little over six months, the process for negotiating with foreign governments to obtain travel documents is dynamic. While there may be a period of inactivity by a particular foreign government to cooperate with issuing travel documents, a policy shift can also occur quickly and result in prompt repatriation.

accepting the repatriation of their citizens or nationals impede DHS's ability to remove the alien in a timely manner and interfere with the United States' sovereign interest in enforcing its immigration laws. Under section 243(d) of the INA, 8 U.S.C. 1253(d), the Secretary has the authority to notify the Secretary of State that a specific country is refusing or unreasonably delaying acceptance of its nationals. Upon such notification from the Secretary, the Secretary of State shall order consular officers in that country to discontinue issuing immigrant visas, nonimmigrant visas, or both to citizens and nationals of that country.[41] While DHS and DOS work through various diplomatic channels and avenues to get such countries to comply, and most countries do comply, there are countries that refuse to assist in the repatriation of their citizens and nationals, and as a result, the United States has imposed visa sanctions under section 243(d) of the INA, 8 U.S.C. 1253(d), to get such countries to cooperate.[42]

D. Withholding of Removal Under the INA and Regulations Implementing CAT and Deferral of Removal Under Regulations Implementing CAT

Even if the alien is inadmissible or deportable and has a final order of removal, DHS's ability to remove an alien in certain cases is further restricted by U.S. treaty obligations. The United States is a party to the 1967 Protocol relating to the Status of Refugees (Protocol), which incorporates, *inter alia,* Article 33 of the 1951 Convention relating to the Status of Refugees. 198 U.N.T.S. 137. Article 33 specifically provides that ''[n]o contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.'' [43] The United States is also a party to the CAT. Article 3 of the CAT requires that ''[n]o State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.'' [44]

Though neither of these treaties is self-executing, the United States has implemented its non-refoulement obligations under them in statute and regulations. With respect to the Protocol, Congress implemented the United States' non-refoulement obligations as part the Refugee Act of 1980, section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). With respect to the CAT, Congress directed the appropriate agencies to publish regulations to implement the United States' obligations under Article 3 of the CAT in the Foreign Affairs Reform and Restructuring Act of 1988 (FARRA), Public Law 105–277, Div. G., § 2442(b) (Oct. 21, 1998). DOJ published regulations in 1999 implementing FARRA § 2442. *See* 64 FR 8478–01 (1999). The regulations governing withholding of removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), and CAT are now codified at 8 CFR 208.16 through 208.18 and 8 CFR 1208.16 through 1208.18.

Aliens granted withholding of removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), as well as aliens granted withholding of removal based on the regulations implementing CAT, 8 CFR 208.16(c), are both subject to mandatory bars to withholding if the alien participated in the persecution of others, is a human rights violator, or has been convicted of a particularly serious crime.[45] However, even if an alien is not eligible for withholding under the provisions noted above because he or she is subject to one of the mandatory bars to withholding, DHS still is not permitted to remove an alien from the United States if an IJ or the Board of Immigration Appeals (BIA) has determined that removal would result in the alien being removed to a country where he or she would more likely than not be tortured. 8 CFR 208.17 and 1208.17. In such instances, the IJ or BIA defers removal to that country.

Withholding of deportation or removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT (if the alien is not subject to a mandatory bar) and CAT deferral of removal are mandatory and must be granted if the alien meets the burden of proof. *See* 8 CFR 208.16(c)(4) and 208.17(a). Once an alien has been granted withholding of removal or deferral of removal, DHS cannot remove the alien to the country from which removal has been withheld or deferred unless the alien's case is reopened and withholding is terminated under 8 CFR 208.24 or 1208.24, or deferral is terminated under 8 CFR 208.17 or 1208.17. In most instances an alien granted withholding of removal or deferral of removal under the regulations implementing CAT will be released pursuant to an order of supervision, but such an order does not alter or affect the nondiscretionary nature of the withholding or deferral of removal grant, even if the alien subsequently violates the conditions for release as specified in the order of supervision. Such violations could result in a return of the alien to ICE custody but will not result in the alien's actual removal from the United States unless the alien's case is reopened and withholding is terminated under 8 CFR 208.24 or 1208.24, or deferral is terminated under 8 CFR 208.17 or 1208.17.

E. Employment Authorization

Whether an alien is authorized to work in the United States depends on the alien's status in the United States and whether employment is specifically authorized by statute or only authorized pursuant to the Secretary's discretion. There are very few statutory provisions that require the Secretary to grant employment authorization.[46] While some statutory provisions specifically allow the Secretary to grant employment authorization as a matter of discretion,[47] the Secretary's general authority under section 274A(h)(3) of the INA, 8 U.S.C.

[41] In 2017, DHS and DOS entered into a Memorandum of Understanding (MOU) Concerning the Removal of Aliens, which superseded the 2011 ICE and DOS Bureau of Consular Affairs MOU Concerning Repatriation. The new MOU creates a framework for effectuating repatriations, sets forth tools the agencies will use to encourage countries to accept the return of their nationals, and establishes a target travel document issuance time of 30 days.

[42] Visa sanctions have been previously invoked under INA Section 243(d) against the following countries: Guyana in 2001; The Gambia in 2016; Cambodia, Eritrea, Guinea, and Sierra Leone in 2017; Burma and Laos in 2018; Cuba, Ghana, and Pakistan in 2019; and Burundi and Ethiopia in 2020. Visa sanctions have since been lifted against Guyana, Guinea, and The Gambia. *See* ''Visa Sanctions Against Two Countries Pursuant to Section 243(d) of the Immigration and Nationality Act,'' at *https://www.ice.gov/visasanctions* (Last updated Aug. 13, 2020).

[43] Convention relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 198 U.N.T.S. 137.

[44] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 3, *ratified* Oct. 21, 1994, 1465 U.N.T.S. 85.

[45] 8 CFR 208.16(d)(2) specifically notes that an application for withholding of removal under CAT shall be denied if the applicant falls within INA section 241(b)(3)(B).

[46] *See, e.g.,* INA sec. 214(c)(2)(E), 8 U.S.C. 1184(c)(2)(E) (requiring spouses of L nonimmigrants to be employment authorized); INA sec. 214(e)(6), 8 U.S.C. 1184(e)(6) (requiring spouses of E treaty traders/investors to be employment authorized; INA sec. 214(p), 8 U.S.C. 1184(p) (requiring U nonimmigrants to be employment authorized).

[47] *See, e.g.,* INA sec. 106(a), 8 U.S.C. 1105a (providing that the Secretary may grant employment authorization to spouses and children of certain nonimmigrants who were battered or subjected to extreme cruelty); INA sec. 214(p)(6), 8 U.S.C. 1182(p)(6) (providing that the Secretary may grant employment authorization to aliens who have filed a bona fide application for U nonimmigrant status).

1324a(h)(3), is used to establish most discretionary employment authorization categories. However, in the context of aliens ordered removed, section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7), specifically prohibits an alien who has been ordered removed from the United States from being eligible to receive employment authorization unless the Secretary determines that the alien cannot be removed because no country, as designated by the alien or delineated under section 241(b) of the INA, 8 U.S.C. 1231(b), will accept the alien *or* the alien's removal is impracticable or contrary to the public interest.

DHS regulations at 8 CFR 274a.12 set forth the categories of aliens who are authorized to work in the United States, including; those aliens who are authorized to work incident to their status (8 CFR 274a.12(a)); aliens who are authorized to work in the United States but only for a specific employer (8 CFR 274a.12(b)); and aliens who fall within a category that the Secretary has determined may be employment authorized as a matter of discretion (8 CFR 274a.12(c)). Aliens seeking employment authorization generally must file an application with USCIS with the appropriate fee (unless waived) and in accordance with the form instructions. *See* 8 CFR 274a.13.

F. Biometric Submission

Current DHS regulations provide general authorities for USCIS to require the submission of biometrics in connection with immigration benefits. *See* 8 CFR 103.2(b)(9). DHS has the authority to require the submission of biometrics from any applicant, petitioner, sponsor, beneficiary, or requestor, or individual filing a request, on a case-by-case basis, through form instructions, or by a **Federal Register** notice. *See* 8 CFR 103.16. Current regulations allow DHS to use the biometric information to conduct background and security checks, adjudicate immigration benefits, and perform other functions related to the administration of the INA. *See id.* DHS is also authorized to charge a biometric services fee associated with the submission of biometric information. *See* 8 CFR 103.17.

V. Discussion of the Proposed Rule

A. Eligibility for Employment Authorization for Aliens on Orders of Supervision

Section 241(a)(7) of the INA, 8 U.S.C. 1231(a)(7), specifically prohibits an alien who has been ordered removed from the United States from being eligible to receive employment authorization unless the Secretary, in the Secretary's discretion, determines, under subparagraph (a)(7)(A), that the alien cannot be removed because no country, as designated by the alien or delineated under section 241(b) of the INA, 8 U.S.C. 1231(b), will accept the alien or, under subparagraph (a)(7)(B), 8 U.S.C. 1231(a)(7)(B), the alien's removal is impracticable or contrary to the public interest. Neither the INA nor the regulations mandate issuance of employment authorization for any alien subject to a final order of removal or based on such alien's temporary release from custody on an order of supervision. The statute preserves the Secretary's discretion to decide if employment authorization should be granted and, if yes, to which classes of aliens based upon a finding under subparagraph (A) or (B) of section 241(a)(7) of the Act, 8 U.S.C. 1231(a)(7)(A), (B).

DHS is proposing to amend 8 CFR 274a.12(c)(18) to eliminate eligibility for employment authorization for all aliens who have final orders of removal and are temporarily released from custody on an order of supervision except for aliens for whom DHS has determined that their removal from the United States is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents. *See* proposed 8 CFR 274a.12(c)(18). Providing EADs to aliens who do not fall within this exception undermines the integrity of the immigration system by incentivizing aliens with a final removal order to remain in the United States instead of complying with their removal orders, obtaining travel documents in a timely manner, and departing the United States.

Encouraging aliens who do not fall within the exception provided in this rule to timely depart the United States also promotes the efficient use of DHS's limited resources. Managing the vast number of aliens on OSUP consumes an inordinate amount of DHS resources. Management of aliens temporarily released on OSUP requires tracking and monitoring the status of such aliens, as well as conducting regular check-ins to ensure compliance with the conditions of release. This time intensive process takes away from other enforcement priorities such identifying, detaining, and removing criminal aliens. The proposed rule also aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. It helps strengthen protections for U.S. workers and minimize the risk of disadvantaging U.S. workers, especially as the economy and the labor market recovers from the significant disruptions caused by the COVID–19 pandemic.

DHS has determined that continuing to provide employment authorization to those aliens who fall within the exception provided in this rule is consistent with the impracticability clause of INA section 241(a)(7)(B), 8 U.S.C. 1231(a)(7)(B). Table 7 below shows the number of aliens for whom DHS cannot obtain travel documents annually out of the total number of aliens removed from the United States.

TABLE 7—ALIENS REMOVED FROM THE UNITED STATES AND ALIENS FOR WHOM DHS WAS UNABLE TO OBTAIN TRAVEL DOCUMENTS IN THE REPORTED FISCAL YEAR *

Fiscal year	Total number of aliens removed from the United States	Number of aliens on orders of supervision for whom DHS could not obtain travel docs to execute removal from the United States
2015	235,413	369
2016	240,255	411
2017	226,119	324
2018	256,085	530
2019	267,258	659
Average over 5-Fiscal Year Period	245,026	459

* Data from ICE ERO, LESA Statistical Tracking Unit (FY 2015 to FY 2019).

In some instances, even if DHS is not able to obtain travel documents for an alien in one fiscal year, DHS is able to obtain such documents in a subsequent fiscal year. DHS expects the number of aliens whose removal from the United States is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents will remain very low. As such, DHS has determined that it is not contrary to the INA or the Administration's enforcement priorities to allow such aliens to work while they remain in the United States and until they can be removed.

For aliens whose removal from the United States is impracticable, DHS is proposing to make economic necessity, which is currently only a discretionary factor, a mandatory eligibility requirement, consistent with other discretionary employment authorization categories. *See, e.g.,* 8 CFR 274a.12(c)(14). As such, aliens who are eligible to apply for employment authorization based on the exception created in this proposed rule will need to demonstrate economic necessity for employment during the period they are on an order of supervision. Aliens who are financially able to support themselves during the period prior to their removal from the United States will not be eligible for an EAD. Furthermore, to protect U.S. workers against potential displacement or any disadvantages in the labor market, including during the current economic recovery, DHS wants to ensure that U.S. employers who hire aliens who are temporarily released on an order of supervision are complying with our immigration laws and not employing unauthorized workers. For this reason, DHS is proposing to require aliens on an order of supervision who are seeking a renewal of their employment authorization be employed by a U.S. employer who is a participant in good standing in the E-Verify program.

DHS proposes to limit the validity period for employment authorization under 8 CFR 274a.12(c)(18), whether the alien seeks an initial or renewal EAD, to a period not to exceed increments of one year.

B. USCIS Evidentiary Requirements

DHS proposes to require aliens temporarily released on orders of supervision who are eligible to apply for employment authorization under the new criteria and who are seeking initial employment authorization or a renewal to submit an Application for Employment Authorization, (Form I–765) with the appropriate fee, including the biometric services fee, and in accordance with the form instructions. *See* proposed 8 CFR 274a.13(a)(3). DHS also proposes to require such aliens to submit the following additional documents: (1) A copy of a decision by an IJ or the BIA, or an administrative removal order issued by DHS demonstrating that the alien is subject to a final order of removal or deportation; (2) a completed Employment Authorization Worksheet (Form I–765WS) to show economic necessity; [48] and (3) a copy of the current and complete Order of Supervision (Form I–220B), including a copy of the complete Personal Report Record which reflects compliance with the conditions for release.

Given that ICE is the primary DHS component with jurisdiction over the detention and removal of aliens with a final removal order, ICE 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. If ICE determines all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents, ICE officers will annotate the Form I–220B to indicate that the alien's removal is currently impracticable because of the reasons stated above. Aliens with final removal orders who are temporarily released on an order of supervision and who are seeking employment authorization based on this exception would not be eligible to apply for employment unless ICE has made such a determination and annotated the Form I–220B to indicate the alien's removal is impracticable because of the reasons stated above.

In addition to the above, DHS proposes to require aliens on orders of supervision who apply for initial employment authorization after the effective date of the final rule and who subsequently seek renewal of their employment authorization to: (1) Show that they meet the exception, (2) demonstrate economic necessity by submitting a completed Employment Authorization Worksheet (Form I–765WS), and (3) show that they are employed by a U.S. employer who is a participant in good standing in E-Verify (renewals only) by providing their U.S. employer's E-Verify Company Identification Number and the employer's name as listed in E-Verify on their application for employment authorization. *Id.* An alien who fails to establish that he or she is employed by an E-Verify employer at the time of filing or adjudication of the application to renew his or her employment authorization is ineligible for an EAD. Furthermore, for both initial and renewal EAD applications, DHS will determine if the alien warrants a favorable exercise of discretion to grant employment authorization. To this end, aliens may include supporting documentation of favorable factors as part of the EAD application.

C. Biometric Submission and Criminal History

Currently, all (c)(18) applicants receive an appointment notice from USCIS to submit their biometrics so USCIS can use them for identity verification and EAD production. DHS proposes to codify this biometric submission and associated biometric services fee for aliens seeking discretionary employment authorization under the (c)(18) category. *See* proposed 8 CFR 241.4(j)(3).

In addition, DHS also proposes to use the (c)(18) applicant's biometrics to screen for criminal history. DHS has a strong interest in ensuring public safety and preventing aliens with significant criminal histories from obtaining a discretionary benefit. As such, for aliens who fall within the exception provided in this proposed rule and meet the economic necessity requirement, DHS is proposing to consider a (c)(18) applicant's criminal history in determining whether DHS will favorably exercise its discretion to grant an employment authorization. Where criminal history is a factor in the adjudication of an immigration benefit, DHS typically conducts biometric-based screening to independently identify and verify criminal history in addition to reviewing any evidence submitted by the applicant regarding his or her criminal history.[49] As such, DHS would also use the (c)(18) applicant's biometrics to screen against government databases (for example, FBI databases) to determine if he or she matched any criminal activity on file. USCIS will continue to notify applicants of the proper date, time, and location to submit their biometrics after the application for employment authorization has been filed.

Furthermore, DHS proposes to require a biometric services fee of $30 for (c)(18)

[48] *See also* 8 CFR 274a.12(e) which provides that the Federal Poverty Guidelines under Title 45 of the U.S. Code should be used as the criteria to establish eligibility for employment authorization when economic necessity is a factor.

[49] *See* ''DHS/USCIS–018 Immigration Biometric and Background Check System of Records,'' 83 FR 36950 (July 31, 2018).

EAD applicants. *See* proposed 8 CFR 106.2(a)(32(i)(C). DHS requires a biometric services fee of $30 to be collected where the underlying immigration benefit fee does not capture or incorporate biometric service costs.[50] *See* 8 CFR 103.17 & 106.2(a)(32)(i)(A), (B). DHS did not require a biometric services fee for (c)(18) EAD applicants in the 2020 USCIS fee rule because this proposed rule and the USCIS fee rule were under development simultaneously, yet independently of one another. *See* 84 FR 62280–62371 (Nov. 14, 2019). Additionally, (c)(18) EAD applicants do not have an underlying immigration benefit application or petition that they must file into which associated biometric submission and processing costs can be incorporated. Therefore, to recover the cost of biometrics services for (c)(18) EAD applications, DHS must require a biometrics fee for a (c)(18) EAD applicant. Thus, DHS proposes to require a $30 biometric services fee with the Form I–765 for (c)(18) EAD applicants. *See* proposed 8 CFR 106.2(a)(32)(i)(C).

D. Aliens Granted Deferral of Removal Under the Regulations Implementing CAT

Once an alien has been granted withholding or deferral of removal, DHS cannot remove the alien to the country from which removal has been withheld or deferred unless withholding or deferral are terminated under applicable regulatory procedures set out in 8 CFR 208.24, 1208.24, 208.17, 1208.17, or 1208.18(c). The average number of aliens granted CAT deferral of removal over a 5-fiscal-year period was 147, and these numbers have not changed significantly over the last decade.[51] As reflected in Table 8 below, the number of aliens granted CAT deferral from FY 2014 through FY 2018, remains low.

TABLE 8—FY 2014 THROUGH FY 2018 CAT CASES GRANTED *

Fiscal year	CAT deferral of removal
2014	121
2015	121
2016	140
2017	175
2018	177
5-Year Average	147

* U.S. Department of Justice, Executive Office for Immigration Review, Statistical Yearbooks for FY 2014–FY 2018.

Currently, aliens who are not going to be removed because they are granted withholding of removal based on section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT are employment authorized based on the grant of withholding. *See* 8 CFR 274a.12(a)(10). However, DHS's regulations do not clearly indicate the basis for withholding of removal (INA section 241(b)(3) or CAT). DHS has determined that aliens who receive CAT deferral of removal should also be included in the regulatory category governing employment authorization for aliens granted withholding of removal. Aliens granted deferral of removal will be employment authorized based on the grant of deferral, until deferral is terminated under applicable regulations. DHS proposes to amend the regulations to make these clarifications.

