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**RE: ILRC Comment in Opposition to Notice of Proposed Rulemaking:
Clarification of Discretionary Employment Authorization for Certain
[Immigrants]– CIS No. 2805-25; DHS Docket No. USCIS-2026-0067; RIN
1615-AC98 (“NPRM”)**

The Immigrant Legal Resource Center (ILRC) submits this comment in strong opposition to the Department of Homeland Security (“DHS”) United States Citizenship and Immigration Services (“USCIS”) NPRM, CIS No. 2805-25; DHS Docket No. USCIS-2026-0067; RIN 1615-AC98, Clarification of Discretionary Employment Authorization for Certain [Immigrants], published on June 5, 2026. This rule, if finalized, will severely restrict immigrant applicants’ longstanding access to an Employment Authorization Document (“EAD” or “work permit”).

Introduction

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC’s mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law and emerging issues, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations supporting in building their capacity to support immigrants and their families who depend on employment authorization to support themselves.

More specifically, the ILRC publishes advisories and manuals for legal practitioners in many areas of humanitarian immigration law which also involve accompanying applications for EADs under a variety of categories. Additionally, we support and host legal clinics to assist individuals in their applications for employment authorization. Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by low-income immigrants of color seeking asylum and immigration benefits, including employment authorization. It is through this lens that we provide this comment on the NPRM.

The NPRM would considerably limit who is eligible for employment authorization, a document necessary for noncitizens to survive and support themselves and their families, including parolees, deferred action recipients, and individuals with final orders of removal released on orders of supervision (OSUP). The NPRM would also adversely impact other noncitizens eligible for employment authorization under other categories by adding needless biometrics requirements; shortening validity periods; and creating criminal bars. The NPRM coupled with current DHS policies and procedures effectively deprives hundreds of thousands of applicants any meaningful ability to survive while their claims are pending. Combined with USCIS's separate rulemaking intended to dramatically restrict asylum-based employment authorization, this rule is part of a systematic effort to strip work authorization from millions of people who are permitted to remain in the United States.

The ILRC opposes this rule because it is unlawful, unsupported by evidence, and deeply harmful. As detailed below, the proposed rule will not only harm families and communities, weaken immigration protections, undermine public safety, and impose significant burdens, but the rule is contrary to law. As such, the ILRC urges DHS to rescind the NPRM.

I. The NPRM's Claim that USCIS has "Sole and Unreviewable Discretion" Is Contrary to Law.

The NPRM has unprecedented language that seeks to expand its authority beyond the confines of the rule of law, purporting to give the agency "sole and unreviewable discretion" to decide who should be authorized for employment.¹ Discretion is subject to examination for fundamental fairness, and if exercised summarily and unfairly, it is an unlawful abuse of discretion. Even USCIS agrees with court decisions that discretion must be exercised fairly by weighing all positive and negative factors, and that officers that fail to do so are abusing discretion.² Arbitrary

¹ 8 CFR 274a.12, Classes of aliens authorized to accept employment, 91 Fed. Reg. 108 (June 5, 2026).

² See USCIS Policy Manual, "When issuing a decision that involves a discretionary determination, a careful explanation of the officer's findings and analysis (communicating the positive and negative factors considered and how the officer weighed these factors) helps ensure that the decision is legally sufficient and appropriate. The discretionary determination gives the officer authority to ultimately approve a benefit or form of relief or deny a benefit or form of relief when the applicant otherwise meets eligibility requirements. Officers, however, cannot exercise that authority arbitrarily or capriciously." 1 USCIS PM E.8, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.

and capricious discretion is unlawful, as is the “sole and unreviewable” discretion that this NPRM purports to grant USCIS.

Discretion is always subject to review for fairness in its exercise, which is the basis of the legal standard for “abuse of discretion.”³ This principle has long been upheld by the BIA.⁴ In addition, the Administrative Procedures Act (APA) provides review for abuse of discretion.⁵ Courts can set aside agency actions and rules that are arbitrary and capricious such as this NPRM.