E. Effective Date of the Final Rule

With the exception of aliens whose removal DHS has determined is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents, DHS proposes to apply changes made by this rule only to initial and renewal applications under 8 CFR 274a.12(c)(18) filed on or after the effective date of the final rule. DHS proposes to allow aliens temporarily released on orders of supervision who are already employment authorized prior to the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless the card is revoked under 8 CFR 274a.14. USCIS would continue processing any pending application for a replacement EAD received before the effective date and receiving new applications for replacement EADs because those adjudications are not considered a new grant of employment authorization but a replacement of an EAD based on a previously authorized period.

DHS further proposes to allow aliens temporarily released on orders of supervision who are granted discretionary employment authorization after the effective date of the final rule to have their employment authorization renewed only if: (1) DHS determines the alien's removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents, (2) the alien shows economic necessity for employment, (3) the alien is employed by a U.S. employer who is a participant in good standing in E-Verify (renewals only), and (4) the alien establishes that he or she warrants a favorable exercise of discretion to obtain employment authorization. DHS is proposing in this rule that it will consider an E-Verify employer to be a participant in good standing if the employer: (1) Has enrolled in E-Verify with respect to all hiring sites in the United States that employ an alien temporarily released on an order of supervision who has received employment authorization under this rule as of the time of filing of the alien's application for employment authorization, (2) is in compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees at those hiring sites, and (3) continues to be a participant in good standing in E-Verify at any time during which the employer employs an alien temporarily released on an order of supervision who has received employment authorization under this rule.

F. Additional Amendments

Finally, DHS is updating the regulations at 8 CFR 241.4(j)(3), 241.5(a), 241.5(c), and 241.13(h)(1) to remove references to obsolete titles of officials of the former INS, to refer generally to ICE as the DHS component with authority to issue orders of supervision, to reflect USCIS as the agency that grants employment authorization, and include appropriate references. This proposed change gives the Secretary and the Director of ICE the flexibility to delegate authorities within ICE to appropriate component heads, notwithstanding the particular titles that may be assigned to a particular position in the future.[52] *See* proposed 8 CFR

[50] 84 FR 62280, 62302–62303 (Nov. 14, 2019). Explaining how USCIS calculated the biometric services fee of $30 that will be required for certain forms for which it performs biometrics services.

[51] U.S. Department of Justice, Executive Office for Immigration Review, Statistical Yearbooks, FY 2014 through FY 2018 at *https://www.justice.gov/eoir/statistical-year-book.*

[52] After the functions of the former Immigration and Naturalization Service were transferred to the Secretary pursuant to the Homeland Security Act, Public Law 107–296, 441(c) (6 U.S.C. 251(2)), the functions were further delegated to component heads. ICE now has primary authority over all enforcement actions and USCIS has authority over adjudications of immigration benefits, including issuance of employment authorization documents. *See* DHS Delegation No. 7030.2, ''Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement,'' (Nov. 13, 2004); DHS Delegation No. 0150.1, ''Delegation to

Continued

241.4(j)(3), 241.5(a), 241.5(c), and 241.13(h)(1). Additionally, DHS is updating 8 CFR 241.5(a) to include a cross-reference to 8 CFR 241.13(h). This cross reference will clarify that aliens temporarily released on an order of supervision under 8 CFR 241.13(h) are subject to the conditions of release provided in 8 CFR 241.5 and close the loop with the concomitant reference to 8 CFR 241.5 contained within 8 CFR 241.13(h). *See* proposed 8 CFR 241.5(a). DHS will update all of 8 CFR 241 in a future rulemaking to remove additional references to obsolete INS titles consistent with the proposed change made under section 8 CFR 241.5(a).

VI. Statutory and Regulatory Requirements

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a ''significant regulatory action'' that is economically significant since it is estimated the proposed rule likely would have an annual effect on the economy of $100 million or more, under section 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this proposed regulation.

1. Summary

This proposed rule is estimated to result in a reduction in the number of aliens on orders of supervision who are eligible for employment authorization, which could result in lost earnings for those no longer eligible. This loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits or third-party organizations to provide for the alien and any dependents. In addition, DHS estimates increased filing burdens associated with the proposed rule for those who remain eligible for employment authorization. Employers that currently hire alien workers who would no longer be eligible to renew under this rule could experience new costs due to employee turnover or complying with the proposed E-Verify requirement. Finally, the proposed rule may result in a loss of tax revenue.

Under the proposed rule, DHS anticipates there would be six types of economic impacts that DHS can estimate and quantify: (1) Potential lost earnings for alien workers on orders of supervision who may no longer be eligible for employment authorization; (2) increased time burden for applicants to submit forms; (3) added time and costs for applicants to submit biometrics; (4) labor turnover costs that employers of alien workers on orders of supervision could incur when their employees' EADs expire and are not renewed; (5) costs to employers to enroll in and maintain an E-Verify account as a participant in good standing to retain alien workers on orders of supervision applying for renewal EADs; and (6) potential employment tax losses to the Federal Government.

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, 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.[53] The ten-year undiscounted costs would range from $940,239 to $14,722,941,163. DHS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

Table 9 provides a summary of the proposed regulatory changes and the estimated impacts of the proposed rule.

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the Bureau of Citizenship and Immigration Services,'' (June 5, 2003).

[53] DHS estimates some of the costs and benefits of this rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (''Fee Schedule Final Rule''), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See, Immigrant Legal Resource Center* v. *Wolf,* No. 4:20–cv–5883 (N.D. Cal. Sept. 29, 2020). DHS intends to vigorously defend this lawsuit and is not changing the baseline for this rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this rule may reflect understated costs associated with biometrics fees and overstated benefits associated with filing Form I–765.

Table 9: Summary of Impacts and Estimated Cost and Benefits of the Proposed Rule

Provisions	Regulatory Changes	Estimated Impact of Regulatory Change
Amending 8 CFR 241.5	DHS proposes to update the current language of the regulation to reflect that the Secretary of Homeland Security (Secretary) or the Secretary's designee can issue orders of supervision.	This change would give DHS the flexibility to delegate the authorities under the provision without requiring additional rulemaking in the future.
Amending 8 CFR 241.4(j)(3), 8 CFR 241.5(c) and 8 CFR 241.13(h)(1)	DHS proposes to remove language that authorized designated ICE officers to grant employment authorization for aliens temporarily released on orders of supervision. ICE no longer grants employment authorization and USCIS has primary jurisdiction over EAD issuance. DHS proposes to add language regarding the existing requirement for biometrics submission from (c)(18) applicants.	These changes propose to codify current policy and reduce confusion for aliens temporarily released on orders of supervision who apply for employment authorization.
Amending 8 CFR 241.4(j)(3) and 8 CFR 106.2(a)(32)(i)(C)	DHS proposes to add language to codify biometrics submission from (c)(18) applicants. Aliens on orders of supervision applying for initial and renewal (c)(18) employment authorization must submit biometrics at a scheduled biometrics services appointment and pay a $30 fee.	This change would require aliens temporarily released on orders of supervision to submit their biometrics at an ASC. Quantified Impacts Costs for aliens temporarily released on orders of supervision would range from $83,148 to $552,741 with a primary estimate of $317,945 (annualized 7%). Qualitative Benefits Enables DHS to vet an applicant's biometrics against government databases to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production.
Amending 8 CFR 274a.12(a)(10)	DHS proposes to revise the (a)(10) employment authorization category, which currently covers those granted withholding of removal under section 241) of the INA, 8 U.S.C. 1231(b)(3), or the regulations implementing CAT under 8 CFR 208.16 or 1208.16, to include aliens who are granted CAT deferral of removal as employment authorized based solely on the grant of deferral. Aliens granted withholding of removal under INA sec. 241(b)(3) and the regulations implementing CAT currently are employment authorized by virtue of the grant of withholding.	This change proposes to revise current policy to reduce confusion for aliens who are granted CAT and would ensure consistency in adjudication for this population. Quantified Benefits Aliens granted CAT deferral of removal who do not apply for an EAD card would save time and money ranging from $0 to $105,690 annually.
Amending 8 CFR 274a.12(c)(18)	DHS proposes to: • Eliminate eligibility for employment authorization for aliens with final orders of removal who are released from custody on orders of supervision except for those aliens for whom DHS determines their removal is impracticable	Quantified Costs and Transfers • Lost earnings for aliens temporarily released on orders of supervision would range from $614,037,170 to $1,495,358,741 with a primary estimate of $1,054,697,955 (annualized 7%).

	because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents. • Add new discretionary factors USCIS will consider when deciding whether to grant employment authorization including whether: 1. the alien complies with the conditions for release specified in the order of supervision, and 2. the alien has any criminal history, including but not limited to criminal activities subsequent to release from detention; • Add a requirement that alien be employed with an E-Verify employer in good standing, if the alien is seeking renewal of an EAD issued based on an order of supervision; and • Add a requirement that an alien establish economic necessity for employment when filing an initial and renewal EAD application.	• DHS acknowledges that businesses that have hired (c)(18) workers who are no longer eligible for work authorization due to this proposed rule would incur labor turnover costs earlier than without this rule. • If employers are unable to find replacement workers, reduction in federal employment taxes paid would range from $93,947,687 to $228,789,887, with a primary estimate of $161,368,787 (annualized 7%). • Employer costs related to enrolling in E-Verify and maintaining an account would cost $113.65 for new E-Verify participants in the first year and $53.71 in subsequent years with an additional cost of $6.14 per query for every company employee – both citizen and non-citizen. Employer costs related to labor turnover for employers who are not enrolled and opt not to enroll in E-Verify would cost between $7,168 and $15,621 per worker, depending on the wage of their (c)(18) alien worker. DHS emphasizes that the costs of the rule in terms of lost or deferred labor earnings will potentially depend on the extent of surplus labor in the labor market. In the current environment with COVID-19-related layoffs and unemployment, there is the potential that the costs of the rule will be lower than they would otherwise have been. <u>Qualitative Costs and Transfers</u> • Those who are currently employment authorized, but who would no longer qualify for employment authorization under the proposed rule could experience other impacts possibly involving personal and family-related hardships and disruptions to the individual, U.S. citizen, or LPR spouses and/or children dependent on the income currently earned by the affected alien. • Additional unquantified Federal, state, and local income tax revenue also could be lost. • A loss of earnings would result in a transfer of costs from the alien to their support network, including family members, community groups, non-profits, or third-party organizations to provide for the alien and any dependents. <u>Qualitative Benefits</u> • 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 on enforcing removal orders for aliens as well as monitoring and tracking aliens temporarily released on orders of supervision.

8 CFR 274a.13(a)(3)	DHS proposes to: • Add requirements for aliens on orders of supervision seeking initial employment authorization and renewals to include: 1. A copy of the decision by the IJ or DHS of the final order of removal, 2. Form I-765WS to show economic necessity, 3. A copy of their current Order of Supervision, (Form I-220B) with a copy of the complete the Personal Report Record reflecting the alien's compliance with the conditions for release from the date of release. • Add a requirement for aliens on orders of supervision seeking renewal of their employment authorization to also submit their U.S. employer's E-Verify Company Identification number and employer's name as listed in E-Verify.	Quantified Costs • Costs to applicants who submit Forms I-765 and I-765WS, would range from $11,721 to $105,459 with a primary estimate of $58,590 (annualized 7%). Qualitative Benefits • Enables DHS to determine if there is an economic necessity for employment authorization and ensures that aliens on orders of supervision who renew their EAD are having their employment authorization verified by their employer.

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The impacts of reducing the number of aliens temporarily released on orders of supervision that are eligible for EADs include both potential distributional impacts (transfers) and costs. USCIS uses the lost compensation to aliens temporarily released on orders of supervision that are no longer eligible for EADs as a measure of the impact of this change—either as distributional impacts (transfers) from these aliens to others or as a proxy for businesses' cost for lost productivity. If all companies are able to easily find reasonable labor substitutes for the positions the aliens temporarily released on orders of supervision would have otherwise filled, DHS estimates a maximum of $1,495,358,741 (annualized at 7%) would be transferred from these workers to others in the labor force (or induced back into the labor force). Under this scenario, there would be no federal employment tax losses. Conversely, if companies are unable to find reasonable labor substitutes for the position the aliens temporarily released on orders of supervision would have filled then a maximum of $1,495,358,741 (annualized 7%) is the estimated monetized cost of this provision, and $0 is the estimated monetized transfers from these aliens to other workers. In addition, under this scenario where jobs would go unfilled, there would be a loss of employment taxes to the Federal Government. USCIS estimates $228,789,887 (annualized 7%) as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect employment eligibility for aliens temporarily released on orders of supervision. There are other costs of the rule, including E-Verify, biometrics, labor turnover, and additional form burdens. These costs exist under both scenarios described above, and thus $94,868 is the minimum cost of the rule (annualized 7%).

DHS is aware that the outbreak of COVID–19 will likely impact these estimates in the short run.[54] As discussed above, the analysis presents a range of impacts, depending on if companies are able to find replacement labor for the jobs alien workers temporarily released on orders of supervision would have filled. In September 2020, the unemployment rate was 7.9 percent.[55] This is an improvement on April's 14.7 percent which marked the highest rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948).[56] By comparison, the unemployment rate for September 2019 was 3.5%.[57] DHS assumes that during the COVID–19 pandemic, with additional available labor nationally, companies are more likely to find replacement labor for the job the alien on an order of supervision would have filled.[58] Thus, in the short-run during the pandemic and the ensuing economic recovery, the lost compensation to EAD applicants as a result of this rule is likely to mean that the costs of the rule will be lower than they would otherwise have been. DHS notes that although the pandemic is widespread, the severity of its impacts varies by locality. Consequently, it is not clear to what extent the distribution of alien workers temporarily released on orders of supervision overlaps with areas of the country that will be more or less impacted by the COVID–19 pandemic. Accordingly, DHS cannot estimate with

[54] On March 13, 2020, the President declared that the COVID–19 outbreak in the United States constitutes a national emergency. *See* ''Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak,'' available at *https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.*

[55] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_10022020.pdf.*

[56] In April 2020, the unemployment rate increased by 10.3 percentage points to 14.7 percent. Department of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020. Available at: *https://www.bls.gov/news.release/archives/empsit_05082020.pdf.*

[57] Department of Labor, Bureau of Labor Statistics, The Employment Situation—September 2019, Employment Situation Summary Table A. Household data, seasonally adjusted. Available at: *https://www.bls.gov/news.release/archives/empsit_10042019.pdf.*

[58] The Congressional Budget Office estimates the unemployment rate is expected to average close to 14 percent during the second quarter, See: CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021 *https://www.cbo.gov/publication/56335* April 24, 2020.

confidence to what extent the impacts will be transfers instead of costs.

DHS's assumption that all applicants with an EAD are able to obtain employment (discussed in further detail later in the analysis), also does not reflect impacts from the COVID–19 pandemic. It is not clear what level of reductions the pandemic will have on the ability of EAD holders to find jobs (as jobs are less available), or how DHS would estimate such an impact with any precision given available data. Consequently, the ranges projected in this analysis regarding lost compensation are expected to be an overestimate, especially in the short-run. The range of impacts described by the scenarios above, plus the consideration of the other costs, are summarized in Table 10.

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Table 10: Summary of Range of Monetized Annualized Impacts						
Table 10(A): Annualized Impacts at 7%						
Category	**Description**	**Scenario: No Replacement Labor found for Aliens Temporarily Released on Orders of Supervision**		**Scenario: All Aliens Temporarily Released on Orders of Supervision Replaced with Other Workers**		**Primary**
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$614,037,170	$1,495,358,741	$747,679,371
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,947,687	$228,789,887	$0	$0	$114,394,944
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics)	$83,148	$552,741	$83,148	$552,741	$317,945
Forms	Opportunity cost of time (provision: additional time for I-765WS)	$11,721	$105,459	$11,721	$105,459	$58,590
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$614,037,170	$1,495,358,741	$0	$0	$747,679,371
Total Costs		$614,132,038	$1,496,016,941	$94,868	$658,200	$748,055,905

Table 10(B): Annualized Impacts at 3%						
Category	**Description**	**Scenario: No Replacement Labor found for Aliens Temporarily Released on Orders of Supervision**		**Scenario: All Aliens Temporarily Released on Orders of Supervision Replaced with Other Workers**	**Primary**	
		Min	Max	Min	Max	
Transfers						
Compensation	Compensation transferred from aliens temporarily released on orders of supervision to other workers (provisions: remove EAD eligibility)	$0	$0	$608,302,571	$1,482,047,682	$741,023,841
Taxes	Lost employment taxes paid to the Federal Government (provisions: remove EAD eligibility)	$93,070,293	$226,753,295	$0	$0	$113,376,648
Costs						
Biometrics	Opportunity cost of time + fee (provision: require biometrics submission)	$82,732	$549,871	$82,732	$549,871	$316,302
Forms	Opportunity cost of time (provisions: additional time for I-765 + Form I-765WS)	$11,662	$104,912	$11,662	$104,912	$58,287
Lost Productivity	Lost compensation used as a proxy for lost productivity to companies (provisions: remove EAD eligibility)	$608,302,571	$1,482,047,682	$0	$0	$741,023,841
Total Costs		$608,396,966	$1,482,702,465	$94,395	$654,783	$741,398,430

In addition, Table 11 presents the prepared accounting statement, as required by the Office of Management and Budget (OMB) Circular A–4, showing the costs associated with this proposed regulation. Note that under costs, the primary estimates provided in the accounting statement are calculated based the minimum cost from the scenario that all aliens temporarily released on orders of supervision are replaced with other workers and the maximum cost from the scenario that no aliens temporarily released on orders of supervision are replaced with other workers (scenario presented in Tables 10(A) and (B)).

Table 11. OMB A-4 Accounting Statement ($, 2020)
Period of analysis: 2020 – 2029

Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation (RIA, preamble, etc.)
BENEFITS				
Monetized Benefits	This proposed rule would produce some benefits for aliens who are granted CAT deferral of removal, as this population would no longer need to submit Form I-765 in order to become employment authorized. DHS estimates the total benefits for this population would range from $0 to $105,690 annually.			RIA
Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	This proposed rule may allow U.S. workers to have a better chance of obtaining jobs that some (c)(18) alien workers currently hold. Additionally, the proposed rule may reduce the incentive for aliens to remain in the United States after receiving a final order of removal, which could save government resources expended on enforcing removal orders for such aliens.			RIA
COSTS				
Annualized monetized costs (discount rate in parenthesis)	(7%) $748,055,905	$94,868	$1,496,016,941	RIA
	(3%) $741,398,430	$94,395	$1,482,702,465	RIA
Annualized quantified, but un-monetized, costs	N/A	N/A	N/A	RIA
Qualitative (unquantified) costs	In cases where employers cannot find reasonable substitutes for the labor the aliens on orders of supervision would have provided, affected employers could also lose profits from lost productivity. In all cases, employers would incur opportunity costs by having to choose the next best alternative to immediately filling the job the alien who was temporarily released on an order of supervision would have filled. Employers may incur additional opportunity costs such as search costs and costs to enroll and participate in the E-Verify program should they choose to retain their eligible (c)(18) workers.			RIA
TRANSFERS				
Annualized monetized transfers: compensation	(7%) $747,679,371	$0	$1,495,358,741	RIA
	(3%) $741,023,841	$0	$1,482,047,682	
From whom to whom?	From employment authorized workers with orders of supervision to other available workers.			RIA

Annualized monetized transfers: "off-budget"	(7%)	$114,394,944	$0	$228,789,887	RIA
	(3%)	$113,376,648	$0	$226,753,295	
From whom to whom?	A reduction in federal employment taxes from employers and employees to the Federal Government. Additional unquantified Federal, state, and local income tax revenue also could be lost.				
Category	***Effects***				***Source Citation (RIA, preamble, etc.)***
Effects on State, local, and/or tribal governments	DHS cannot determine the number of (c)(18) alien workers who could be removed from the labor force due to the proposed rule. Federal, state, and local income tax revenue also may be reduced. For the (c)(18) alien population that will not be able to renew their EAD or obtain an initial EAD, there would likely be an impact in terms of lost income which could pose economic hardships. Members of this population may need to rely on their support networks for financial and social assistance, which could involve, but which may not be limited to, family members and friends, religious and charitable organizations, private non-profit providers, and non-governmental organizations (NGOs).				RIA
Effects 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.				RFA
Effects on wages	None.				RIA
Effects on growth	None.				RIA

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The benefits potentially realized by the proposed rule are both qualitative and quantitative. Under this proposed rule, a U.S. worker may have a better chance of obtaining jobs that some (c)(18) alien workers currently hold, as the proposal would reduce employment authorization eligibility for this population of aliens who have been ordered removed from the country. 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. Third, DHS clarifies that aliens granted CAT deferral of removal would no longer need to submit Form I–765 in order to become employment authorized after the effective date of the final rule. DHS estimates the total benefits for this population would range from $0 to $105,690 annually. Additional savings could also be accrued in the form of opportunity costs of time if applicants would have spent time submitting evidence under any of the (c)(18) considerations.