USCIS’s own subregulatory guidance in the Policy Manual does not agree with this proposed regulation that the agency has sole and unreviewable, that is, absolute discretion. Elsewhere in the USCIS Policy Manual it states, “[i]n short, discretion is defined as the ability or power to exercise sound judgment in decision-making. While the discretionary analysis gives the officer some autonomy in the way in which he or she decides a particular case after all applicable eligibility requirements are established, that autonomy may only be exercised within the confines of certain legal restrictions. These restrictions define the scope of the officer’s discretionary authority.”⁶ Thus discretion has limits, it is not unreviewable.

Indeed, USCIS’s own guidance to officers regarding discretion states that, “supervisory review is required in certain situations. The law provides for outcomes that may be extraordinarily favorable for the applicant but uphold principles of fairness and equity.”⁷ Yet, this NPRM inexplicably attempts to create a new, unsupported, illegal “unreviewable” discretion.

As such, the NPRM’s language “sole and unreviewable” must be removed from the proposed regulation.

II. The NPRM Relies on Policy Manual Changes That Have No Legal Basis and were a Radical Departure from Prior USCIS Guidance on Discretion in Adjudications, Yet No Meaningful Opportunity for Public Review was Provided.

The NPRM relies on USCIS’s Policy Manual for authority⁸ but the Policy Manual changes on discretion were a radical change in the definition of discretion and were never opened for public comment. The Policy Manual changes took place in 2020 without public input and without

³ See [Matter of Arai \(PDF\)](#), 13 I&N Dec. 494, 496 (BIA 1970). See [Matter of Lam \(PDF\)](#), 16 I&N Dec. 432 (BIA 1978).

⁴ *Id.*

⁵ A court can “hold unlawful and set aside agency actions, findings and conclusions” that meet one or more of six standards: • Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; • Contrary to constitutional right, power, privilege or immunity... “ according to the APA. 5 U.S.C. § 706(2)(A)-(F); *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (citing 5 U.S.C. § 706(2)(A)-(D)) (“In all cases agency action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”)

⁶ 1 USCIS PM E.8, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8>.

⁷ 1 USCIS PM E.8 fn. 82, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8#footnotelink-82>.

⁸ DHS, *Clarification of Discretionary Employment Authorization for Certain Aliens*, 91 Fed. Reg. 108 (June 5, 2020), fns. 135 and 136.

justifying legal authority.⁹ Now with changes in the regulations, USCIS is trying to bootstrap authority for the regulation to its prior changes to the Policy Manual.

The Policy Manual mischaracterized existing regulations and case law on discretion in adjudications. USCIS created many new interpretations of discretion and the factors that adjudicators should apply, and it made no distinction between different application types despite differing underlying case law and regulations. The changes fundamentally altered applicants' ability to qualify for numerous benefits, yet the affected public was not given a meaningful opportunity to review them before they took effect. These changes were not published in regulations with a notice and comment as required by the APA. Instead, these major changes appeared in an unannounced change, effective immediately, to administrative guidance in the policy manual.

Prior to the Policy Manual changes on discretion, the agency relied on the policy described in the Adjudicator's Field Manual ("AFM"). The AFM guidance on discretion was two paragraphs long, applied mainly to adjustment of status, changes of status and waivers, and did not state specific factors that adjudicators must review to determine discretionary eligibility. Instead, the AFM encouraged officers to consult precedent case law, regulatory guidelines, and their supervisors when weighing discretionary factors identified in that case law.¹⁰ The AFM urged adjudicators to exercise caution in applying discretion to adjudications and emphasized the importance of consistency and uniformity of decisions.¹¹

The prior changes to 10 USCIS PM-A.5 that USCIS is now relying on as legal authority imposed an exhaustive discretionary analysis on employment authorization applications under INA 274a.12(c), which includes adjustment applicants, students, applicants for cancellation of removal, parolees, those granted deferred action, persons granted TPS, and individuals released under supervision with a final order of removal, among others.

The discretionary factors and formulas created by USCIS in the Policy Manual are a hodge-podge, some taken out of context from case law on specific forms of relief (motions to reopen, waivers of criminal grounds under former INA 212(c), eliminated by IIRIRA effective April 1, 1997, for example) and then applied across the board to a dozen types of applications with completely different underlying law. Other factors listed are cited to no authority whatsoever, except to the Policy Manual itself.