2. Background and Purpose of the Proposed Rule

ICE works to remove aliens subject to a final order of removal from the United States promptly. Removal operations require integrated coordination, management, and facilitation efforts. The removal of aliens subject to final orders of removal is a national security priority for the United States, highlighted by E.O. 13768, ''Enhancing Public Safety in the Interior of the United States'' (Jan. 25, 2017).

By law, DHS is required to remove or release a detained alien ordered removed within a period of 90 days (''removal period'') after the issuance of a final order of removal.[59] Furthermore, the law expressly prohibits DHS from releasing an alien during the removal period if the alien was ordered removed based on criminal grounds and/or terrorist activities.[60]

For aliens detained beyond the removal period, DHS must comply with the U.S. Supreme Court's decision in *Zadvydas*[61] which held that an alien with a final order of removal cannot be kept in detention (unless special circumstances exist) once it has been determined that there is not a ''significant likelihood of removal in the reasonably foreseeable future.''[62] The Court established 6 months as the ''presumptively reasonable period of detention.'' After the 6-month period, ''once the alien provides good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future, the Government must have sufficient evidence to rebut that showing.''[63]

Aliens with final orders of removal who are released from ICE custody under INA section 241(a)(3) are subject to supervision.[64] The supervision is

[59] INA sec. 241(a)(1). The 90-day period is extended if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent removal.

[60] INA sec. 241(a)(2).

[61] 533 U.S. 678 (2001).

[62] *Id.*

[63] *Id.* at 701; *see also* 8 CFR 241.13(d).

[64] INA sec. 241(a)(3). When releasing an alien ordered removed on an order of supervision, ICE is not necessarily making a determination that all applicable foreign countries are refusing to accept the alien. ICE's efforts to repatriate are always ongoing and even after an alien is temporarily released on an order of supervision the foreign government could very well comply with repatriation efforts which would allow ICE to immediately take the alien back into custody and remove the alien from the United States.

effectuated through ICE Form I–220B, Order of Supervision. Conditions for release typically include regular check-ins with ICE, making good faith efforts to obtain travel documents and travel arrangements, not associating with gangs, criminals, or engaging in criminal activity, and participating in requisite rehabilitative treatment programs.

DHS currently extends eligibility for employment authorization to aliens, also known as the (c)(18) category, who have been ordered removed and have been temporarily released from custody under INA section 241(a)(3), 8 U.S.C. 1231(a)(3), on an order of supervision. *See* 8 CFR 241.5(c), 274a.12(c)(18). In order for such aliens to obtain employment authorization, they must file a Form I–765 accompanied by required documentation and the proper fee. Required documentation for Form I–765 includes a copy of the order of removal and the order of supervision. USCIS would require aliens temporarily released on an order of supervision to submit biometrics and pay the associated $85 fee as part of their initial or renewal EAD application. If USCIS approves the alien's Form I–765 under the (c)(18) category, it is valid for 1 year,[65] and USCIS mails an EAD according to the mailing preferences indicated by the applicant. To renew an alien's employment authorization under the (c)(18) category, an alien must file Form I–765, accompanied by required documentation, biometrics and the proper fees, to demonstrate that they remain on an order of supervision and continue to comply with it. USCIS may, at discretion, deny an application regardless of eligibility. If USCIS denies the Form I–765 application, the agency sends a written notice to the applicant explaining the basis for denial.

As explained in detail in the preamble, DHS has determined that employment authorization should be limited to a subset of aliens ordered removed and temporarily released on orders of supervision to better align with the DHS enforcement mission and the Administration's current immigration enforcement priorities, including those outlined in E.O. 13768, and efforts to strengthen protections of U.S. workers. Therefore, DHS proposes to amend 8 CFR 274a.12(c)(18) to eliminate eligibility for employment authorization for aliens temporarily released on orders of supervision unless DHS has determined that the alien's removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue a travel document.

Further, DHS intends to require aliens who qualify under this exception to establish an economic necessity for employment during the period they are on orders of supervision and expand the current lists of factors it considers as a matter of discretion when adjudicating an application for employment authorization from aliens on orders of supervision to include the alien's compliance with the conditions for release, and the alien's criminal history, including but not limited to any criminal arrests, charges, or convictions subsequent to the alien's release on an order of supervision.

Meanwhile, under proposed 8 CFR 274a.12(a)(10), aliens who have received a grant of CAT deferral of removal, as described in 8 CFR 208.17 and 1208.17, would be eligible for an EAD based solely on the grant of deferral, similar to aliens who are granted withholding of removal based on INA 241(b)(3), 8 U.S.C. 1231(b)(3), or the regulations implementing CAT. Aliens who fall under the 8 CFR 274a.12(a)(10) are not subject to requirements to apply to DHS to obtain employment authorization before they can begin work. However, the alien is required to apply (*i.e.,* submit Form I–765) in order to receive a physical EAD if they want a document evidencing their employment authorization pursuant to their grant of withholding or deferral. Currently, aliens granted CAT deferral of removal are required to apply for an EAD under the (c)(18) category. Upon the effective date of the final rule, these aliens would no longer be required to meet the requirements of the (c)(18) category or pay the initial $410 application fee for employment authorization since they would be able to apply for an EAD under the (a)(10) category, which is fee exempt for initial applicants. However, if these aliens want a physical EAD card as evidence of their employment authorization they would need to submit Form I–765.

Additionally, USCIS proposes to amend regulations at 8 CFR 274a.12(c)(18) and 274a.13(a) to require renewal applicants be employed by an E-Verify employer, to clarify the application and evidentiary requirements for such aliens seeking initial and renewal employment authorization under the (c)(18) category, and to codify the validity period of a (c)(18) EAD. *See* proposed 8 CFR 274a.12(c)(18)(iii) and 274a.13(a)(3)(ii). Under the proposed rule, a renewal EAD would only be granted to those applicants eligible for an EAD under the proposed exception and who establish that they are employed by a U.S. employer that is a participant in good standing in DHS's employment eligibility verification system (E-Verify) by providing their U.S. employer's E-Verify Company Identification Number and employer's name as listed in E-Verify. Renewal applications for aliens who cannot establish that they are employed by an E-Verify employer would be denied and fees would not be returned.

DHS proposes to apply changes made by this rule only to initial and renewal applications under 8 CFR 274a.12(c)(18) filed on or after the effective date of the final rule. DHS proposes to allow aliens temporarily released on orders of supervision who are already employment authorized prior to the final rule's effective date to remain employment authorized until the expiration date on their EAD, unless the card is revoked under 8 CFR 274a.14. USCIS would continue processing any pending application for a replacement EAD received before the effective date and receiving new applications for replacement EADs because such adjudications are not considered a new grant of employment authorization but a replacement of an EAD based on a previously authorized period.

3. Population

The populations that could be affected by this proposed rule consist of work-authorized aliens who have final orders of removal but who are temporarily released from custody on an order of supervision and aliens granted CAT deferral of removal. DHS estimates the affected population based on historical data for FY 2010 to FY 2019.

Eligibility for Employment Authorization for Aliens on Orders of Supervision

Table 12 shows the annual receipts and approvals for initial and renewal applications of employment authorization for aliens temporarily released on an order of supervision using Form I–765 for FY 2010 to FY 2019.[66]

[65] All initial and renewal EADs issued under the (c)(18) category are currently valid for one year upon issuance. Replacement EAD cards are issued for the same dates as the previous card which would have had a validity period of one year.

[66] This data was provided by the USCIS Office of Performance and Quality (OPQ) and can be found online at *https://www.uscis.gov/sites/default/files/document/data/I-765_Application_for_Employment_FY03-19.pdf.* Note that replacement filings and pending counts are not presented because they would not be impacted by the proposed rule and are thus immaterial to the analysis.

TABLE 12—TOTAL ANNUAL FORM I–765 RECEIPTS AND APPROVALS FOR ALIENS TEMPORARILY RELEASED ON ORDERS OF SUPERVISION, FY 2010 TO FY 2019

Fiscal year	Initial		Renewal	
	Receipts	Approvals	Receipts	Approvals
2010	6,420	5,559	9,328	8,297
2011	6,827	5,906	12,361	11,765
2012	8,446	7,719	14,242	13,730
2013	9,163	7,091	17,316	15,119
2014	10,658	8,681	19,427	17,441
2015	9,628	8,748	22,801	21,236
2016	8,665	7,499	26,102	24,464
2017	6,235	5,273	26,332	21,274
2018	4,408	3,433	20,640	20,151
2019	5,697	4,071	19,306	*21,350

*The number of approved applications for renewal EADs in FY 2019 exceed the number of receipts since some renewal EAD applications were received in a previous fiscal year.

The number of initial approved employment authorizations increased from 5,559 in FY 2010 to 8,748 in FY 2015, then declined to 3,433 in FY 2018 before increasing to 4,071 in FY 2019. The number of renewal approvals increased from 8,297 in FY 2010 to 24,464 in FY 2016 before decreasing to about 21,000 renewal approvals annually from FY 2017 to FY 2019. Although DHS estimates this proposed rule would reduce the number of aliens eligible for employment authorization and anticipates a decline in (c)(18) receipts and approvals for both initial and renewals, DHS is unable to determine the magnitude of decline for reasons discussed further in this analysis.

In order to project future growth in the number of initial receipts and approvals, this analysis uses the 10-year annual percentage growth rates of −1.2 percent for initial receipts (Table 13).[67] DHS recognizes that the 5-year annual percentage growth rate also shows a decline (−10.0 percent).[68] For this analysis, DHS chooses the more conservative projection of initial receipts by using the 10-year annual percentage growth rate (−1.2 percent). By choosing the 10-year annual percentage growth rate, the projection (or baseline) will be higher for initial receipts which will lead to a greater range of potential cost estimates.

TABLE 13—ANNUAL PERCENTAGE GROWTH RATES OF RECEIPTS

Fiscal years	Initial	Renewal
2015–2019	−10.0	−3.3
2010–2019	−1.2	7.5

Source: USCIS analysis.

To project the number of renewal receipts, DHS also considered the 5- and 10-year annual percentage growth rates. Table 13 shows the 5-year annual percentage growth rate in the number of renewal receipts is −3.3 percent and the 10-year annual percentage growth rate is 7.5 percent.[69] Similar to the growth rates for the initial receipts, renewal receipts have a negative annual percentage growth rates over the 5-year period.

To project renewal receipts going forward, DHS acknowledges that aliens temporarily released on orders of supervision have removal orders and are continually being deported from the United States on an ongoing basis. Additionally, the declining growth rates for initial receipts would, at some point, result in either a plateau or a decrease for renewal receipts. Therefore, we do not find it reasonable to use the 10-year annual percentage growth rate of 7.5 percent to project renewal receipts. Therefore, this analysis uses the 5-year annual percentage growth rate of −3.3 percent to project a decline in the number of renewal receipts.

In order to estimate initial and renewal approvals, DHS recognizes that approvals have generally moved in line with receipts.[70] DHS recognizes that the number of approvals could occasionally differ from or lag receipts, but over time we would expect approvals to mostly move in line with receipts. Over the 10-year period from FY 2010 to FY 2019, the average initial approval rate was approximately 84 percent of initial receipts and the average renewal approval rate was approximately 93 percent of renewal receipts.[71]

To project FY 2020 initial receipts, the 10-year annual percentage growth rate of −1.2 percent (Table 13) is multiplied by the number of initial receipts from FY 2019, 5,697 (Table 12), which equals −68 (rounded). Subtracting 68 from 5,697 equals 5,629 (Table 14). The FY 2020 initial approvals are calculated by multiplying the 10-year average initial approval rate of 84 percent by the estimated number

[67] Calculation: (((FY 2019 Initial Receipts 5,697/FY 2010 Initial Receipts 6,420) ^ (1/10)) − 1) * 100 = −1.2 percent.

[68] Calculation: (((FY 2019 Initial Receipts 5,697/FY 2015 Initial Receipts 9,628) ^ (⅕)) − 1) * 100 = −10.0 percent.

[69] Calculations:

(((FY 2019 Renewal Receipts 19,306/FY 2015 Renewal Receipts 22,801) ^ (⅕)) − 1) * 100 = −3.3 percent.

(((FY 2019 Renewal Receipts 19,306/FY 2010 Renewal Receipts 9,328) ^ (1/10)) − 1) * 100 = 7.5 percent.

[70] Exceptions for initials include FY 2013 when initial approvals declined while initial receipts increased; exceptions for renewals include FY 2017 when renewal receipts increased slightly while renewal approvals declined and FY 2019 when the number of renewal approvals exceeded the number of renewal receipts received.

[71] Calculations:

(6,398 (initial approvals 10-year average)/7,615 (initial receipts 10-year average)) × 100 = 84 percent (rounded).

(17,483 (renewal approvals 10-year average)/18,786 (renewal receipts 10-year average)) × 100 = 93 percent (rounded).

of initial receipts from FY 2020, 5,629, which equals 4,728 (rounded).[72] The FY 2019 renewal receipts, 19,306, is multiplied by the 5-year annual percentage growth rate of −3.3 to get −637 (rounded).[73] Subtracting 637 from the FY 2019 renewal receipts equals 18,669. The 18,669 is then multiplied by the 10-year average renewal approval rate of 93 percent, which equals 17,362 (rounded) to get the FY 2020 renewal approvals.[74] To project receipts for FY 2021, the same process was repeated using the calculated FY 2020 numbers in place of those from FY 2019. Approvals were then calculated based on the projected receipts for FY 2021. The process was then repeated for subsequent years. These projections are shown in Table 14 and are used as the baseline for this rule.

TABLE 14—PROJECTED TOTAL ANNUAL FORM I–765 RECEIPTS AND APPROVALS FOR ALIENS TEMPORARILY RELEASED ON ORDERS OF SUPERVISION, FYS 2020 TO 2029

Fiscal year	Initial		Renewal	
	Receipts	Approvals	Receipts	Approvals
2020	5,629	4,728	18,669	17,362
2021	5,561	4,671	18,053	16,789
2022	5,494	4,615	17,457	16,235
2023	5,428	4,560	16,881	15,699
2024	5,363	4,505	16,324	15,181
2025	5,299	4,451	15,785	14,680
2026	5,235	4,398	15,264	14,196
2027	5,173	4,345	14,761	13,727
2028	5,110	4,293	14,274	13,274
2029	5,049	4,241	13,802	12,836

Source: USCIS analysis.

This proposed rule would eliminate the eligibility for employment authorization for aliens temporarily released on orders of supervision with one exception. The exception is for aliens for whom DHS has determined removal is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents. In order to estimate the number of aliens whose removal is impracticable for the reason stated, USCIS obtained data from ICE on the number of aliens released from custody who have been unable to obtain travel documents over the last 5 fiscal years. Table 15 shows the number of aliens temporarily released on orders of supervision denied a travel document in the corresponding fiscal year. DHS estimates this proposed rule would result in fewer aliens temporarily released on orders of supervision who are eligible for employment authorization and would result in a maximum of 459 aliens remaining eligible for an employment authorization under the exception.

TABLE 15—ALIENS RELEASED FROM ICE CUSTODY, UNABLE TO OBTAIN TRAVEL DOCUMENTS, FY 2015 TO FY 2019

Fiscal year	Total
2015	369
2016	411
2017	324
2018	530
2019	659
5-year Average	459

Source: DHS–ICE ERO, LESA Statistical Tracking Unit.

As noted in the preamble, DHS is proposing to consider the alien's criminal history, including but not limited to criminal activities subsequent to his or her release on an order of supervision in determining whether the alien warrants DHS's favorable exercise of discretion to obtain an EAD. While there are aliens with an order of supervision who are known convicted criminals, DHS is unable to precisely estimate the number of aliens that could potentially be denied an EAD as a matter of discretion should this proposed rule be promulgated as a final rule. DHS is proposing to expressly consider the alien's criminal history as a factor in determining whether the alien warrants a favorable exercise of discretion in granting an EAD. The discretionary analysis is case specific and typically assessed after an officer has determined that the alien meets all applicable threshold eligibility requirements. It involves the review of all relevant, specific facts and circumstances in an individual case and weighing all the positive factors present in a particular case against any negative factors in the totality of the record. Further, DHS does not know the number of excepted aliens that would be denied as a matter of discretion because of subsequent criminal convictions. For these reasons, we cannot estimate how many aliens would be denied as a matter of discretion based on criminal history.

Aliens Granted CAT Deferral of Removal

DHS also proposes to revise the (a)(10) employment authorization category to include aliens who are granted CAT deferral of removal as employment authorized based solely on the grant of deferral. Table 16 shows the number of CAT cases granted deferral of removal for FY 2014 to FY 2018.[75] Since FY 2015, the number of CAT cases granted deferral of removal has trended upward reaching a high of 177 cases in FY 2018. The 5-year average number of cases is approximately 147.

[72] Calculation: 5,629 (FY 2020 estimated initial receipts) × 84 percent = 4,728 estimated FY 2020 initial approvals.

[73] Calculation: FY 2019 renewal receipts 19,306 × 5-year annual percentage growth rate −0.033 = −637.

[74] Calculation: 18,669 (FY 2020 estimated renewal receipts) × 93 percent = 17,362 estimated FY 2020 renewal approvals.

[75] The Department of Justice Statistics Yearbook website was last updated on August 30, 2019 with FY 2018 data. The analysis will be updated with FY 2019 when it becomes available.

TABLE 16—CASES GRANTED CAT DEFERRAL OF REMOVAL, FY 2014–FY 2018

Fiscal year	Cases
2014	121
2015	121
2016	140
2017	175
2018	177
5-year average	147

Source: Department of Justice Statistics Yearbook, *https://www.justice.gov/eoir/statistical-year-book.*

The population of aliens who have been granted deferral of removal based on the regulations implementing CAT are currently regulated to apply for employment authorization under the (c)(18) category. Currently, USCIS does not have a breakout for the number of aliens who have been granted CAT deferral of removal who have applied or been approved for an initial or renewal EAD. Under the proposed rule, this population would be employment authorized based solely on such a grant and would only need to apply for the physical EAD card under the (a)(10) category if they want a document evidencing their employment authorization pursuant to the grant of deferral of removal.

Estimated Eligible Employment Authorizations

Based on the exception (459) and the grant of CAT deferral of removal exception (147), DHS estimates an upper bound estimate for initial (c)(18) EAD approvals that would remain eligible for employment authorization under this rule in the future is 606 annually. DHS recognizes this upper bound estimate does not take into account the number of aliens who would no longer be eligible due to subsequent convictions. DHS also does not know how many of these aliens would be eligible or ineligible under the economic necessity requirement or the number that would apply for or be denied for other considerations, such as the alien's compliance with their order of supervision conditions, and the alien's criminal history, including but not limited to any criminal arrests, charges, or convictions subsequent to the alien's release from custody on an order of supervision. DHS recognizes that if any of the 459 potential approvals who may fall under the exception do not apply for work authorization or are denied employment authorization that the upper bound of 606 would be an overestimate. Thus, we use an upper bound estimate of 606 assuming 100 percent of aliens temporarily released on orders of supervision who have been unable to obtain travel documents would remain employment eligible under this rule, because choosing any other upper bound would be speculative (Table 17(B) column A). We use a lower bound estimate of 147 (Table 17(A) column A) since all aliens who are granted CAT deferral of removal would continue to be employment authorized. These upper and lower bound initial receipts estimates are applied, unchanged, into the future. Although initial receipts overall have been declining (Table 12), the upper and lower bounds depend on the average number of aliens released from ICE custody who are unable to obtain travel documents and aliens granted CAT deferral of removal, both of which have experienced periods of stability and growth over their respective five-year periods of analysis (Tables 15 and 16). For this analysis, DHS relies on the five-year averages for these populations as there are various factors outside of this rulemaking may result in a decline or rise of in the number of aliens identified as unable to obtain travel documents or granted CAT deferral of removal. However, DHS cannot predict with certainty at this time if the trend in the size of these populations would increase, decrease, or remain stable. Therefore, DHS uses the respective 5-year averages for this analysis.

DHS estimates that the lower bound share of initial EADs under the baseline that would continue to be eligible for renewal under this proposed rule ranges from 3.1 percent in FY 2020 to 3.5 percent in FY 2029 (Table 17(A) column C).[76] Under the assumption that the same share of initial approvals would be eligible as renewals, we multiply the renewal receipt and approval populations by these percentages to obtain the corresponding lower bound renewal EAD estimates for each fiscal year (Table 17(A) columns E and G). Further, the upper bound is also estimated assuming that the same share of initial approvals would be eligible as renewals. Table 17(B) repeats the estimates for the upper bound populations for initials and renewals.

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[76] Calculations: For example, for FY2020—(147 estimated lower bound/4,728 projected number of initial approvals) × 100 = 3.1 percent (rounded). 147 estimated upper bound/4,241 projected number of initial approvals) × 100 = 3.5 percent (rounded).

Table 17: Number of Eligible Employment Authorizations under Orders of Supervision Under this Proposed Rule, FYs 2020 to 2029

Table 17(A): Lower Bound

Fiscal Year	Initial			Renewal			
	Estimated Approvals Under this Rule	Projected Approvals Under the Baseline	Share (%)	Projected Receipts Under the Baseline	Estimated Receipts Under this Rule	Projected Approvals Under the Baseline	Estimated Approvals Under this Rule
	A	B	C = A / B	D	E = C x D	F	G = C x F
2020	147	4,728	3.1%	18,669	579	17,362	538
2021	147	4,671	3.1%	18,053	560	16,789	520
2022	147	4,615	3.2%	17,457	559	16,235	520
2023	147	4,560	3.2%	16,881	540	15,699	502
2024	147	4,505	3.3%	16,324	539	15,181	501
2025	147	4,451	3.3%	15,785	521	14,680	484
2026	147	4,398	3.3%	15,264	504	14,196	468
2027	147	4,345	3.4%	14,761	502	13,727	467
2028	147	4,293	3.4%	14,274	485	13,274	451
2029	147	4,241	3.5%	13,802	483	12,836	449

Table 17(B): Upper Bound

Fiscal Year	Initial			Renewal			
	Estimated Approvals Under this Rule	Projected Approvals Under the Baseline	Share (%)	Projected Receipts Under the Baseline	Estimated Receipts Under this Rule	Projected Approvals Under the Baseline	Estimated Approvals Under this Rule
	A	B	C = A / B	D	E = C x D	F	G = C x F
2020	606	4,728	12.8%	18,669	2,390	17,362	2,222
2021	606	4,671	13.0%	18,053	2,347	16,789	2,183
2022	606	4,615	13.1%	17,457	2,287	16,235	2,127
2023	606	4,560	13.3%	16,881	2,245	15,699	2,088
2024	606	4,505	13.5%	16,324	2,204	15,181	2,049
2025	606	4,451	13.6%	15,785	2,147	14,680	1,996
2026	606	4,398	13.8%	15,264	2,106	14,196	1,959
2027	606	4,345	13.9%	14,761	2,052	13,727	1,908
2028	606	4,293	14.1%	14,274	2,013	13,274	1,872
2029	606	4,241	14.3%	13,802	1,974	12,836	1,836

Source: USCIS Analysis

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DHS recognizes that the projected lower bound range of 449 to 538 for renewal approvals may not fully account for the number of aliens who would no longer be eligible for employment authorization due to the proposed E-Verify requirement if their employers are not enrolled and opt not to enroll in E-Verify, and if they are unable to find alternative employment with an E-Verify employer. Some renewal applicants may also not be currently employed and therefore would not meet the new requirements for renewal. Additionally, DHS does not know how many of these aliens would be eligible under the economic necessity requirement or determined not to warrant employment authorization as a matter of discretion due to subsequent convictions. DHS recognizes that if any of the estimated range of 449 to 538 renewal receipts do not apply for employment authorization or are denied employment authorization that this lower bound could be even lower.

Renewal Applicants for Employment Authorization—E-Verify

DHS proposes to allow aliens on orders of supervision who are granted employment authorization after the effective date of the final rule to have their employment authorization renewed only if they meet the exception and they establish that they are employed by a U.S. employer who is a participant in good standing in DHS's employment eligibility verification system (E-Verify) by providing their U.S. employer's E-Verify Company Identification Number and the employer's name as listed in E-Verify.

Since this rule proposes to eliminate eligibility for employment authorization for aliens temporarily released on orders of supervision, the impact on the renewal population would depend on which aliens remain eligible and if the alien's employer already participates in E-Verify or would be willing to enroll and participate in E-Verify if the employer is not enrolled. Because of the uncertainty regarding eligibility, DHS is unable to estimate a range for the renewal population that would be impacted by this provision and attempting to do so would be speculative. However, DHS acknowledges there would be renewal applicants who would be impacted by this provision.

Employer Population

DHS recognizes that this proposed rule would impact employers who currently, or will in the future, employ (c)(18) alien workers. However, DHS cannot precisely estimate the number of employers that could incur costs because (c)(18) employment authorization is considered to be ''open market,'' where alien workers are not tied to a specific employer. Such employment also does not require a Labor Condition Application (LCA) or a Temporary Labor Certification (TLC) from the U.S. Department of Labor (DOL), or other employer data at any point in the EAD process (initial, renewal, or replacement stage). DHS recognizes that many factors influence whether an employer participates in the E-Verify program. While E-Verify is a free, voluntary program, some employers are required to enroll in the program as a condition of federal contracting, or as a requirement of state legislation or other applicable laws. However, DHS cannot predict the number of employers who would use E-Verify or how many would experience labor turnover due to this proposed rule. Further, DHS does not know the number of employers that would choose to enroll in E-Verify to retain their (c)(18) renewal alien employees or the overall number of employees for whom these entities would create an E-Verify case, should they enroll. DHS is also unable to determine the number of employers whose (c)(18) alien employees would remain employment eligible as a result of this proposed rule. DHS welcomes public comment or data on employers who enroll in the E-Verify program to retain (c)(18) alien renewal employees as well as the overall number of employees for whom employers would create E-Verify cases, should they enroll employees. DHS notes that this provision may act as a barrier to a company hiring or continuing to employ a (c)(18) employment authorized alien should the company make the choice to not enroll in E-Verify. Such barriers contribute to the cost calculation of this rule by increasing the potential for turnover costs incurred by U.S. businesses—even in situations where a (c)(18) employee remains employment authorized.

4. Transfers, Costs and Benefits of the Proposed Rule

Transfers and Costs

This section presents the costs and benefits associated with the proposed rule. The impacts of the proposed provisions are estimated in comparison with a baseline that assumes no proposed action will be implemented.

Proposal Regarding EAD Eligibility

DHS anticipates that revising eligibility and introducing new evidentiary requirements for (c)(18) EADs could have several impacts, including potential lost earnings to alien workers temporarily released on an order of supervision after receiving a final order of removal, the cost associated with an increase of a 30 minute time burden to complete Form I–765, as well as the costs of filing an additional form (Form I–765WS) and submitting biometrics.

The proposed rule is estimated to result in a reduction in the number of aliens temporarily released from custody on an order of supervision that are eligible for EADs. The impacts of reducing the number of aliens temporarily released on orders of supervision that are eligible for EADs include both potential distributional impacts (transfers) and costs. USCIS uses lost compensation to aliens temporarily released on an order of supervision that are no longer eligible for EADs as a measure of the impact of this change—either as distributional impacts (transfers) from these aliens to others or as a proxy for businesses' cost for lost productivity.

Companies may incur opportunity costs by having to choose the next best alternative to filling a job an alien temporarily released on orders of supervision would have filled. DHS is unable to determine what an employer's next best alternative may be for those companies. As a result, DHS does not know the portion of overall impacts of this rule that are transfers or costs. If companies can find replacement labor for the positions the aliens temporarily released on orders of supervision would have filled, removing EAD eligibility for these aliens would result in primarily distributional effects in the form of transfers from aliens temporarily released on orders of supervision to others that are currently in the U.S. labor force (or workers induced to return to the labor market), possibly in the form of additional work hours or overtime pay. DHS acknowledges that there may be additional opportunity costs to employers such as additional costs associated with searching for new employees. If companies 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 primarily result in costs to those companies through lost productivity and profits.

DHS has no information on wages or occupations of alien workers temporarily released on orders of supervision, at the initial or renewal stage, since these alien workers obtain an open-market EAD that does not include or require any data on their employment.

The federal minimum wage is currently $7.25.[77] The use of the federal minimum wage is grounded in the notion that most of the relevant EAD holders would not have been in the labor force long and would thus not be expected to earn relatively high wages. However, in this proposed rulemaking, we rely on the ''effective'' minimum wage of $11.80. As is reported by The New York Times ''[t]wenty-nine states and the District of Columbia have state-level minimum hourly wages higher than the federal [minimum wage],'' as do many city and county governments. This analysis in The New York Times estimates that ''the effective minimum

[77] *See* 29 U.S.C. 206—Minimum wage, *available at https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8-sec206.htm* (accessed May 19, 2020). *See also* U.S. Department of Labor, Wage and Hour Division. The minimum wage in effect as of May 19, 2020. Available at *https://www.dol.gov/general/topic/wages/minimumwage.*

wage in the United States . . . [was] $11.80 an hour in 2019.'' [78] DHS accounts for worker benefits by calculating a benefits-to-wage multiplier using the most recent DOL, Bureau of Labor Statistics (BLS) report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance, and retirement, etc.[79] Although the federal minimum wage could be considered a lower bound income for the population of interest, DHS calculates the total rate of compensation for the effective minimum hourly wage is $17.23, which is 62.7 percent higher than the federal minimum wage.[80]

DHS does not rule out the possibility that some portion of the population might earn the average wage for all occupations, but without empirical information, DHS believes that including a range with the lower bound relying on the effective minimum wage is justifiable. Therefore, this analysis uses both the effective minimum hourly wage rate of $11.80 to estimate a lower bound and an average wage rate for all occupations of $25.72 as an upper bound in consideration of the variance in average wages across states.[81] Therefore, DHS calculates the average total rate of compensation for all occupations as $37.55 per hour, where the mean hourly wage is $25.72 per hour worked and average benefits are $11.83 per hour.[82] All of the quantified estimates of costs and transfer payments in this analysis incorporate lower and upper bound ranges based on the effective minimum hourly wage and the average hourly wage across all occupations.

Estimated impacts in this analysis include lost potential earnings to applicants. Since the current validity period of a (c)(18) EAD is up to one year, DHS multiplied the total rate of compensation using the average effective minimum hourly wage rate of $17.23 and the average hourly wage rate across all occupations of $37.55 by 2,080 hours, the typical annual number of work hours, to estimate the annual earnings of $35,838 and $78,106, respectively, for each applicant.[83] Table 18 shows the two population ranges for initial and renewal approvals for the two ranges of wage estimates for aliens temporarily released on orders of supervision and the corresponding potential lost earnings. Table 18(A) shows cost estimates for the lower and upper bound range of initial EAD approvals based on the lower bound wage annual earnings of $35,838. The total earnings for each population under the rule based on the projections developed in the ''Population'' section are reported in Columns B, D and F. Columns G and H present the potential lost earnings, by subtracting, from the current baseline (column F), the potential earnings from rule populations (columns B and D). Similarly, Table 18(B) repeats the estimates for the lower and upper bound range of initial EAD approvals based on the upper bound (average) wage annual earnings of $78,106. Tables 18(C) and 18(D) repeat the estimates from Table 18(A) and 18(B) for the lower and upper bound ranges of renewal EAD approvals based on the lower and upper bound wage annual earnings, respectively.

[78] ''Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)'' Ernie Tedeschi, The New York Times, April 24, 2019. Accessed at *https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html* (last visited August 21, 2020).

[79] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $37.10/$25.47 = 1.458 = 1.46 (rounded). See Economic News Release, *Employer Cost for Employee Compensation (March 2020),* U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. March 19, 2020, available at *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (last visited March 24, 2020).

[80] Calculations (1) for effective minimum wage: $11.80 hourly wage × benefits burden of 1.46 = $17.23; (2) (($17.23 wage − $10.59 wage)/$10.59)) wage = 0.627, which rounded and multiplied by 100 = 62.7 percent.

[81] The average wage for all occupations is found Department of Labor, Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates. The data is found at: *https://www.bls.gov/oes/2019/may/oes_nat.htm#00-0000* (last visited March 19, 2020).

[82] The calculation of the weighted mean hourly wage for applicants: $25.72 per hour × 1.46 = $37.5512 = $37.55 (rounded) per hour.

[83] Calculations: 2,080 typical annual work hours × $17.23 the total rate of compensation using the average state minimum wage = $35,838 (rounded). 2,080 typical annual work hours × $37.55 the total rate of compensation using the average wage = $78,106 (rounded).

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Table 18: Wage Estimates for Aliens on Orders of Supervision and Potential Lost Earnings, FYs 2020 to 2029

Table 18(A): Initial Approvals, Lower Bound Wage

Fiscal Year	Lower Bound Number of Filers* A	Total Annual Lower Bound Earnings B = A x $35,838	Upper Bound Number of Filers* C	Total Upper Bound Earnings D = C x $35,838	Projected Form I-765 Filers Without Rule (Baseline) E	Estimated Annual Earnings Without Rule (Baseline) F = E x $35,838	Lost Lower Bound Earnings as a Result of this Rule G = F - B	Lost Upper Bound Earnings as a Result of this Rule H = F - D
2020	147	$5,268,186	606	$21,717,828	4,728	$169,442,064	$164,173,878	$147,724,236
2021					4,671	$167,399,298	$162,131,112	$145,681,470
2022					4,615	$165,392,370	$160,124,184	$143,674,542
2023					4,560	$163,421,280	$158,153,094	$141,703,452
2024					4,505	$161,450,190	$156,182,004	$139,732,362
2025					4,451	$159,514,938	$154,246,752	$137,797,110
2026					4,398	$157,615,524	$152,347,338	$135,897,696
2027					4,345	$155,716,110	$150,447,924	$133,998,282
2028					4,293	$153,852,534	$148,584,348	$132,134,706
2029					4,241	$151,988,958	$146,720,772	$130,271,130
10-year Total							$1,553,111,406	$1,388,614,986

Table 18(B): Initial Approvals, Upper Bound Wage

Fiscal Year	Lower Bound Number of Filers* A	Total Annual Lower Bound Earnings B = A x $78,106	Upper Bound Number of Filers* C	Total Upper Bound Earnings D = C x $78,106	Projected Form I-765 Filers Without Rule (Baseline) E	Estimated Annual Earnings Without Rule (Baseline) F = E x $78,106	Lost Lower Bound Earnings as a Result of this Rule G = F - B	Lost Upper Bound Earnings as a Result of this Rule II = F - D
2020	147	$11,481,582	606	$47,332,236	4,728	$369,285,168	$357,803,586	$321,952,932
2021					4,671	$364,833,126	$353,351,544	$317,500,890
2022					4,615	$360,459,190	$348,977,608	$313,126,954
2023					4,560	$356,163,360	$344,681,778	$308,831,124
2024					4,505	$351,867,530	$340,385,948	$304,535,294
2025					4,451	$347,649,806	$336,168,224	$300,317,570
2026					4,398	$343,510,188	$332,028,606	$296,177,952
2027					4,345	$339,370,570	$327,888,988	$292,038,334
2028					4,293	$335,309,058	$323,827,476	$287,976,822
2029					4,241	$331,247,546	$319,765,964	$283,915,310
10-year Total							$3,384,879,722	$3,026,373,182

Table 18(C): Renewal Approvals, Lower Bound Wage

Fiscal Year	Lower Bound Number of Filers*	Total Annual Lower Bound Earnings	Upper Bound Number of Filers*	Total Upper Bound Earnings	Projected Form I-765 Filers Without Rule (Baseline)	Estimated Annual Earnings Without Rule (Baseline)	Lost Lower Bound Earnings as a Result of this Rule	Lost Upper Bound Earnings as a Result of this Rule

	A	B = A x $35,838	C	D = C x $35,838	E	F = E x $35,838	G = F - B	H = F - D
2020	538	$19,280,844	2,222	$79,632,036	17,362	$622,219,356	$602,938,512	$542,587,320
2021	520	$18,635,760	2,183	$78,234,354	16,789	$601,684,182	$583,048,422	$523,449,828
2022	520	$18,635,760	2,127	$76,227,426	16,235	$581,829,930	$563,194,170	$505,602,504
2023	502	$17,990,676	2,088	$74,829,744	15,699	$562,620,762	$544,630,086	$487,791,018
2024	501	$17,954,838	2,049	$73,432,062	15,181	$544,056,678	$526,101,840	$470,624,616
2025	484	$17,345,592	1,996	$71,532,648	14,680	$526,101,840	$508,756,248	$454,569,192
2026	468	$16,772,184	1,959	$70,206,642	14,196	$508,756,248	$491,984,064	$438,549,606
2027	467	$16,736,346	1,908	$68,378,904	13,727	$491,948,226	$475,211,880	$423,569,322
2028	451	$16,162,938	1,872	$67,088,736	13,274	$475,713,612	$459,550,674	$408,624,876
2029	449	$16,091,262	1,836	$65,798,568	12,836	$460,016,568	$443,925,306	$394,218,000
10-year Total							$5,199,341,202	$4,649,586,282

Table 18(D): Renewal Approvals, Upper Bound Wage

Fiscal Year	Lower Bound Number of Filers* A	Total Annual Lower Bound Earnings B = A x $78,106	Upper Bound Number of Filers* C	Total Upper Bound Earnings D = C x $78,106	Projected Form I-765 Filers Without Rule (Baseline) E	Estimated Annual Earnings Without Rule (Baseline) F = E x $78,106	Lost Lower Bound Earnings as a Result of this Rule G = F - B	Lost Upper Bound Earnings as a Result of this Rule H = F - D
2020	538	$42,021,028	2,222	$173,551,532	17,362	$1,356,076,372	$1,314,055,344	$1,182,524,840
2021	520	$40,615,120	2,183	$170,505,398	16,789	$1,311,321,634	$1,270,706,514	$1,140,816,236
2022	520	$40,615,120	2,127	$166,131,462	16,235	$1,268,050,910	$1,227,435,790	$1,101,919,448
2023	502	$39,209,212	2,088	$163,085,328	15,699	$1,226,186,094	$1,186,976,882	$1,063,100,766
2024	501	$39,131,106	2,049	$160,039,194	15,181	$1,185,727,186	$1,146,596,080	$1,025,687,992
2025	484	$37,803,304	1,996	$155,899,576	14,680	$1,146,596,080	$1,108,792,776	$990,696,504
2026	468	$36,553,608	1,959	$153,009,654	14,196	$1,108,792,776	$1,072,239,168	$955,783,122
2027	467	$36,475,502	1,908	$149,026,248	13,727	$1,072,161,062	$1,035,685,560	$923,134,814
2028	451	$35,225,806	1,872	$146,214,432	13,274	$1,036,779,044	$1,001,553,238	$890,564,612
2029	449	$35,069,594	1,836	$143,402,616	12,836	$1,002,568,616	$967,499,022	$859,166,000
10-year Total							$11,331,540,374	$10,133,394,334

*As discussed in the analysis, since the number of eligible filers under this proposed rule is unknown, USCIS provides ranges of potentially eligible filers for both the initial and renewal populations.