Some factors listed are so vague as to invite improper denials including: "moral depravity or criminal tendencies," (citing to *Matter of Edwards*, 20 I&N 191 (BIA 1990), a BIA case on former INA 212(c) waiver of criminal grounds, eliminated by IIRIRA, and irrelevant to other types of applications not applicable here); "findings of juvenile delinquency," (no case law cited); "community service beyond any imposed by the courts," (no citation); "evidence regarding respect for law and order, good character, and intent to hold family responsibilities (for

⁹ See USCIS, Policy Alert, *Applying Discretion in USCIS Adjudications* (July 15, 2020) <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200715-Discretion.pdf> and ILRC, ILRC Opposes USCIS's Changes to the Policy Manual on Discretion (Aug. 17, 2020) <https://www.ilrc.org/resources/ilrc-opposes-uscis%E2%80%99s-changes-policy-manual-discretion>.

¹⁰ Attachment 1.

¹¹ *Id.*

example, affidavits from family, friends and responsible community members,”) (citing to three cases that concerned the former INA 212(c) waiver of criminal grounds). These vague, unsupported factors will invite improper denials. Furthermore, they come from case law regarding standards for waivers of criminal grounds and have nothing in common whatsoever with a routine application for employment authorization, the I-765.

The citations in the Policy Manual are most often made to the Policy Manual itself, or on other occasions to cases which do not support the proposition asserted. The Policy Manual cites to a series of U.S. Supreme Court decisions on motions to reopen,¹² which have entirely separate statutory and regulatory provisions on discretion, and purports to apply this standard to the many types of immigration benefits named in the Policy Manual.¹³ The Policy Manual also cites to BIA decisions which are very specific to the relief discussed in the particular case, and then applies the discussion of discretionary factors to dozens of application types that the BIA never considered in those decisions.¹⁴ Again, none of these decisions had any relevance to the adjudication of an I-765, which is not an application for relief, but is rather an ancillary application for employment authorization that relies on an underlying application or status that the person has with USCIS.

Despite USCIS’s reliance on its Policy Manual, this NPRM creates even more illegitimate and murky factors for consideration in discretion. The hapless adjudicator who must attempt to follow this legal formula will be, quite rightly, confused. Furthermore, this labyrinth of discretionary factors lacks any legitimate legal authority and is inappropriate for adjudication of an I-765. The I-765 is not the primary application and should not be treated as an adjudication of a benefits application – it is merely a ministerial adjudication, routinely performed after checking that the person fits the category they are applying under for the employment authorization. It is not in any sense a discretionary benefits application such as a waiver, which of necessity involves weighing positive evidence of equities against negative factors.

III. The NPRM violates the Administrative Procedure Act.

The Administrative Procedure Act (“APA”) establishes the procedures by which federal agencies are held accountable to the public and subjects their actions to judicial review.¹⁵ Under Supreme

¹² 1 USCIS-PM E.8 cites in footnote 36, 41 to *INS v. Doherty* (502 U.S. 314) (1992) motion to reopen denied in discretion to asylum applicant who was convicted of murder); *INS v. Abudu*, 485 U.S. 94 (1988) (motion to reopen granted to asylum applicant because BIA had abused its discretion)); and to *INS v. Rios-Pineda*, 471 U.S. 444 (1985) (motion to reopen) to support its expansive views of discretion, and its view that USCIS can deny an application on discretion without determining whether the individual is otherwise eligible for the benefit.

¹³ Motions to reopen have specific statutory and regulatory requirements that are irrelevant to the applications for benefits being impacted by the changes in the policy manual. See INA 240(c) (7)(B) and 8 CFR 1003.2(c)(1).

¹⁴ The policy manual cites repeatedly to *Matter of Marin*, 16 I&N 581, *Matter of Buscemi*, 19 I&N 628, and *Matter of Edwards*, 20 I&N 191 to support its expansive view of discretionary factors and its place in determination of eligibility. See I USCIS -PM E.8 fns. 31, 41, 46, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, and 61. These were cases where the BIA specifically considered discretion as it related to the criminal waiver under former INA 212(c). This discussion is not relevant to the application of discretion in the dozen other categories where the policy manual now applies it, and it is based on a section of the INA that was removed effective April 1, 1997 by IIRIRA.

¹⁵ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905, 207 L. Ed. 2d 353 (2020).