Source: USCIS Analysis

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DHS uses the lost compensation to aliens temporarily released on orders of supervision as a measure of the overall impact of removing eligibility for a (c)(18) EAD—either as distributional impacts (transfers) or as a proxy for businesses' cost for lost productivity. It does not include additional costs to businesses for lost profits and opportunity costs or the distributional impacts for those in an applicant's support network. As shown in Table 18, the potential lost earnings depend on the number of aliens released temporarily on orders of supervision who remain eligible for an EAD and continue to work, as well as their wage rate. Over the 10-year period from FY 2020 to FY 2029, the total lost earnings would range from $6,038,201,268 to $14,716,520,096.[84] Annualized at 7 percent, lost earnings for initial and renewal EAD holders would range from $614,037,170 to $ 1,495,358,741 (Table 22).[85]

[84] Calculations: $1,388,614,986 (10-year total initial upper bound costs) + $4,649,586,282 (10-year total renewal upper bound costs) = $6,038,201,268 (minimum 10-year total lower bound costs); $3,384,879,722 (10-year total initial upper bound costs) + $11,331,540,374 (10-year total renewal upper bound costs) = $14,716,420,096 (maximum 10-year total upper bound costs).

[85] An important assumption relied upon in this analysis is that each holder of an approved EAD has entered the labor force and is working (when the rule becomes effective). DHS relies on this assumption on the grounds that individuals would not have expended the direct filing and time-related opportunity costs of applying for an EAD if they did not intend to recoup an economic benefit from doing so. In reality, some EAD holders may not be employed for any number of reasons—including normal labor market frictions—that have nothing to do with this rule. In addition, DHS has received information that some individuals seek an EAD for purposes of paper documentation and may not intend to work.

EAD holders who would no longer be eligible to renew their employment authorization under the proposed eligibility criteria in this rule would incur lost earnings. Additionally, DHS acknowledges the potential for additional lost compensation to renewal applicants if their employers are not currently enrolled in E-Verify and opt not to enroll in the E-Verify program. In such cases, renewal applicants could lose earnings if they are unable to find employment with an employer who participates in E-Verify.

DHS recognizes that, excluding the effects of inflation, earnings generally rise over time and the earnings of EAD holders could be larger in the future than estimated in this analysis. Moreover, since EAD renewals, by necessity of order, follow in time after an initial EAD approval, wages and, hence, total compensation, earned could be higher for renewals. Accordingly, this effect could bias the estimate of earnings losses downward. However, we see no tractable way at present to incorporate this possibility into the quantified estimates.

DHS welcomes public comments and data concerning the appropriateness of using the effective minimum wage rate as a lower bound and the average wage rate as an upper bound for (c)(18) workers and the resulting impacts presented.

In addition to the above quantified impacts, there could be qualitative impacts for aliens on orders of supervision who would no longer be eligible for employment authorization. For the (c)(18) population that will not be able to renew their EAD or obtain an initial EAD, there would likely be an impact in terms of lost income which could pose economic hardships. Members of this population may need to rely on their support networks for financial and social assistance, which could involve, but may not be limited to, family members and friends, religious and charitable organizations, private non-profit providers, state and local governments, and NGOs. DHS believes that the immediate indirect impact of this rule to an applicant's support network is likely not significantly more than the wages and benefits the applicant would have earned without this rule.

Costs to Applicants To Submit Biometrics

This rule proposes to codify a biometrics requirement for aliens who file for an EAD under the (c)(18) category. Currently, all (c)(18) applicants receive an appointment notice from USCIS to submit their biometrics [86] at an Application Support Center (ASC) to, among other things, assist in identity verification and facilitate (c)(18) EAD card production. They are also required to pay the $85 biometric services fee.[87] This rule would codify the requirement for aliens to submit biometrics and pay the proposed $30 biometric services fee. The biometrics requirement would apply to (c)(18) Form I–765 filers, for both initial and renewal EAD applications. In addition, DHS proposes to use the biometrics submitted by (c)(18) EAD applicants to screen for criminal history.

The submission of biometrics requires that aliens travel to an ASC for the biometric services appointment. In past rulemakings, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.[88] The cost of travel also includes a mileage charge based on the estimated 50 mile round trip at the 2020 General Services Administration (GSA) rate of $0.58 per mile.[89] Because an individual alien would spend 1 hour and 10 minutes (1.17 hours) at an ASC to submit biometrics, summing the ASC time and travel time yields 3.67 hours.[90] At the lower and upper wage bounds, the opportunity costs of time to submit biometrics services are $63.23 and $137.81.[91] The travel cost is $29, which is the per mileage reimbursement rate of $0.58 multiplied by 50-mile travel distance. Summing the time-related and travel costs generates a per person biometrics submission cost of $92.23 at the lower bound wage and $166.81 at the upper bound wage.[92] Combining these costs with the biometric services fee totals a per person biometrics submission cost of $122.23 and $196.81 at the respective lower and upper wage rates.[93]

Table 19 shows the two population ranges for initial and renewal receipts for the two ranges of wage estimates for aliens on orders of supervision and the corresponding total cost to submit biometrics. Table 19(A) shows cost estimates for the lower and upper bound range of initial EAD receipts at the lower bound submission cost of $122.23. The total costs for Columns C and E provide the range of undiscounted costs for the lower bound. Similarly, Table 19(B) repeats the estimates for the lower and upper bound range of initial EAD receipts based on the upper bound submission cost of $196.81. Tables 19(C) and 19(D) repeat these estimates for the lower and upper bound ranges of renewal EAD receipts based on the lower and upper bound submission costs, respectively.

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[86] At present, biometrics collection generally refers to the collection of fingerprints, photographs, and signatures. *See https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment* (describing biometrics as including fingerprints, photographs, and digital signature) (last visited May 15, 2020).

[87] USCIS was previously authorized to collect an $85 biometric services fee. However, the recently promulgated fee rule incorporated the biometric services costs into the underlying immigration benefit request fees for which biometric services are applicable in the recent fee rule and maintained a separate $30 biometric services fees for certain benefit requests. *See* DHS, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR 46788 (Aug. 3, 2020) (Fee Rule).

[88] *See* ''Employment Authorization for Certain H–4 Dependent Spouses; Final rule,'' 80 FR 10284 (25 Feb. 2015); and ''Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule,'' 78 FR 536, 572 (3 Jan. 2013).

[89] The General Services Administration mileage rate of $0.58, effective January 1, 2020, available at: *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates* (last visited May 7, 2020).

[90] Source for biometric time burden estimate: Paperwork Reduction Act (PRA) Supporting Statement for Form I–485 (OMB control number 1615–0023). The PRA Supporting Statement can be found at Question 12 on *Reginfo.gov* at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201706-1615-001.*

[91] Calculations: 3.67 (total time in hours to submit biometrics) × $12.05 (prevailing wage for 1 hour of work) = $44.22; 3.67 (total time in hours to submit biometrics) × $37.55 (average wage for 1 hour of work) = $137.81.

[92] Calculations: $29 (cost of travel) + $63.23 (time-related costs at lower bound wage) = $92.23; $29 (cost of travel) + $137.81 (time-related costs at upper bound wage) = $166.81.

[93] Calculations: $92.23 (total time-related cost at lower bound wage) + $30 (biometrics fee) = $122.23; $166.81 total (time-related costs at upper bound wage) + $30 (biometrics fee) = $196.81.

Table 19: Cost Estimates for Aliens Temporarily Released on Orders of Supervision to Submit Biometrics, FYs 2020 to 2029 (Undiscounted)

Table 19(A): Initial Receipts, Lower Bound Wage

Fiscal Year	Submission Cost	Lower Bound Projected Receipts	Total Lower Bound Costs	Upper Bound Projected Receipts	Total Upper Bound Costs
	A	B	C = A x B	D	E = A x D
2020	$122.23	147	$17,968	606	$74,071
2021			$17,968		$74,071
2022			$17,968		$74,071
2023			$17,968		$74,071
2024			$17,968		$74,071
2025			$17,968		$74,071
2026			$17,968		$74,071
2027			$17,968		$74,071
2028			$17,968		$74,071
2029			$17,968		$74,071
10-year Total			$179,678		$740,714

Table 19(B): Initial Receipts, Upper Bound Wage

Fiscal Year	Submission Cost	Lower Bound Projected Receipts	Total Lower Bound Costs	Upper Bound Projected Receipts	Total Upper Bound Costs
	A	B	C = A x B	D	E = A x D
2020	$196.81	147	$28,931	606	$119,267
2021			$28,931		$119,267
2022			$28,931		$119,267
2023			$28,931		$119,267
2024			$28,931		$119,267
2025			$28,931		$119,267
2026			$28,931		$119,267
2027			$28,931		$119,267
2028			$28,931		$119,267
2029			$28,931		$119,267

10-year Total			$289,311		$1,192,669
Table 19(C): Renewal Receipts, Lower Bound Wage					
Fiscal Year	**Submission Cost**	**Lower Bound Projected Receipts**	**Total Lower Bound Costs**	**Upper Bound Projected Receipts**	**Total Upper Bound Costs**
	A	**B**	**C = A x B**	**D**	**E = A x D**
2020	$122.23	579	$70,771	2,390	$292,130
2021		560	$68,449	2,347	$286,874
2022		559	$68,327	2,287	$279,540
2023		540	$66,004	2,245	$274,406
2024		539	$65,882	2,204	$269,395
2025		521	$63,682	2,147	$262,428
2026		504	$61,604	2,106	$257,416
2027		502	$61,359	2,052	$250,816
2028		485	$59,282	2,013	$246,049
2029		483	$59,037	1,974	$241,282
10-year Total			$644,397		$2,660,336
Table 19(D): Renewal Receipts, Upper Bound Wage					
Fiscal Year	**Submission Cost**	**Lower Bound Projected Receipts**	**Total Lower Bound Costs**	**Upper Bound Projected Receipts**	**Total Upper Bound Costs**
	A	**B**	**C = A x B**	**D**	**E = A x D**
2020	$196.81	579	$113,953	2,390	$470,376
2021		560	$110,214	2,347	$461,913
2022		559	$110,017	2,287	$450,104
2023		540	$106,277	2,245	$441,838
2024		539	$106,081	2,204	$433,769
2025		521	$102,538	2,147	$422,551
2026		504	$99,192	2,106	$414,482
2027		502	$98,799	2,052	$403,854
2028		485	$95,453	2,013	$396,179
2029		483	$95,059	1,974	$388,503
10-year Total			$1,037,582		$4,283,570
Source: USCIS Analysis					

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As shown in Table 19, the cost to submit biometrics depends on the number of aliens temporarily released on orders of supervision who apply for an EAD and their wage rate. Over the 10-year period from FY 2020 to FY 2029, the total cost to submit biometrics would range from $824,075 to $5,476,238.[94] Annualized at 7 percent, the estimated costs to submit biometrics would range from $83,148 to $552,741 (Table 22).

[94] Calculations: $179,678 (10-year total initial lower bound costs) + $644,397 (10-year total renewal lower bound costs) = $824,075 (minimum 10-year total lower bound costs); $1,192,669 (10-year total initial upper bound costs) + $4,283,570 (10-year total renewal upper bound costs) = $5,476,238 (maximum 10-year total upper bound costs).

Cost of Forms

For those aliens who remain eligible to be employment authorized, the proposed rule would increase the time burden on the population of applicants applying for employment authorization. This rule also proposes to add filing

procedures and evidentiary requirements for aliens on orders of supervision who are seeking an initial EAD or renewing an EAD. The proposed new requirements include submitting a Form I–765WS, to establish the alien's economic necessity for employment and, for renewal applicants only, the name of the alien's U.S. employer as listed in E-Verify and that employer's E-Verify Company Identification Number.

Currently, DHS estimates the time burden for completing Form I–765 is 4 hours and 30 minutes (4.5 hours).[95] For aliens on orders of supervision who continue to be eligible and apply for employment authorization after this rule is final, this proposed rule would increase the time burden of Form I–765 by 30 minutes (0.5 hours) for a total of 5 hours.[96] This change would increase the opportunity cost of time for each application by approximately $8.62 based on the effective minimum hourly wage and by about $18.78 based on the average wage for all occupations.[97]

This proposed rule would also make it a requirement to submit Form I–765WS for aliens applying for employment authorization under the (c)(18) category. Currently, proving the existence of economic necessity to be employed is listed as a discretionary factor for consideration, but it is not a requirement. In this proposed rule, DHS now makes this a mandatory requirement. DHS estimates the current time burden for completing Form I–765WS is 30 minutes (0.5 hours).[98] For aliens temporarily released on orders of supervision who continue to be eligible and apply for employment authorization after the rule is final, the proposed rule would increase the opportunity cost of time for each applicant by $8.62 based on the effective minimum hourly wage and $18.78 based on the average wage for all occupations.[99] Combining the new costs of the I–765 and I–765WS, the total per person increased time burden would add costs of $17.23 and $37.55 at the respective lower and upper bound wage rates.

Table 20 shows the additional filing time burden-costs for Forms I–765 and I–765WS for the two population ranges for initial and renewal receipts. Table 20(A) shows cost estimates for the lower and upper bound range of initial EAD receipts based on the lower bound additional time burden cost of $12.05. The total costs for Columns C and E provide the range of undiscounted costs for the lower bound wage. Similarly, Table 20(B) repeats the estimates for the lower and upper bound range of initial EAD receipts based on the upper bound additional time burden cost of $37.55. Tables 20(C) and 20(D) repeat these estimates for the lower and upper bound ranges of renewal EAD receipts based on the lower and upper bound wage time burden costs, respectively.

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[95] *See* Instructions for Form I–765, December 26, 2019, available at *https://www.uscis.gov/i-765* (last visited April 21, 2020).

[96] The additional 30 minutes is an average estimate across all respondents completing Form I–765 to review additional language in the instructions and gather required supporting documentation.

[97] Calculations: 0.5 (burden hours) × $17.23 (effective minimum hourly wage for 1 hour of work) = $8.62 (rounded). 0.5 (burden hours) × $37.55 (average wage for all occupations for 1 hour of work) = $18.78 (rounded).

[98] *See* Instructions for Form I–765, December 26, 2019, available at *https://www.uscis.gov/i-765* (last visited April 21, 2020). Calculation: 0.5 hours (added time to file I–765) × $17.23 (effective minimum hourly wage for 1 hour of work) = $8.62 (rounded).

[99] Calculations: 0.5 hours (time to file I–765WS) × $17.23 (effective minimum hourly wage for 1 hour of work) = $8.62 (rounded). 0.5 hours (time to file I–765WS) × $37.55 (average wage for all occupations for 1 hour of work) = $18.78 (rounded).

Table 20: New Cost Estimates Related to Increased Time Burden to Complete and Submit Forms I-765 and I-765WS for Aliens Temporarily Released on Orders of Supervision, FYs 2020 to 2029 (Undiscounted)

Table 20(A): Initial Receipts, Lower Bound Wage

Fiscal Year	Additional Time Burden Cost A	Lower Bound Projected Receipts B	Total Lower Bound Costs C = A x B	Upper Bound Projected Receipts D	Total Upper Bound Costs E = A x D
2020	$17.23	147	$2,533	606	$10,441
2021			$2,533		$10,441
2022			$2,533		$10,441
2023			$2,533		$10,441
2024			$2,533		$10,441
2025			$2,533		$10,441
2026			$2,533		$10,441
2027			$2,533		$10,441
2028			$2,533		$10,441
2029			$2,533		$10,441
10-year Total			$25,328		$104,414

Table 20(B): Initial Receipts, Upper Bound Wage

Fiscal Year	Additional Time Burden Cost A	Lower Bound Projected Receipts B	Total Lower Bound Costs C = A x B	Upper Bound Projected Receipts D	Total Upper Bound Costs E = A x D
2020	$37.55	147	$5,520	606	$22,755
2021			$5,520		$22,755
2022			$5,520		$22,755
2023			$5,520		$22,755
2024			$5,520		$22,755
2025			$5,520		$22,755
2026			$5,520		$22,755
2027			$5,520		$22,755
2028			$5,520		$22,755
2029			$5,520		$22,755
10-year Total			$55,199		$227,553

Table 20(C): Renewal Receipts, Lower Bound Wage

Fiscal Year	Additional Time Burden Cost A	Lower Bound Projected Receipts B	Total Lower Bound Costs C = A x B	Upper Bound Projected Receipts D	Total Upper Bound Costs E = A x D
2020	$17.23	579	$9,976	2,390	$41,180
2021		560	$9,649	2,347	$40,439
2022		559	$9,632	2,287	$39,405
2023		540	$9,304	2,245	$38,681

2024		539	$9,287	2,204	$37,975
2025		521	$8,977	2,147	$36,993
2026		504	$8,684	2,106	$36,286
2027		502	$8,649	2,052	$35,356
2028		485	$8,357	2,013	$34,684
2029		483	$8,322	1,974	$34,012
10-year Total			$90,837		$375,011
Table 20(D): Renewal Receipts, Upper Bound Wage					
Fiscal Year	**Additional Time Burden Cost A**	**Lower Bound Projected Receipts B**	**Total Lower Bound Cost C = A x B**	**Upper Bound Projected Receipts D**	**Total Upper Bound Cost E = A x D**
2020	$37.55	579	$21,741	2,390	$89,745
2021		560	$21,028	2,347	$88,130
2022		559	$20,990	2,287	$85,877
2023		540	$20,277	2,245	$84,300
2024		539	$20,239	2,204	$82,760
2025		521	$19,564	2,147	$80,620
2026		504	$18,925	2,106	$79,080
2027		502	$18,850	2,052	$77,053
2028		485	$18,212	2,013	$75,588
2029		483	$18,137	1,974	$74,124
10-year Total			$197,964		$817,276
Source: USCIS Analysis					

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As indicated in the table, the estimated total opportunity costs of time incurred as a result of increased time burden for completing the forms over the 10-year period from FY 2020 to FY 2029 would range from about $116,165 to $1,044,829.[100] There would be no change in the estimated time burden for aliens temporarily released on orders of supervision for ICE Form I–220B. ICE completes Form I–220B and it is currently already submitted during the employment authorization application process.

Costs to Employers

DHS anticipates that revising eligibility for aliens temporarily released on orders of supervision could lead to a loss of employment resulting in turnover costs for employers. Additionally, the proposed E-Verify requirement for renewal applicants would also result in costs to employers who are not currently enrolled in the E-Verify program and would seek to retain their (c)(18) worker(s). The population that could involve costs to employers involves specifically the renewal population, and the development of such impacts embodies two different provisions: (i) The provisions regarding eligibility in general, and (ii) the E-Verify requirement for aliens seeking to renew an EAD.

I. Unquantified Turnover Costs

Some aliens who have final orders of removal but are temporarily released from custody on orders of supervision would eventually be out of the labor force even in the absence of this proposed rule. Since these aliens have been ordered removed, the federal government makes efforts to remove them from the United States on an ongoing basis regardless of employment authorization. For aliens who would no longer be eligible for employment authorization under this rule because they do not meet the proposed exception—DHS has not determined that the removal of such aliens is impracticable because ICE has not identified them as unable to obtain travel documents—this rule would affect the timing of when such alien workers would be removed from the labor force, which could vary. This proposed rule would result in employers incurring labor turnover costs earlier in comparison to the state of affairs in the absence of the proposed rule. Since the timing of when alien workers would be removed from the labor force is variable regardless of whether this proposed rule becomes final or not, DHS is unable to establish a baseline estimate of the labor turnover costs employers currently incur. In addition, DHS cannot quantify the labor turnover costs that employers would incur earlier than they would otherwise due to the proposed rule because there

[100] Calculations: $25,328 (10-year total initial lower bound costs) + $90,837 (10-year total renewal lower bound costs) = $116,165 (minimum 10-year total lower bound costs); $227,553 (10-year total initial upper bound costs) + $817,276 (10-year total renewal upper bound costs) = $1,044,829 (maximum 10-year total upper bound costs).

is no way to know the timing for when aliens would be removed.

II. Employer Costs of E-Verify Requirement for Renewal Applicants

For renewal applicants, employment authorization would only be granted to applicants who continue to meet the exception, demonstrate economic necessity, do not have subsequent criminal convictions, are employed by a U.S. employer who is a participant in good standing in the E-Verify program, and establish that they warrant a favorable exercise of discretion. The E-Verify program is a DHS web-based system that allows enrolled employers to confirm the identity and eligibility of their employees to work in the United States by electronically matching information provided by employees on the Employment Eligibility Verification (Form I–9) against records available to DHS and the Social Security Administration (SSA).[101] DHS does not charge a fee for employers to participate in the E-Verify Program and create cases to confirm the identity and employment eligibility of newly hired employees. EAD renewal applications would be denied for those aliens who cannot establish that they are employed by an E-Verify employer and their $410 filing fee would not be refunded. DHS does not know the number of renewal applicants who would incur this cost once the rule is final.

Although there is no fee to use E-Verify, this proposed requirement would result in costs to newly enrolling employers. Employers who would newly enroll in the E-Verify program would incur startup enrollment or program initiation costs as well as additional opportunity costs of time for ongoing annual training for the E-Verify program. DHS assumes that employers who are currently participating in the E-Verify program would not incur these costs since they previously incurred enrollment costs and would continue to participate in ongoing annual training regardless of this proposed rule.[102] Additionally, DHS expects that only newly enrolled employers would incur new costs for verifying the identity and work authorization of all of their newly hired employees, including any new (c)(18) workers as a result of this proposed rule. For employers currently enrolled in E-Verify who choose to hire a (c)(18) alien worker, the proposed rule would not cause such employers to incur new costs since they already must use E-Verify for all newly hired employees as of the date they signed the E-Verify Memorandum of Understanding (MOU).[103] Therefore, with or without the proposed rule, an employer already enrolled in the E-Verify program that chooses to hire a (c)(18) alien worker would incur the opportunity cost of time to verify any newly hired employees.

Data show that some employers currently use E-Verify to confirm the identity and employment eligibility of (c)(18) alien workers. Further, the requirement to participate in the E-Verify program is not new as certain employers are required to enroll in the program as a condition of Federal contracting, or as a condition of business licensing under state legislation or other applicable law or regulation.[104]

To renew an EAD, the proposed rule would require that (c)(18) alien workers be employed by employers enrolled in E-Verify and in good standing. Therefore, the proposed rule would result in additional costs for employers that hire (c)(18) alien workers only if such employers are not currently enrolled in the E-Verify program and who choose to retain their (c)(18) workers.

For employers that have hired or intend to hire (c)(18) alien workers but are not enrolled in the E-Verify program, such employers would incur opportunity costs of time to enroll. Participating in the E-Verify program and remaining in good standing requires employers to enroll in the program online,[105] electronically sign the associated MOU with DHS that sets the terms and conditions of participation in the program, and create E-Verify cases for all newly hired employees. The MOU requires employers to abide by lawful hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of E-Verify.[106] If an employer violates the terms of this agreement, it is grounds for immediate termination from the program.[107] Additionally, employers are required to designate and register at least one person that serves as an E-Verify administrator on their behalf.

For this analysis, DHS assumes that each employer participating in the E-Verify program designates one HR specialist to manage the program on its behalf. Based on the most recent Paperwork Reduction Act (PRA) Information Collection Package for E-Verify, DHS estimates the time burden for an HR specialist to undertake the tasks associated with the E-Verify program. DHS estimates the time burden for an HR specialist to complete the enrollment process is 2 hours 16 minutes (2.26 hours), on average, to provide basic company information, review and sign the MOU, take a new user training, and review the user guides.[108] Once enrolled in the E-Verify program, DHS estimates the time burden is 1 hour to complete ongoing annual training on new features and system updates.[109]

Once enrolled in the E-Verify program, the employer is responsible for ensuring that the employment verification process adheres to the requirements of the MOU and the employer verifies that all newly hired employees are employment authorized. After completing the Form I–9, the employer must enter the newly hired employee's information in E-Verify where it is checked against records available to SSA and DHS. After checking an employee's information against these records, E-Verify returns the case processing results, which could either automatically confirm the employee as employment authorized or return a tentative non-confirmation (TNC). Receiving a TNC does not mean an employee is not authorized to work in the United States; rather, it indicates there is an initial system mismatch between the information the employer entered in E-Verify from the employee's Form I–9 and the records available to DHS or SSA. Employees receiving a TNC have the option to contest (take action) or not contest (not take action)

[101] *See* E-Verify, available at *https://www.e-verify.gov/* (last visited May 29, 2019).

[102] Employers already participating in E-Verify likely already complete ongoing annual training because they voluntarily chose to enroll or because of rules or regulations beyond the scope of this proposed rule. DHS anticipates that such employers would continue to use E-Verify regardless of their decision to hire (c)(18) workers or not.

[103] *See* About E-Verify, Questions and Answers, April 9, 2014 *https://www.e-verify.gov/about-e-verify/questions-and-answers?tid=All&page=0* (last visited April 16, 2020).

[104] Certain states (for example Alabama, Arizona, Mississippi, and South Carolina) and certain Federal contracts subject to the Federal Acquisition Regulation found at 48 CFR, Subpart 22.18 require the use of E-Verify.

[105] *See* The Enrollment Process at *https://www.e-verify.gov/employers/enrolling-in-e-verify/the-enrollment-process* (last visited February 12, 2019).

[106] An employer that discriminates in its use of E-Verify based on an individual's citizenship status or national origin may also violate the INA's anti-discrimination provision, at 8 U.S.C. 1324b.

[107] *See* USCIS, The E-Verify Memorandum of Understanding for Employers, available at *http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.*

[108] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See PRA E-Verify Program (OMB control number 1615–0092), May 24, 2016. The PRA Supporting Statement can be found under Question 12 at *https://www.regulations.gov/document?D=USCIS-2007-0023-0081* (last visited May 29, 2019).

[109] *Id.*

to resolve the DHS and/or SSA TNC case result. E-Verify requires employers to promptly inform the employee about the TNC and provide instructions for contesting it. The E-Verify website also provides detailed information about contesting the TNC.[110]

In the absence of specific population data on which entities would continue to hire (c)(18) alien workers, it is only possible to calculate an estimated average unit cost for an employer not currently participating in E-Verify to hire one (c)(18) renewal alien worker. In this analysis, DHS uses an hourly compensation rate for estimating the opportunity cost of time for an HR specialist. DHS uses this occupation as a proxy for those who might prepare and complete the verification for an employer. DHS notes that not all employers may have an HR specialist, but rather some equivalent occupation may prepare and complete the verification and create the E-Verify case.

According to BLS data, the average hourly wage rate for HR specialists is $32.58.[111] DHS estimates the hourly compensation rates by adjusting the average hourly wage rates by a benefit-to-wage multiplier to account for the full cost of benefits such as paid leave, insurance, and retirement. Based on the most recent report by the BLS on the average employers' costs for employee compensation for all civilian workers in major occupational groups and industries, DHS estimates that the benefits-to-wage multiplier is 1.46.[112] Therefore, DHS calculates an average hourly compensation rate of $47.57 for HR specialists.[113] Applying this average hourly compensation rate to the estimated time burden of 2.26 hours for the enrollment process, DHS estimates an average opportunity cost of time for a new employer to enroll in E-Verify is $107.51.[114] DHS assumes the estimated opportunity cost of time to enroll in the E-Verify program is a one-time cost to employers. In addition, DHS estimates the opportunity cost of time associated with 1 hour of ongoing annual training for newly-enrolled entities would be $47.57 annually in the years following enrollment.

Newly-enrolled employers would also incur opportunity costs of time to enter employee information into the E-Verify system to confirm their identity and work authorization. DHS estimates the time burden for an HR specialist to submit a case in E-Verify is 7.74 minutes (or 0.129 hours).[115] Therefore, DHS estimates the opportunity cost of time would be approximately $6.14 per case.[116]

DHS estimates the total first year cost for a new employer to enroll in E-Verify and create a single E-Verify case in the E-Verify system would be approximately $113.65.[117] In subsequent years, DHS estimates newly-enrolled employers would incur costs of $53.71, at minimum, to maintain their account and create one new E-Verify case for their (c)(18) worker.[118] DHS recognizes that the actual cost to newly-enrolled employers of using E-Verify would be higher since case submissions would also include all newly hired employees, not just (c)(18) workers. However, since DHS cannot predict how many employees each employer would hire in the future, DHS cannot estimate how many additional E-Verify cases an employer may expect to create. Employers already enrolled in the E-Verify program who choose to hire (c)(18) workers in subsequent years would incur costs even in the absence of this proposed rule.

Employers that are not participating in E-Verify face the binary choice of participating in or not participating in the program. If the employer who had hired a (c)(18) alien worker does not participate, the employer faces the potential for labor turnover costs. If the employer does participate, the employer incurs the cost of enrolling and participating in the program and implementing the program requirements. On one hand, since the EADs last only a year, there might be some disincentive not to participate in E-Verify. However, as discussed in the population section, DHS cannot make reliable estimates of the number of employers that would enroll and participate in E-Verify, and as such, cannot estimate total costs germane to this implementation.

III. Turnover Costs to Employers Who Currently Hire (c)(18) EAD Holders

In order to properly account for costs involving employers who have hired aliens temporarily released on orders of supervision who are EAD holders, DHS introduces the costs applicable to discuss labor turnover and E-Verify in separate segments.

DHS anticipates this proposed rule would impose labor-related turnover costs on U.S. employers who employ (c)(18) alien workers who would remain eligible under this rule but are not enrolled in E-Verify and opt not to enroll. Employers would incur labor turnover costs because these alien workers would remain eligible for an initial EAD under this rule but would not be eligible for a renewal EAD since they would be unable to establish that they are employed by an E-Verify employer. As a result, alien workers would no longer be able to work and presumably employers would need to find a replacement worker. For aliens who would remain eligible for an EAD under this rule, the duration of time to remove aliens on orders of supervision from the U.S. would likely be longer than average as DHS has determined that removal for these aliens is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents. Therefore, employers who do not use or are enrolled in E-Verify would incur turnover costs in cases where their (c)(18) alien workers would remain eligible for an EAD under this rule. However, U.S. employers who are not enrolled in E-Verify could avoid turnover costs by choosing to enroll in the program. If an employer chooses to

[110] See the following for more detailed information *https://www.e-verify.gov/employees/tentative-nonconfirmation-overview/how-to-correct-a-tentative-nonconfirmation* (last visited May 29, 2019).

[111] *See* U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2019, Human Resources Specialist (SOC #13–1071): *https://www.bls.gov/oes/2019/may/oes131071.htm* (last visited May 7, 2020).

[112] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $37.10/$25.47 = 1.457 = 1.46 (rounded). See Economic News Release, ''Employer Cost for Employee Compensation— December 2019,'' (March 2020), U.S. Department of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. March 19, 2020, available at *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (last visited March 24, 2020).

[113] Hourly compensation of $47.57 = $32.58 average hourly wage rate for HR specialists × 1.46 benefits-to-wage multiplier.

[114] Calculation: 2.26 hours for the enrollment process × $47.57 total compensation wage rate for an HR specialist = $107.51.

[115] The USCIS Office of Policy and Strategy, PRA Compliance Branch estimates the average time burdens. See Paperwork Reduction Act (PRA) E-Verify Program (OMB control number 1615–0092), May 24, 2016. The PRA Supporting Statement can be found under Question 12 at *https://www.regulations.gov/document?D=USCIS-2007-0023-0081* (last visited May 29, 2019).

[116] Calculation: 0.129 hours to submit a query * $47.57 total compensation wage rate for an HR specialist = $6.14.

[117] Calculation: $107.51 opportunity cost for a new entity to enroll in E-Verify + $6.14 cost to submit a query into E-Verify = $113.65.

[118] Calculation: $47.57 one hour of annual training + $6.14 cost to submit a query into E-Verify = $53.71. E-Verify has a Work Authorization Docs Expiring case alert that notifies employers that an employee's EAD or Arrival-Departure Record (Form I–94) document is expiring. The alert is a reminder for the employer to reverify the employee. *See* About E-Verify Questions and Answers, Creating and Managing Cases, page 2 (04/30/2018) at *https://www.e-verify.gov/about-e-verify/questions-and-answers* (last viewed Jul. 15, 2020).

enroll in E-Verify, the employer would instead incur the associated costs to enroll in the system, submit cases (for all newly hired employees, not just (c)(18) workers), and maintain their account.

Employee turnover may cause employers to incur various direct and indirect turnover costs. Direct turnover cost employers could incur include those that involve separation and replacement costs. Separation costs include exit interviews, severance pay, and assigning other employees to temporarily cover the departing employee's duties and functions, which may require overtime or temporary staffing. Replacement costs typically include those related to advertising positions, search and agency fees, screening applicants, interviewing, background verification, employment testing, hiring bonuses, and possible travel and relocation costs. Once hired, employers may incur additional costs for training, orientation, and assessments. Additionally, other direct costs may include loss of productivity and possible reduced profitability due to operational and production disruptions. Moreover, employers may incur indirect costs, including loss of institutional knowledge, networking, and impacts to morale and interpersonal work relationships. These indirect costs are more difficult to measure.

DHS has reviewed recent research and literature on turnover costs. While peer-reviewed research on turnover costs is not extensive, there are several studies available which are cited repeatedly across various reports focusing on specific locations and occupations, and measure turnover costs in different ways. For example, a 2012 report published by the Center for American Progress (''2012 CAP Survey'') reviewed several dozen studies that considered both direct and indirect costs.[119] This survey found that turnover costs per employee ranged from 10 to 30 percent of the salary for most salaried workers with an average mid-point of about 20 percent of the worker's salary in total labor turnover costs.

In the absence of specific data on which employers hire (c)(18) alien workers and use, or would enroll in, E-Verify, it is only possible to calculate an estimated range of average per employee turnover costs an employer not currently participating in E-Verify could incur. In order to estimate labor turnover costs, DHS uses estimated employee annual earnings of $35,838 based on the effective minimum wage as a lower bound and $78,106 based on the average wage developed previously in this analysis (see ''Proposal Regarding EAD Eligibility'' section) and an upper bound. DHS multiplied each of these estimated employee annual earnings by 20 percent in accordance with the 2012 CAP Survey. Using annual earnings based on the effective minimum wage (lower bound), DHS estimates labor turnover costs would be approximately $7,168 per worker and using the annual earnings based on the average wage (upper bound), DHS estimates labor turnover costs would be approximately $15,621 per worker.[120] Turnover costs would be higher if a U.S. employer that does not use or enroll in E-Verify employs more than one (c)(18) alien worker who would remain eligible under this rule. DHS recognizes that turnover costs would occur in the year an EAD expires and, depending on the effective date of this rule should it become finalized, employers who incur turnover costs may incur them in up to two consecutive fiscal years.

DHS is unable to predict how many employers would actually participate in E-Verify in order to retain their (c)(18) alien workers or the total number of employment authorizations they would confirm through E-Verify should they choose to participate. DHS assumes that employers would make a cost-benefit decision between incurring labor turnover costs and incurring the current and future costs to enroll and participate in E-Verify. DHS recognizes that an employer that enrolls and participates in E-Verify would confirm employment authorization for all new hires, not only their (c)(18) alien workers. Unlike the development of the costs germane to forgone earnings, in which DHS could at least deduce a range for the population based on some limited data, doing so here would be completely speculative, and we do not endeavor to rely on a range here.

I. Government Transfers

This proposed rule could reduce taxes paid to the federal government (a transfer payment) in the short term. During the period of vacancy for a job formerly held by the (c)(18) alien worker, the federal government would not be collecting taxes.

In addition, in instances where an employer cannot hire replacement labor for a position an alien on an order of supervision had or would have filled, this proposed rule may result in a reduction in taxes paid to the federal government. It is difficult to quantify income tax losses because individual tax situations vary widely.[121] However, DHS estimates the potential reduction in tax revenue generated through employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[122] DHS notes that the total estimated reduction in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent since both the employee and employer would not pay their respective portions of Medicare and Social Security taxes when a position remains unfilled by an alien on an order of supervision who held or would have filled the position.[123]

To estimate the range of employment tax losses, we take the estimated lost earnings for the range of initial and renewal projected filers at the prevailing and average wage rates from Table 18, columns G and H, and multiply each year by 15.3 percent. These calculations are shown in Table 21.

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[119] *See* ''There Are Significant Business Costs to Replacing Employees,'' By Heather Boushey and Sarah Jane Glynn (2012), Center for American Progress, at: *https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/* (last visited Apr. 15, 2020).

[120] Calculations: $35,838 × 20% = $7,168; $78,106 × 20% = $15,621.