Court precedent, the agency is required to engage in “reasoned decisionmaking.”¹⁶ Further, an agency action is found to be arbitrary and capricious if:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁷

The NPRM is arbitrary and capricious in the following ways. First, the NPRM’s proposed exercise of discretion assessing applicants’ criminal backgrounds is arbitrary and capricious and violates the APA. Second, the NPRM fails to acknowledge or even consider noncitizens’, families’ and communities’ reliance interests. Third, the NPRM is unsupported by evidence and is unduly burdensome on noncitizens, their families, employers, and communities.

a. The NPRM’s Recommendation of Denying Employment Authorization Based on an Exercise of Discretion to All Individuals Who Have Been Arrested For or Convicted Of A Crime, Who Admit to Committing a Violent or Dangerous Crime, or Who Are Believed to Be Members of a Gang or Terrorist Organization, is Arbitrary, Capricious and Unlawful Under the APA.

The ILRC rejects the underlying premise of this regulation that there are “bad immigrants” who do not deserve the ability to work in the United States and “good immigrants” who deserve the ability to work in the United States. All individuals who are eligible for a work permit, whether it be statutorily mandated or granted in an exercise of discretion, should be given employment authorization regardless of their criminal background. All people accused or convicted of crimes are entitled to a presumption of innocence and to due process rights under the U.S. and the state Constitutions.

As of 2023, immigrants made up 14.3% of the U.S. population or 47,805,500 people. Immigrants paid \$651.9 billion in taxes and had spending power of \$1.7 trillion.¹⁸ According to the U.S. Census in 2022, over one quarter of all children lived with at least one foreign-born parent.¹⁹ Immigrants are an integral part of the United States. This proposed rule that effectively denies employment authorization for millions of noncitizens would cause devastating harm throughout

¹⁶ *Id* quoting *Michigan v. EPA*, 576 U.S. 743, 750, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015).

¹⁷ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁸ American Immigration Council, *Immigrants in the United States*, <https://map.americanimmigrationcouncil.org/locations/national/>.

¹⁹ Lydia Anderson and Paul Hernez, U.S. Census, *Children Living with at Least One Foreign-Born Parent More Likely to Live with Two Parents than Children with Native-Born Parents*, (Feb. 3, 2022), <https://www.census.gov/library/stories/2022/02/over-quarter-of-children-lived-with-at-least-one-foreign-born-parent.html>

the country. By DHS's own estimates, the cost of this proposed rule is between \$9.1 billion and \$27.9 billion over ten years.²⁰

DHS's NPRM proposes to eliminate discretionary employment authorization to noncitizens who have been paroled into the United States; for noncitizens who are granted deferred action; and for noncitizens against whom there is a final order of removal and who are released from custody under an order of supervision who have a criminal background or are suspected of gang membership or membership in a terrorist organization is arbitrary, capricious, and contrary to the law under the APA. There is an exception in the NPRM for impacted individuals where there are "significant countervailing public interests, which may include the presence of the [noncitizen] in the United States to assist law enforcement activity in the United States."²¹

However, this proposed rule fails to: (1) consider Congress's statutory scheme for allowing individuals in removal proceedings, individuals who are applying for relief, and individuals who are granted parole or deferred action to work legally in the United States for the duration of their status; (2) consider important aspects of the problem, including the dramatic change from past practice or offer a reasonable justification for the discretionary denial of employment authorization where the individual is arrested or convicted of a crime;²² or (3) consider "significant reliance interests"²³ of immigrants, and their families on the ability of noncitizens to work in the United States while their immigration case or ultimate removal is pending.

i. Denying Employment Authorization to People Arrested for a Crime Regardless of the Outcome of the Arrest Is Arbitrary and Capricious and Violates the APA.

Denying discretionary employment authorization to individuals who are arrested for a crime unless they can show that they have cooperated with law enforcement blatantly violates the APA. First, many, if not most, arrests do not result in convictions. For example, according to the California Department of Justice, in 2022, in the State of California, police made more than 250,000 felony arrests and more than 500,000 misdemeanor arrests. That year, there were 57,000 felony convictions and fewer than 100,000 misdemeanor convictions.²⁴ To dig deeper into this data, in California in 2022, only 61% of *all* felony arrests resulted in any type of conviction. Of

²⁰ DHS, *Clarification of Discretionary Employment Authorization for Certain Aliens*, 91 FR 34352, at 34357 (June 5, 2026) to be codified at 8 CFR §§ 106, 241, 274a.