[121] More than 44 percent of workers pay no federal income tax (Sept. 16, 2018) available at *https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16.*

[122] The various employment taxes are discussed in more detail at *https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes. See IRS Publication 15, Circular E, Employer's Tax Guide for specific information on employment tax rates. https://www.irs.gov/pub/irs-pdf/p15_18.pdf. See* More than 44 percent of Americans pay no federal income tax (Sep. 16, 2018) available at: *https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16.* (last visited Sep. 16, 2018)

[123] Calculation: (6.2 percent Social Security + 1.45 percent Medicare) × 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

Table 21: Lost Earnings and Corresponding Estimated Tax Losses, FYs 2020 to 2029

Table 21(A): Initial Approvals on the Lower Bound Wage

Fiscal Year	Lost Lower Bound Earnings A	Employment Tax Losses B = A x 15.3%	Lost Upper Bound Earnings C	Employment Tax Losses D = C x 15.3%
2020	$164,173,878	$25,118,603	$147,724,236	$22,601,808
2021	$162,131,112	$24,806,060	$145,681,470	$22,289,265
2022	$160,124,184	$24,499,000	$143,674,542	$21,982,205
2023	$158,153,094	$24,197,423	$141,703,452	$21,680,628
2024	$156,182,004	$23,895,847	$139,732,362	$21,379,051
2025	$154,246,752	$23,599,753	$137,797,110	$21,082,958
2026	$152,347,338	$23,309,143	$135,897,696	$20,792,347
2027	$150,447,924	$23,018,532	$133,998,282	$20,501,737
2028	$148,584,348	$22,733,405	$132,134,706	$20,216,610
2029	$146,720,772	$22,448,278	$130,271,130	$19,931,483
10-year Total	$1,553,111,406	$237,626,045	$1,388,614,986	$212,458,093

Table 21(B): Initial Approvals on the Upper Bound Wage

Fiscal Year	Lost Lower Bound Earnings A	Employment Tax Losses B = A x 15.3%	Lost Upper Bound Earnings C	Employment Tax Losses D = C x 15.3%
2020	$357,803,586	$54,743,949	$321,952,932	$49,258,799
2021	$353,351,544	$54,062,786	$317,500,890	$48,577,636
2022	$348,977,608	$53,393,574	$313,126,954	$47,908,424
2023	$344,681,778	$52,736,312	$308,831,124	$47,251,162
2024	$340,385,948	$52,079,050	$304,535,294	$46,593,900
2025	$336,168,224	$51,433,738	$300,317,570	$45,948,588
2026	$332,028,606	$50,800,377	$296,177,952	$45,315,227
2027	$327,888,988	$50,167,015	$292,038,334	$44,681,865
2028	$323,827,476	$49,545,604	$287,976,822	$44,060,454
2029	$319,765,964	$48,924,192	$283,915,310	$43,439,042

10-year Total	$3,384,879,722	$517,886,597	$3,026,373,182	$463,035,097
Table 21(C): Renewal Approvals on the Lower Bound Wage				
Fiscal Year	**Lost Lower Bound Earnings A**	**Employment Tax Losses B = A x 15.3%**	**Lost Upper Bound Earnings C**	**Employment Tax Losses D = C x 15.3%**
2020	$602,938,512	$92,249,592	$542,587,320	$83,015,860
2021	$583,048,422	$89,206,409	$523,449,828	$80,087,824
2022	$563,194,170	$86,168,708	$505,602,504	$77,357,183
2023	$544,630,086	$83,328,403	$487,791,018	$74,632,026
2024	$526,101,840	$80,493,582	$470,624,616	$72,005,566
2025	$508,756,248	$77,839,706	$454,569,192	$69,549,086
2026	$491,984,064	$75,273,562	$438,549,606	$67,098,090
2027	$475,211,880	$72,707,418	$423,569,322	$64,806,106
2028	$459,550,674	$70,311,253	$408,624,876	$62,519,606
2029	$443,925,306	$67,920,572	$394,218,000	$60,315,354
10-year Total	$5,199,341,202	$795,499,204	$4,649,586,282	$711,386,701
Table 21(D): Renewal Approvals on the Upper Bound Wage				
Fiscal Year	**Lost Lower Bound Earnings A**	**Employment Tax Losses B = A x 15.3%**	**Lost Upper Bound Earnings C**	**Employment Tax Losses D = C x 15.3%**
2020	$1,314,055,344	$201,050,468	$1,182,524,840	$180,926,301
2021	$1,270,706,514	$194,418,097	$1,140,816,236	$174,544,884
2022	$1,227,435,790	$187,797,676	$1,101,919,448	$168,593,676
2023	$1,186,976,882	$181,607,463	$1,063,100,766	$162,654,417
2024	$1,146,596,080	$175,429,200	$1,025,687,992	$156,930,263
2025	$1,108,792,776	$169,645,295	$990,696,504	$151,576,565
2026	$1,072,239,168	$164,052,593	$955,783,122	$146,234,818
2027	$1,035,685,560	$158,459,891	$923,134,814	$141,239,627
2028	$1,001,553,238	$153,237,645	$890,564,612	$136,256,386
2029	$967,499,022	$148,027,350	$859,166,000	$131,452,398
10-year Total	$11,331,540,374	$1,733,725,677	$10,133,394,334	$1,550,409,333
Source: USCIS Analysis				

Lost earnings, which DHS estimates could range between $6,038,201,268 and $14,716,520,096 [124] over the 10-year period from FY 2020 to FY 2029, would result in corresponding employment tax losses ranging between $923,844,794 and $2,251,612,274.[125] Annualized at 7 percent, employment tax losses would range from approximately $93,947,687 to $228,789,887 (Table 22). Again, depending on the circumstances of the employee, there could be additional federal income tax losses not estimated here. There may also be state and local income tax losses that would vary according to the jurisdiction, but which DHS is unable to quantify. It is noted that the potential decrease in tax transfers only applies to the compensation impacts, not to labor turnover costs, costs associated with the forms' burdens, or implementation and usage of E-Verify.

[124] Calculations (data from Table 18): $1,388,614,986 (10-year total initial upper bound costs) + $4,649,586,282 (10-year total renewal upper bound costs) = $6,038,201,268 (minimum 10-year total lower bound costs); $3,384,879,722 (10-year total initial upper bound costs) + $11,331,540,374 (10-year total renewal upper bound costs) = $14,716,420,096 (maximum 10-year total upper bound costs).

[125] Calculations: $212,458,093 (10-year total initial lower bound costs) + $711,386,701 (10-year total renewal lower bound costs) = $923,844,794 (minimum 10-year total lower bound costs); $517,886,597 (10-year total initial upper bound costs) + $1,733,725,677 (10-year total renewal upper bound costs) = $2,251,612,274 (maximum 10-year total upper bound costs).

II. Total Costs of the Rule

In the previous sections we presented monetized estimates of the impacts of the proposed rule germane to lost labor earnings, biometrics submission, increased time burdens for completing forms, and labor turnover costs for renewals. We estimated the per employer cost associated with enrolling in and participating in the E-Verify program, but not the total costs for businesses. In the development of costs associated with lost labor earnings, our inability to refine the population that could be impacted drove reliance on a lower and upper bound.

The total impacts are aggregated by summing the total initial and renewal impacts from Tables 18 through 21 in terms of the maximum and minimum estimates. Therefore, Table 22 shows the range of estimated monetized costs of the proposed rule, where Table 22(A) presents the maximum estimates, and Table 22(B) presents the minimum estimates. For each sub-table the ten-year totals are provided in undiscounted 10-year total values, as well as the present value costs and annualized costs discounted at 7 percent and 3 percent.

Table 22: Monetized Impacts of the Proposed Rule, FY 2020 to 2029				
Table 22(A): Maximum Estimates				
Fiscal Year	**Lost Labor Earnings (Costs or Transfers)**	**Biometrics (Costs)**	**Time Burden to Complete Forms (Costs)**	**Taxes (Transfers)**
2020	$1,671,858,930	$589,643	$112,500	$255,794,416
2021	$1,624,058,058	$581,180	$110,885	$248,480,883
2022	$1,576,413,398	$569,371	$108,632	$241,191,250
2023	$1,531,658,660	$561,105	$107,055	$234,343,775
2024	$1,486,982,028	$553,036	$105,516	$227,508,250
2025	$1,444,961,000	$541,818	$103,375	$221,079,033
2026	$1,404,267,774	$533,749	$101,836	$214,852,969
2027	$1,363,574,548	$523,121	$99,808	$208,626,906
2028	$1,325,380,714	$515,445	$98,343	$202,783,249
2029	$1,287,264,986	$507,770	$96,879	$196,951,543
Undiscounted 10-year Total	$14,716,420,096	$5,476,238	$1,044,829	$2,251,612,274
PV 7%	$10,502,774,047	$3,882,223	$740,702	$1,606,924,429
PV 3%	$12,642,167,340	$4,690,512	$894,918	$1,934,251,602
Annualized 7%	$1,495,358,741	$552,741	$105,459	$228,789,887
Annualized 3%	$1,482,047,682	$549,871	$104,912	$226,753,295
Table 22(B): Minimum Estimates				
Fiscal Year	**Lost Labor Earnings (Costs or Transfers)**	**Biometrics (Costs)**	**Time Burden to Complete Forms (Costs)**	**Taxes (Transfers)**
2020	$690,311,556	$88,739	$12,509	$105,617,668
2021	$669,131,298	$86,417	$12,182	$102,377,089
2022	$649,277,046	$86,294	$12,164	$99,339,388
2023	$629,494,470	$83,972	$11,837	$96,312,654
2024	$610,356,978	$83,850	$11,820	$93,384,618
2025	$592,366,302	$81,650	$11,510	$90,632,044
2026	$574,447,302	$79,572	$11,217	$87,890,437
2027	$557,567,604	$79,327	$11,182	$85,307,843
2028	$540,759,582	$77,249	$10,889	$82,736,216
2029	$524,489,130	$77,005	$10,855	$80,246,837
Undiscounted 10-year Total	$6,038,201,268	$824,075	$116,165	$923,844,794
PV 7%	$4,312,740,129	$583,994	$82,322	$659,849,240
PV 3%	$5,188,944,320	$705,725	$99,482	$793,908,481
Annualized 7%	$614,037,170	$83,148	$11,721	$93,947,687
Annualized 3%	$608,302,571	$82,732	$11,662	$93,070,293
Source: USCIS Analysis				

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As table 22 shows, the projected 10-year monetized undiscounted costs of the proposed rule for the period fiscal year 2020 to 2029 could be as high as about $14.72 billion with a minimum cost estimate of $6.04 billion under the assumptions relied on.[126] 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 orders of supervision would have filled. DHS notes there are unquantified costs not reflected in the estimates above.

Benefits

The benefits potentially realized by the proposed rule are both qualitative and quantitative. DHS has provided estimates of monetized benefits, where possible. DHS estimates that U.S. workers could have a better chance of obtaining jobs that some (c)(18) alien workers currently hold, as the proposed rule would reduce employment authorization eligibility for the (c)(18) alien worker population.

In addition, the restriction on the ability to obtain work authorization may increase incentives for aliens with final orders of removal to depart the United States, which could decrease the amount of time aliens are in this status and could save government resources expended while aliens are temporarily released on orders of supervision and pending repatriation. ICE oversees the monitoring and tracking of aliens on orders of supervision as well as effectuates their removal from the United States.[127] Managing aliens temporarily released on orders of supervision consumes DHS resources. Specifically, ICE must devote resources to track and monitor the status of these aliens. This includes conducting regular check-ins to ensure compliance with conditions of release. These cases absorb scarce enforcement resources that could be diverted to, among other things, identifying and detaining criminal aliens. If fewer aliens with final orders of removal on orders of supervision remain in the United States for an extended period of time because this rule increases the incentives for them to depart, then ICE is likely to spend fewer resources on monitoring and tracking aliens on orders of supervision. Monetizing this benefit is not possible at this time. Although the federal government makes efforts to remove these aliens from the United States on an ongoing basis regardless of employment authorization, there is no way to know the timing of when aliens would be removed, if an alien would be motivated to self-deport or, ultimately, who would execute the removal.

The proposal to revise the (a)(10) employment authorization category could provide aliens who are granted CAT deferral of removal with monetary benefits that can be quantified. Currently, this population is regulated to apply for an EAD under the (c)(18) category. In practice, DHS acknowledges that some aliens who are granted CAT deferral of removal have applied under the (a)(10) Form I–765 category and adjudication of these applications has been inconsistent. This proposed revision would thus reduce confusion for aliens who are granted CAT deferral of removal applying for an EAD and would lead to consistent Form I–765 adjudication for this population.

For those who currently apply under the (c)(18) category, Form I–765 must be accompanied by the filing fee and a copy of the DOJ Executive Office for Immigration Review (EOIR) immigration judge's order of removal. As stated in the Form I–765 instructions, three additional factors may also be considered under the (c)(18) category, including the existence of a dependent spouse and/or children in the United States who rely on the alien for support; existence of economic necessity to be employed; and the anticipated length of time before the alien can be removed from the United States. If supporting evidence is requested, DHS recognizes that there would be associated opportunity costs of time for those aliens.

Aliens under the (a)(10) category are not required to apply to DHS to obtain employment authorization before they can begin work. However, (a)(10) aliens are required to apply (*i.e.,* submit Form I–765) in order to receive a physical EAD card if they want a document evidencing their employment authorization pursuant to their grant of withholding or deferral. Under the (a)(10) category, aliens file Form I–765 with a copy of the EOIR immigration judge's signed order granting withholding of removal. There are no additional factors for consideration. DHS is not able to determine the number of aliens who are granted CAT deferral of removal who apply under the (c)(18) category, submit evidence for the additional factors, or who may opt to not apply for a physical EAD card. Therefore, since DHS cannot separate out the number of applicants who may benefit from this proposed provision, we consider a ''best-case'' scenario. In the best-case scenario, none of the 147 (the 5-year average number of cases, Table 16) aliens who are granted CAT deferral of removal would apply for a physical EAD card after the effective date of this rule since they would not need to obtain an EAD in order to begin work. Under this scenario, benefits would accrue from not paying filing fees and not spending time filing Form I–765. The filing fee for aliens applying for employment authorization is $550.[128] DHS estimates this population could save a maximum $80,850 in filing fees in the first year of the rule becoming effective.[129] The other benefit would be accrued in the form of opportunity costs since these aliens would not spend time preparing and submitting Form I–765 and any other evidence that would have been required under the (c)(18) considerations. DHS is able to quantify the savings that would result from not submitting Form I–765, which has an estimated time burden of 4 hours and 30 minutes.[130] Using the lower and upper bound wage rates, the opportunity cost of time savings would range from about $77.54 to $168.98 per alien in the first year.[131] For the 147 aliens who are granted CAT deferral of removal, the opportunity cost of time savings would range from $11,398 to $24,840 under this scenario.[132] Per alien, benefits for this population would range from approximately $627.54 to $718.98 per alien, with a total benefit ranging from $92,248 to $105,690 annually.[133] Additional savings could

[126] Calculations: $6,038,201,268 (lost labor earnings costs) + $824,075 (biometrics costs) + $116,165 (time burden to complete forms costs) = $6,039,141,507 minimum undiscounted 10-year total; $14,716,420,096 (lost labor earnings costs) + $5,476,238 (biometrics costs) + $1,044,829 (time burden to complete forms costs) = $14,722,941,163 maximum undiscounted 10-year total.

[127] *See* Immigration Enforcement, Removal *https://www.ice.gov/removal* and Enforcement and Removal Operations, ERO Overview *https://www.ice.gov/ero.*

[128] USCIS was previously authorized to collect a $410 Form I–765 filing fee. However, the recently promulgated fee rule updated the fee for Form I–765 to $550. The final fee rule is expected to take effect on October 3, 2020. *See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 85 FR 46788 (Aug. 3, 2020).

[129] $550 (filing fee to apply for an initial EAD under the (c)(18) category) × 147 (average number of cases granted CAT deferral of removal) = $80,850.

[130] *See* Instructions for Form I–765 (05/31/2020) at *https://www.uscis.gov/i-765.*

[131] Calculations: 4.5 hours (time burden for Form I–765) × $17.23 (one hour of work at prevailing wage) = $77.54; 4.5 hours (time burden for Form I–765) × $37.55 (one hour of work at average wage for all occupations) = $168.98.

[132] Calculations: $77.54 × 147 (the average number of cases granted CAT deferral of removal) = $11,398; $168.98 × 147 (the average number of cases granted CAT deferral of removal) = $24,840.

[133] Calculation: $77.54 (lower bound opportunity cost of time) + $550 (filing fee) = $627.54; $168.98 (upper bound opportunity cost of time) + $550

Continued

also be accrued in the form of opportunity costs if applicants would have spent time submitting evidence under any of the (c)(18) considerations.

The scenario presented here is an extreme to best estimate the maximum savings of this proposed provision. It is likely that some aliens who are granted CAT deferral of removal would continue to submit Form I–765 and pay the $550 filing fee in order to obtain a physical EAD card. Therefore, the overall benefit of this proposed provision is presented using a range from $0 to $105,690 annually.

DHS welcomes any data or public comments on the benefits of removing the eligibility of employment authorizations to certain (c)(18) workers. DHS is particularly interested in public comments about the benefits to U.S. workers of removing the eligibility of employment authorization for (c)(18) workers. DHS is also interested in receiving comments on the increased employment opportunities for U.S. workers due to this rule. DHS welcomes any overall public feedback or data that could assist DHS in quantifying the benefits of the proposed rule.

Labor Market Overview

As discussed in the population section of this analysis, USCIS anticipates approving somewhere between 17,077 and 22,090 Form I–765 applications annually from aliens with final orders of removal in the absence of this proposed rule.[134] The U.S. labor force consists of a total of 160,143,000 workers, according to recent data (September 2020).[135] Therefore, the maximum population affected by this proposed rule (about 22,090) represents 0.01 percent of the U.S. labor force, suggesting that the number of potential workers no longer eligible for an EAD make up a very small percentage of the U.S. labor market.[136]

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.[137]

This proposed rule would eliminate eligibility for employment authorization for aliens who have final orders of removal and are temporarily released on orders of supervision except in cases where the alien meets the exception under this proposed rule (*i.e.* removal is impracticable because all countries from whom DHS requested travel documents have affirmatively declined to issue such documents). DHS has estimated that the rule would cover an upper bound population of about 22,090 aliens. As previously explained, the provision being proposed may result in forgone labor earnings for aliens temporarily released on order of supervision. This rule directly regulates and impacts aliens temporarily released on orders of supervision and individuals are not considered a small entity under the Regulatory Flexibility Act. Some entities (including employers) could be indirectly impacted by labor turnover costs or the costs of implementing and utilizing E-Verify by this proposed rule because they employ an affected alien. DHS has prepared an initial regulatory flexibility analysis (IRFA) to accompany this proposed rule.

i. A Description of the Reasons Why the Action by the Agency is Being Considered

DHS has determined that the current employment authorization regulations governing discretionary employment authorization do not adequately reflect DHS's enforcement mission and priorities. As discussed more fully in the preamble, DHS's enforcement goals are not consistent with allowing aliens to work when they have an order of removal from the United States.

DHS is proposing through this rulemaking to align its discretionary authority to grant employment authorization with its immigration enforcement mission and priorities. Enforcement is essential to the integrity of the immigration system.

ii. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

DHS's authority to detain and release aliens ordered removed from custody on orders of supervision and to grant employment authorization is found in several statutory provisions. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107–296, 116 Stat. 2135), 6 U.S.C. 112 and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States.[138] In addition to establishing the Secretary's general authority to administer and enforce immigration laws, section 103 of the INA, 8 U.S.C. 1103, enumerates various related authorities including the Secretary's authority to establish regulations as are necessary for carrying out his authority. Section 241 of the INA, 8 U.S.C. 1231, governs the detention, release, and removal of aliens after they have received an administratively final order of removal. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed by statute or in the discretion of the Secretary and the requirements U.S. employers must follow to verify the identity and employment authorization of their employees. The authority to establish and operate E-Verify is found in sections 401–405 of IIRIRA, Public Law 104–208, 110 Stat. 3009–546. The Secretary proposes the changes in this rule under these authorities.

iii. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

This rule directly regulates and impacts aliens temporarily released on orders of supervision and individuals are not considered a small entity under the Regulatory Flexibility Act. Since some small entities may be indirectly impacted by this proposed rule by employing an affected alien, DHS has developed this IRFA to evaluate the potential impact on small entities. Small entities could incur costs due to the proposed rule if they employ EAD holders who are affected by the new requirements of the proposed rule. However, DHS does not currently require information on the employer or employment status of the EAD holder and thus is unable to determine how many entities could be impacted by the

(filing fee) = $718.98; $627.54 × 147 = $92,248 (lower bound total benefit); $718.98 × 147 = $105,690 (upper bound total benefit).