²¹ *Id.* at 34353.

²² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (a "reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.")

²³ *Encino Motorcars, LLC v. Navarro*, 579 U.S. —, —, 136 S.Ct. 2117, 2126, 195 L.Ed.2d 382 (2016) quoting *Fox Television*, 556 U.S. at 515, 129 S.Ct. 1800; *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020) (agencies are "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.")

²⁴ Committee on Revision of the Penal Code, *Staff Memorandum 2023-07, Prosecutorial Discretion, Plea Bargaining, and Related Matters* (Sept. 26, 2023) at 2 citing California Department of Justice, *Crime in California 2022*, Table 19; Judicial Council of California, *2023 Court Statistics Report*, Tables 8b & 9a, <https://clrc.ca.gov/CRPC/Pub/Memos/CRPC23-07.pdf>.

the 250,000 felony arrests in 2022, more than 40,000 felony arrests were rejected for further prosecution *by the prosecutors*.²⁵ More than 20,000 felony filings resulted in a dismissal and more than 18,000 resulted in a misdemeanor conviction.²⁶ To deny an individual discretionary employment authorization because they have been *arrested* for a crime subverts the criminal law paradigm that all people are innocent until proven guilty beyond a reasonable doubt. To deny an individual discretionary employment authorization because they have been *arrested* radicalizes the way the criminal justice system works and creates a presumption of guilt rather than innocence.

Being denied employment authorization because of an arrest is especially dangerous for survivors of domestic violence who might have a U visa application,²⁷ a T visa application,²⁸ a VAWA self-petitioning applicant,²⁹ or a VAWA cancellation of removal application pending.³⁰ The NPRM creates another tool to allow perpetrators to further victimize survivors of abuse by ensuring that they lack the ability to work based on a false arrest. Many cities and states throughout this country are “dual arrest” jurisdictions where both the abuser and victim are arrested, charged with domestic violence, and incarcerated.³¹ Some states explicitly provide for dual arrests. In California, dual arrests are discouraged but are not prohibited.³² In dual arrest jurisdictions, discretion is taken away from the police officer answering the call and is placed on the judge to determine which party is the victim.³³ Studies indicate that over half of domestic violence arrestees are victims of domestic violence themselves.³⁴ To deny survivors of domestic violence employment authorization because they have been arrested for a crime further victimizes them.

Not only does this rule harm survivors of domestic violence, but it also harms people arrested for a variety of crimes. Public Defenders in the State of California report that individuals have been arrested for a variety of crimes, including selling raw milk,³⁵ using an artificial light for hunting,³⁶ and resisting arrest where there is no underlying crime.³⁷ As of 2026, more than 300

²⁵ *Prosecutorial Discretion, Plea Bargaining, and Related Matters*, at 3.

²⁶ *Prosecutorial Discretion, Plea Bargaining, and Related Matters*, at 5.

²⁷ People with U visa bona fide determinations are granted deferred action and are granted employment authorization in an exercise of discretion. 8 CFR § 274a.12(c)(33). *See also* USCIS, *National Engagement – U Visa and Bona Fide Determination Process – Frequently Asked Questions*, <https://www.uscis.gov/records/electronic-reading-room/national-engagement-u-visa-and-bona-fide-determination-process-frequently-asked-questions>.

²⁸ 8 CFR § 274a.12(c)(40).

²⁹ 8 CFR § 274a.12(c)(9).

³⁰ 8 CFR § 274a.12(c)(1).

³¹ Alayna Bridgett, *Mandatory-Arrest Laws and Domestic Violence: How Mandatory-Arrest Laws Hurt Survivors of Domestic Violence Rather Than Help Them*, 30 Health Matrix 437 (2020) <https://scholarlycommons.law.case.edu/healthmatrix/vol30/iss1/11>.

³² California Penal Code § 13701(b).

³³ David Hirschel et al., *Explaining the Prevalence, Context, and Consequences of Dual Arrest in Intimate Partner Cases*, U.S. DEPT. OF JUSTICE 1, 4 (2007), available at <https://www.ojp.gov/pdffiles1/nij/grants/218355.pdf>.

³⁴ *Mandatory Arrest Laws and Domestic Violence* at 452.

³⁵ Cal. Food & Agricultural Code § 35891.

³⁶ Cal. Fish & Game Code § 2005(a).

³⁷ Cal. Penal Code § 148(a)(1) *In re Charles G.*, 223 Cal.Rptr.3d 350 (Ct. App. 2017) (physical resistance, hiding or running away from a police officer, as well as refusing an officer’s repeated requests, can constitute a violation of this statute).

municipalities have banned urban camping.³⁸ Individuals will be denied employment authorization for sleeping outdoors. Public Defenders also report incidents of wrongful arrests, such as people being arrested for driving under the influence of alcohol or a controlled substance only to have the toxicology report come back and show that the person was not under the influence; or after a brutal murder where the police arrested every male person of color within a certain age range and charged them all with murder. These arbitrary arrests can result in a denial of employment authorization for thousands of people, including DACA recipients³⁹ and individuals with a pending application for Temporary Protected Status.⁴⁰

The NPRM can harm minors who are stopped for an act of juvenile delinquency or are adjudicated to be juvenile delinquents. Minors can be mistakenly denied employment authorization under the NPRM because the adjudicator mistakenly determines the minor was arrested or convicted of a crime. The Board of Immigration Appeals has held “that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.”⁴¹

The NPRM can harm all noncitizen people of color. Policing disproportionately impacts communities of color, and Black communities. “Multiple studies have consistently shown that racial/ethnic minorities, particularly Black people and Hispanic people, are more likely to be subjected to more intense law enforcement practices than white people.”⁴² A 2021 report from the Public Policy Institute of California analyzed data for almost four million stops by California’s fifteen largest law enforcement agencies in 2019 and found notable differences in police stops based on the color of the person’s skin. Black Californians are more than twice as likely to be searched as white Californians, at about 20 percent versus 8 percent of all stops. Black individuals are almost twice as likely to be booked into jail as white individuals. Searches of Black individuals were somewhat less likely to yield contraband and evidence than searches of white individuals.⁴³ Behavioral scientists have noted that there are substantial and persistent racial disparities in policing.⁴⁴ To deny people employment authorization based on the fact of an arrest alone is discriminatory and cruel, especially since many noncitizens are more likely to be arrested based on the color of their skin. We urge the Agency to remove arrests as a reason to deny employment authorization in an exercise of discretion. People are often mistakenly arrested, charges are dropped for a lack of evidence, and people are arrested based on false

³⁸ Marissa Lang, *A Homeless Man was Charged with a Felony for Camping. He’s One of the First*, National Public Radio (July 21, 2026) https://www.npr.org/2026/07/21/nx-s1-5887358/tennessee-homeless-arrest-felony-camping-ban?utm_source=firefox-newtab-en-us.

³⁹ 8 CFR § 274.12(c)(33).

⁴⁰ 8 CFR § 274a.12(c)(19).

⁴¹ *Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000), citing, e.g., *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981), *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981), *Matter of C. M.*, 5 I&N Dec. 27 (BIA 1953).

⁴² Hossein Zare, *Disparities in Policing from Theory to Practice*, Am J. Public Health (Apr. 2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10937607/>.

⁴³ Magnus Lofstrom et al, *Racial Disparities in Law Enforcement Stops*, Public Policy Institute of California (Oct. 2021), <https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/>.

⁴⁴ John Dovidio, Phillip Solomon, *The Scope of Racial Bias in Policing: Behavioral Science’s Role in a Systemic Problem*, Vol. 11, The Russell Sage Foundation Journal of the Social Sciences, Issue 3 (Oct. 2025), <https://www.rsjournal.org/content/11/3/22/tab-article#abstract-1>.

accusations. Denying an individual employment authorization based on an arrest is arbitrary, capricious, and unlawful under the APA. And is simply unconscionable.

ii. Denying Employment Authorization to Anyone Convicted of a Crime who is Eligible for Discretionary Employment Authorization is Arbitrary and Capricious and Unlawful Under the APA.