[134] Calculations: 4,241 (projected initial approvals FY 2029) + 12,836 (projected renewal approvals FY 2029) = 17,077 minimum projected annual approvals; 4,728 (projected initial approvals FY 2020) + 17,362 (projected renewal approvals FY 2020) = 22,090 maximum projected annual approvals.

[135] The BLS labor force data are found in Table A–1. Employment status of the civilian population by sex and age, seasonally adjusted, from the Current Population Survey October 2020 News Release: *https://www.bls.gov/news.release/archives/empsit_10022020.pdf.* (last visited October 8, 2020).

[136] Calculation: (22,090 maximum projected annual (c)(18) alien worker approvals/160,143,000 workers) *100 = 0.01 percent (rounded).

[137] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

[138] Public Law 104–208, div. C, at secs. 401–405.

proposed rule or whether the entities impacted would be considered small entities. This is because these EADs are open market EADs,[139] 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. DHS expects that this type of turnover would be incurred in the first two years after the effective date of this rule.[140] Small entities, that do not currently participate in E-Verify would incur costs to implement and use the program in order to retain aliens temporarily released on orders of supervision in order for the alien to be eligible for a renewal EAD under this rule. DHS estimates the total first year cost for a new entity to enroll in the E-Verify program and create a single E-Verify case would be approximately $113.65. In subsequent years, DHS estimates newly enrolled entities would incur a minimal annual cost of $53.71 to maintain their account and create one new case for their (c)(18) worker. DHS recognizes that the actual cost to newly-enrolled entities of using E-Verify would be higher since case submissions would also include all newly hired employees, not just (c)(18) workers. However, since DHS cannot predict how many employees each entity would hire in the future, DHS cannot estimate how many additional E-Verify cases an entity may expect to create. Entities already enrolled in the E-Verify program who choose to hire (c)(18) workers in subsequent years would incur costs even in the absence of this proposed rule.

Small entities that are not participating in E-Verify face the binary choice of participating in or not participating in the program. If an entity who had hired a (c)(18) alien worker does not participate, the entity faces the potential for labor turnover costs. If the entity does participate, the entity incurs the cost of enrolling and participating in the E-Verify program and implementing the program requirements. On one hand, since the EADs last only a year, there might be some disincentive not to participate in E-Verify. However, as discussed in the population section, DHS cannot make reliable estimates of the number of entities that would enroll and participate in E-Verify, and as such, cannot estimate total costs germane to this implementation.

If a small entity who employs (c)(18) alien workers who would remain eligible under this rule is not enrolled in E-Verify and opts not to enroll, the entity would incur labor related turnover costs. Entities would incur labor turnover costs because these alien workers would remain eligible for an initial EAD under this rule, but would not be eligible for a renewal EAD since they would be unable to establish that they are employed by an entity enrolled in E-Verify. As a result, alien workers would no longer be able to work and presumably entities would need to find a replacement worker. For aliens who would remain eligible for an EAD under this rule, the duration of time to remove aliens on orders of supervision from the U.S. would likely be longer than average as DHS has determined that removal for these aliens is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents. Therefore, entities who do not use or are enrolled in E-Verify would incur turnover costs in cases where their (c)(18) alien workers would remain eligible for an EAD under this rule.

Using annual earnings based on the effective minimum wage (lower bound), DHS estimates labor turnover costs would be approximately $7,168 per worker and using the annual earnings based on the average wage (upper bound), DHS estimates labor turnover costs would be approximately $15,621 per worker.[141] Turnover costs would be higher if a U.S. employer that does not use or enroll in E-Verify employ more than one (c)(18) alien worker who would remain eligible under this rule. DHS recognizes that turnover costs would occur in the year an EAD expires and, depending on the effective date of this rule should it become finalized, employers who incur turnover costs may incur them in up to two consecutive fiscal years.

DHS is unable to predict how many entities would actually participate in E-Verify in order to retain their (c)(18) alien workers or the total number of employment authorizations they would confirm through E-Verify should they choose to participate. DHS assumes that entities would make a cost-benefit decision between incurring labor turnover costs and incurring the current and future costs to enroll and participate in E-Verify. DHS recognizes that an entity that enrolls and participates in E-Verify would confirm employment authorization for all new hires, not only their (c)(18) alien workers.

DHS has no way to predict how many small entities would adopt the E-Verify system and how many workers they would vet. Since this rule proposes to eliminate eligibility for employment authorization for aliens temporarily released on orders of supervision, the impact on the renewal population would depend on which aliens remain eligible and if the alien's employer already participates in E-Verify or would be willing to enroll and participate in E-Verify if the employer is not enrolled. DHS cannot rule out that some employers would incur labor turnover costs as a result of choosing to not enroll and participate in E-Verify. Because of the uncertainty regarding eligibility, DHS is unable to estimate a range for the renewal population that would be impacted by this provision and attempting to do so would be completely speculative. However, DHS acknowledges there could be renewal applicants who would be impacted by this provision, which could, in turn, affect employers, some of which could be small entities. DHS seeks comments from the public on the impacts to small entities from enrolling and participating in the E-Verify program. DHS also seeks public comment on the number of small businesses that may be affected as well as compliance costs to those small businesses as a result of this proposed rule.

[139] Open market EADs allow aliens to work in any occupation or industry. The alien is not required to work for a specific employer or in any specific industry or occupation, and the U.S. employer is not required to test the labor market to ensure that there are no U.S. workers available and that the hiring of the (c)(18) alien will not adversely affect the wages and working conditions for similarly situated U.S. workers.

[140] We do not attribute turnover costs from ineligibility in other years because we operate under the assumption that if an initial EAD is approved, then the renewal would also be approved under the proposed criteria of this rule. DHS recognizes that in some cases, a renewal filing could be denied even in the wake of an approved initial EAD in future years, but the number of instances this would occur is unknown. Estimation of these cases would be speculative at this time.

[141] Calculations: $35,838 × 20% = $7,168; $78,106 × 20% = $15,621.

iv. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report Record

This rule would not directly impose any reporting, recordkeeping, or other compliance requirements on small entities.

v. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

DHS is unaware of any relevant federal rule that may duplicate, overlap, or conflict with the proposed rule.

vi. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

This rule directly regulates and impacts aliens temporarily released on orders of supervision and individuals are not considered a small entity under the Regulatory Flexibility Act. Accordingly, DHS is not aware of any alternatives to the proposed rule that accomplish the stated objectives and that would minimize the economic impact of the proposed rule on small entities as this rule already imposes no direct costs on small entities. DHS requests comments and seeks alternatives from the public that will accomplish the same objectives.

C. Congressional Review Act

This proposed rule is a major rule as defined by 5 U.S.C. 804, also known as the Congressional Review Act (CRA) as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the CRA, or 60 days after the final rule's publication, whichever is later.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100 million in 1995, adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI–U), is $168 million.[142] While this rule may result in the expenditure of more than $100 million annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes. Therefore, no actions were deemed necessary under the provisions of the UMRA.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this proposed rule would impose substantial direct compliance costs on State and local governments or preempt state law. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

G. Executive Order 13175 Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

H. Family Assessment

DHS has reviewed this proposed rule in line with the requirements of section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277. DHS has systematically reviewed the criteria specified in section 654(c)(1). DHS has determined that the proposed rule may adversely cause personal and family-related hardships, including causing disruptions to the alien, U.S. citizen, or LPR spouses and/or children dependent on the income currently earned by the affected alien and may decrease disposable income and increase the poverty of certain family members. However, DHS notes that an alien with a final order of removal will eventually be removed from the country and such families should ultimately expect to experience such hardships. Thus, this proposed rule could result in families experiencing such hardships earlier in comparison to the state of affairs in the absence of the proposed rule. DHS has also determined that the proposed rule neither strengthens or erodes the authority and rights of parents in the education, nurture and supervision of their children; nor affects the ability for a family to perform its functions, or substitutes governmental activity or function; this is not an action that can be carried out by State or local government or by the family, nor does the action establish an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. For the reasons stated elsewhere in this preamble, however, DHS has determined that the benefits of the action justify the financial impact on the family. As described in the Purpose, Background, and Discussion sections of this rule, DHS has compelling legal and policy reasons for the proposed regulatory action, including the enforcement of the general prohibition against providing alien's ordered removed with employment authorization and encouraging those aliens with final orders of removal to depart the United States.

I. National Environmental Policy Act

DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01 establish the policies and procedures DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ)

[142] U.S. Bureau of Labor Statistics, Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. City Average, All Items, available at *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202001.pdf* (last visited Feb. 19, 2020).

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657 − 152.383)/152.383] * 100 = (103.274/152.383) *100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions''), which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1507.3(b)(2)(ii), 1508.4. For an action to be categorically excluded, the Instruction Manual requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)–(c).

This proposed rule would amend regulatory criteria for determining eligibility for employment authorization for aliens temporarily released from custody on an order of supervision by amending two existing regulations. First, it would amend 8 CFR 274a.12 to limit employment authorization eligibility to aliens whose removal DHS has determined is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents and who establish economic necessity. Second, this proposed rule would amend the application process in 8 CFR 274a.13 for aliens seeking initial employment authorization by making certain changes to the supporting documentation submitted with the application. The proposed amendments clearly fit within categorical exclusion A3(a) ''Promulgation of rules of a strictly administrative or procedural nature'' and A3(d) ''Promulgation of rules . . . that interpret or amend an existing regulation without changing its environmental effect.'' Instruction Manual, Appendix A, Table 1. Furthermore, the proposed amendments are not part of a larger action and do not present extraordinary circumstances creating the potential for significant environmental impacts. Therefore, the proposed amendments are categorically excluded from further NEPA review.

J. Paperwork Reduction Act

DHS is submitting the information collection requirements in this rule to OMB for review and approval in accordance with requirements of the PRA of 1995, 44 U.S.C. 3501–3512. Table 23 shows a summary of the forms that are part of this rulemaking.

TABLE 23

Form	Form name	New or updated form	General purpose of form	General categories filing	Applicability to employment authorization
I–765	Application for Employment Authorization.	Update—revises and adds instructions and questions for aliens seeking employment authorization who are subject to a final order of removal and have been temporarily released from custody on an order of supervision and for aliens who are recipients of deferral of removal under the regulations implementing the CAT.	Applicants use this form to request employment authorization from USCIS.	• Aliens temporarily released on orders of supervision. • Aliens granted deferral of removal under the regulations implementing the CAT.	USCIS will require aliens seeking employment authorization based on an order of supervision or DCAT to file an application to receive an EAD.
I–765WS	Form I–765 Worksheet.	Update—updates instructions to include aliens temporarily released on orders of supervision in the list of aliens who must complete the Form I–765WS to show economic necessity for employment authorization.	Applicants for employment authorization use this form to provide financial information demonstrating an economic need for employment authorization and an explanation of the circumstances resulting in the need for an EAD.	• Aliens temporarily released on orders of supervision.	USCIS will require aliens seeking employment authorization based on an order of supervision to submit Form I–765WS to establish economic need for an EAD.

USCIS Form I–765 and I–765WS

DHS invites comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

1. Evaluate whether the collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Application for Employment Authorization.

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Forms I–765; I–765WS; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals and households. USCIS will require an individual seeking employment authorization who has a final order of

removal and was temporarily released on an order of supervision to file the Form I–765. USCIS will use the data collected on this form to determine if an individual temporarily released on an order of supervision and seeking employment authorization is eligible based on DHS's determination that his or her removal is impracticable because all countries from whom DHS has requested travel documents have affirmatively declined to issue such documents. Form I–765WS is used to determine if the individual seeking employment authorization has an economic need to work.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection Form I–765 is 2,286,000 and the estimated hour burden per response is 5 hours; the estimated total number of respondents for the information collection Form I–765WS is 307,697 and the estimated hour burden per response is .50 hours; the estimated total number of respondents for the information collection biometrics is 308,232 and the estimated hour burden per response is 1.17 hours: the estimated total number of respondents for the information collection passport-style photographs is 2,280,303 and the estimated hour burden per response is .50 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 13,084,631hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this information collection is $400,838,850.

K. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

List of Subjects

8 CFR Part 106

Immigration, user fees.

8 CFR Part 241

Administrative practice and procedure, Aliens, Employment, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Regulatory Amendments

Accordingly, DHS proposes to amend parts 106, 241 and 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

PART 106—USCIS FEE SCHEDULE

■ 1. The authority for Part 106 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b, 1304, 1356; Pub. L. 107–609; 48 U.S.C. 1806; Pub. L. 115–218.

■ 2. Amend § 106.2 by adding paragraph (a)(32)(i)(C) to read as follows:

§ 106.2 Fees

(a) * * *

(32) * * *

(i) * * *

(C) An alien subject to a final order of removal and temporarily released on an order of supervision who is applying for initial or renewal of employment authorization under 8 CFR 274a.12(c)(18).

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

■ 3. The authority citation for part 241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1228, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4103(c)(4); Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101, *et. seq.*); 8 CFR part 2.

■ 4. Amend § 241.4 by revising paragraph (j)(3) to read as follows:

§ 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

* * * * *

(j) * * *

(3) *Employment authorization.* An alien who is subject to a final order of deportation or removal and whom U.S. Immigration and Customs Enforcement has temporarily released on an order of supervision pursuant to section 241(a)(3) of the Act may apply to USCIS for employment authorization pursuant to the procedures prescribed under 8 CFR 274a.12(c)(18) and 274a.13. Any grant of employment authorization by USCIS is completely discretionary and the burden is on the alien to establish that he or she warrants a favorable exercise of discretion to receive employment authorization under this part. USCIS will only grant employment authorization if USCIS determines that the alien meets the criteria for employment authorization under 8 CFR 274a.12(c)(18) and warrants a favorable exercise of discretion. The alien must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions, and must submit biometrics, with any required fee.

* * * * *

■ 5. Amend § 241.5 by revising paragraphs (a) and (c) to read as follows:

§ 241.5 Conditions of release after removal period.

(a) *Order of Supervision.* Any alien U.S. Immigration and Customs Enforcement releases pursuant to 8 CFR 241.4 or 241.13(h), must be temporarily released on an order of supervision and must be issued a completed Form I–220B, Order of Supervision, specifying the conditions of release and the consequences for failure to comply with the conditions of release, including DHS authority to take the alien back into custody and the potential for criminal charges and fines under section 243 of the Act if the alien fails to comply with the conditions of release. The Secretary, Director of ICE, or designated delegate must have the authority to issue an order of supervision under this section. The order of supervision must specify the conditions of release including, but not limited to, the following:

* * * * *

(c) *Employment authorization.* An alien who is subject to a final order of deportation or removal and whom U.S. Immigration and Customs Enforcement has temporarily released on an order of supervision pursuant to section 241(a)(3) of the Act may apply to USCIS for employment authorization pursuant to 8 CFR 274a.12(c)(18) and 274a.13. USCIS will only grant employment authorization under this paragraph if USCIS determines, in the sole and unreviewable discretion of USCIS, that the alien meets the criteria to apply for employment authorization under 8 CFR 274a.12(c)(18) and warrants a favorable exercise of discretion.

§ 241.13 [Amended]

■ 6. Amend § 241.13(h)(3) by

■ a. Removing the words ''The Service'' and adding in its place ''USCIS''; and

■ b. Removing the reference to paragraph ''§ 241.5(c)'' and adding in its place ''8 CFR 241.5, 274a.12(c)(18), and 274a.13''.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 7. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 8. Amend § 274a.12 by revising paragraphs (a)(10) and (c)(18) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

(a) * * *

(10) An 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.

* * * * *

(c) * * *

(18)(i) USCIS, in its sole and unreviewable discretion, may grant employment authorization to an alien who is subject to a final order of deportation or removal and temporarily released from custody on an order of supervision, pursuant to section 241(a)(3) of the Act, who establishes economic necessity for employment, and for whom DHS has determined that the alien's removal is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents.

(ii) USCIS may grant employment authorization under 8 CFR 274a.12(c)(18) for a period that USCIS determines is appropriate at its discretion, not to exceed one year. Factors that USCIS will consider in determining whether an applicant with a final order of removal and temporarily released on an order of supervision warrants a favorable exercise of discretion include but are not limited to:

(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;

(iii) For renewal applications only, the applicant must also show that he or she is employed by a U.S. employer who is a participant in good standing in E-Verify.

* * * * *

■ 9. Amend § 274a.13 by adding paragraph (a)(3) and revising paragraph (b) to read as follows:

§ 274a.13 Application for employment authorization.

(a) * * *

(3) Aliens with final orders of removal or deportation who have been temporarily released from detention on an order of supervision and whose removal DHS has determined is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue such documents, and are applying for initial employment authorization or renewal of employment authorization based on 8 CFR 274a.12(c)(18) must file the appropriate form designated by USCIS, with the prescribed fee, and in accordance with the form instructions.

(i) *Evidence for initial applications.* Aliens who are applying for initial employment authorization under 8 CFR 274a.12(c)(18) must submit the following supporting documentation:

(A) A decision by an immigration judge or the Board of Immigration Appeals or an administrative removal order issued by DHS demonstrating that the alien is subject to a final order of removal or deportation;

(B) A completed Form I–765WS, Form I–765 Worksheet or successor form designated by USCIS and in accordance with the form instructions to show economic necessity; and

(C) A copy of the complete order of supervision issued by U.S. Immigration and Customs Enforcement including a copy of the complete Personal Report Record which reflects that the alien has been in continuous compliance with the order of supervision, from the date the alien was temporarily released on an order of supervision through the time of adjudication of the application for employment authorization.

(ii) *Evidence for Renewal Applications for Employment Authorization.* In addition to the evidence required under paragraph (a)(3)(i) of this section, aliens seeking renewal of employment authorization based on 8 CFR 274a.12(c)(18) must provide their U.S. employer's E-Verify Company Identification Number (or client company identification number if the U.S. employer uses an agent) and the employer's name as listed in E-Verify. An E-Verify employer is a participant in good standing if the employer has enrolled in E-Verify with respect to all hiring sites in the United States that employ an alien temporarily released from custody on an order of supervision who has received employment authorization under this rule, when the alien files their application for employment authorization; is in compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees at those hiring sites; and continues to be a participant in good standing in E-Verify at any time during which the employer employs an alien temporarily released on an order of supervision who has received employment authorization under this rule.

(b) *Approval of application.* If USCIS approves an application for employment authorization, USCIS will notify the alien. USCIS will issue an Employment Authorization Document (EAD) valid for a specific period and subject to any terms and conditions noted. For aliens granted employment authorization based on DHS's determination that the alien's removal is impracticable because all countries from which DHS has requested travel documents have affirmatively declined to issue a travel document, USCIS may limit the validity period, in its discretion, not to exceed one year.

* * * * *

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel,U.S. Department of Homeland Security.

[FR Doc. 2020–25473 Filed 11–17–20; 11:15 am]

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