There are several grounds of inadmissibility under INA § 212 and deportability under INA § 237 that result in the removal of an individual, denial of admission, or in the inability of an individual to apply for relief. Other forms of relief such as DACA and TPS have their own criminal grounds of ineligibility. Even with these underlying convictions, individuals are still often eligible for waivers of removal because the hardship to that person to their family, and to society at large, outweighs the seriousness of the offense. Oftentimes, people are convicted of crimes that do not make them deportable, inadmissible, or ineligible for relief. To summarily deny an individual employment authorization where they have been convicted of a crime that does not even make them inadmissible, deportable, or ineligible for relief is punitive, arbitrary, capricious, and violates the APA. DHS should allow the criminal justice system and the immigration court system to do their jobs and not deny people the ability to work while their cases are pending. Denying people the ability to work while their immigration case is pending harms individuals, families, and society in general as explained further below.

iii. Denying Employment Authorization to Anyone Who Gets an Alternative Disposition to a Crime Such as Pre-Trial Diversion, who is Eligible for Discretionary Employment Authorization, is Arbitrary and Capricious and Unlawful Under the APA.

The NPRM provides that while a person's successful participation in a state or federal program such as pre-trial diversion may not be a conviction for immigration purposes, the fact of the arrest will be considered to be a negative factor for employment authorization purposes.⁴⁵ Where a person has not even been convicted of a crime and is not inadmissible, deportable, or ineligible for immigration relief because of a crime, to deny them the ability to support themselves and their family because of an arrest is unconscionable. According to the National Conference of State Legislatures, pre-trial diversion often offers individuals "intensive treatment, graduated sanctions and rewards, close monitoring by the court and other programming such as education or job training."⁴⁶ To deny an individual's employment authorization and the ability to provide for themselves and their family at a time that they are undergoing intensive rehabilitative treatment or at a time that they have completed intensive rehabilitative treatment is unconscionable.

iv. Denying Employment Authorization to People Who Admit to Committing a Violent and Dangerous Crime Where There is No Definition of What Constitutes a Violent or Dangerous Crime and

⁴⁵ 91 Fed. Reg. at 34385.

⁴⁶ NCLS, *Report: Pretrial Diversion* (Apr. 10, 2024), <https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion>.

Where There is No Definition of What Constitutes an Admission is Arbitrary and Capricious and Violates the APA.

There are no grounds under which to deny an individual employment authorization where they have not been convicted of an offense that makes them deportable, inadmissible, or ineligible for relief. Compounding this problem, this ground for denial of employment authorization lacks any definition of what constitutes a “violent” or “dangerous” crime. There are no guidelines for adjudicators to use to determine if a person has admitted to committing a violent or dangerous crime.

Under immigration law precedent, the adjudicators need to understand that an “admission” must be a formal admission of a crime to an officer.⁴⁷ DHS must clarify that a person’s verbal statement is not an “admission” unless it meets the following requirements. First, the admission must be free and voluntary.⁴⁸ Second, the person must admit to the commission of conduct that constitutes the elements of the offense.⁴⁹ Finally, the officer must provide the person with an understandable definition of the elements of the offense.⁵⁰ The ILRC rejects this ground for the denial of employment authorization.

v. Denying Employment Authorization to Individuals Who are Suspected of Gang Membership or Membership in a Terrorist Organization is Arbitrary, Capricious, and in Violation of the APA.

Gang databases are notoriously inaccurate, and thousands of individuals could be denied employment authorization based on false inclusion in a gang database.

There is no single universally accepted definition of what constitutes a “gang”. Throughout the country, the designation of “gang” members is notoriously inaccurate. The inclusion criteria may be overbroad or not clearly defined. A “gang” can be as few as two people. Individuals may be classified as a “verified” gang member based on a points system. In Boston, the police award “points” based on wearing certain clothing, or being seen with another “verified” gang member. Something as innocuous as walking home with a “verified” gang member while wearing a sports jersey can result in a person being identified as a gang member.⁵¹ In Washington D.C., as of October 2022, the DC Gang Database contained 1,951 individuals identified by the police as being a “gang associate or gang member. Of the 1951 tracked individuals, 1,619 (83%) were Black, 288 (12%) were Latinx, and only one individual was White (.05%). Seventy percent of the individuals included in the gang database lived in zip codes of predominantly Black and

⁴⁷ *Matter of K-*, 7 I&N Dec. 594 (BIA 1957).

⁴⁸ *Matter of G-*, 6 I&N Dec. 9 (BIA 1953); *Matter of G-*, 1 I&N Dec. 225 (BIA 1942); *Matter of M-C-*, 3 I&N Dec. 76 (BIA 1947).

⁴⁹ *Matter of B-M-*, 6 I&N Dec. 806 (BIA 1955); *Matter of A-*, 3 I&N Dec. 168 (BIA 1948); *Matter of Espinosa*, 10 I&N Dec. 98 (BIA 1962). *Matter of G-M-*, 7 I&N Dec. 40 (A.G. 1956); *Matter of E-N-*, 7 I&N Dec. 153 (BIA 1956).

⁵⁰ *Matter of K-*, 7 I&N Dec. 594 (BIA 1957); *Matter of G-M-*, 7 I&N Dec. 40 (A.G. 1956).

⁵¹ *Unmasking the Boston Police Department’s Gang Database: How an Arbitrary System Criminalizes Innocent Conduct*, Harvard Law Review (Mar. 2024), <https://harvardlawreview.org/wp-content/uploads/2024/03/137-Harv.-L.-Rev.-1381.pdf>.

Latinx communities.⁵² In California, an audit of CalGangs, the state gang database, found that many law enforcement agencies could not substantiate a significant portion of the entries that they had put into the system.⁵³ Gang databases are regularly riddled with errors as a result of administrative mistakes, lack of appropriate supervision and review, and even police misconduct.⁵⁴ The criteria for inclusion in gang databases are almost entirely unrelated to criminal conduct or to participation in a gang.⁵⁵ The U.S. Court of Appeals for the First Circuit noted that the databases, even if they are properly managed and administered, are overinclusive and overstate minority participation rates.⁵⁶ For example, in California, an audit of the state's gang database reported that twenty-eight children who were under one year old had admitted to being gang members.⁵⁷ Moreover, there is typically no notice to the individuals of their inclusion in a gang database and there is no specified procedure to object.⁵⁸

This rule is arbitrary and capricious where there is no definition of what constitutes a “gang” or what evidence qualifies to presume gang membership.⁵⁹ There are no instructions on how adjudicators screen for gang membership or even what constitutes a gang. Based on criminal forensic studies, it is much more likely that a person of color would be included in a gang database than a white person. To deny individuals employment authorization based on alleged gang membership is arbitrary, capricious, and violates the APA.

There is no definition of what constitutes a terrorist organization

This rule is arbitrary, capricious, and in violation of the APA where it seeks to deny individuals employment authorization if they are suspected of being a member of a terrorist organization, but there is no definition in the proposed rule of what constitutes a terrorist organization. There is also no definition of what evidence qualifies to presume membership in a terrorist organization.⁶⁰ To deny individuals employment authorization based on presumed membership in a terrorist organization without a definition of what constitutes a terrorist organization and what constitutes presumed membership in a terrorist organization is arbitrary, capricious, and in violation of the law under the APA.

⁵² Washington Lawyers' Committee for Civil Rights and Urban Affairs, et al., *Targeted, Labeled, Criminalized: Early Findings on the District of Columbia's Gang Database* (Jan. 2024) <https://www.washlaw.org/wp-content/uploads/2024/01/Edited-TARGETED%5EJ-LABELED%5EJ-CRIMINALIZED-Final-Conforming-Edits-01-11-24.pdf>.

⁵³ Cal State Auditor, *The CalGang Criminal Intelligence System, Report 2015-130* at 2 (August 2016), <https://information.auditor.ca.gov/pdfs/reports/2015-130.pdf>. Cited, Peter Honnef, *Gang Databases and Immigration Enforcement*, Center for Policing Equity (Feb. 2026), https://policingequity.org/wp-content/uploads/2026/02/CPE_Digital_Gang_Databases_Whitepaper_FINAL.pdf?utm_source=web&utm_medium=blog&utm_campaign=gang-databases.

⁵⁴ Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. OF C.R. & C.L. 115, 118 (2005).

⁵⁵ *Id.*, at 125.

⁵⁶ *Diaz Ortiz v. Garland*, 23 F.4th 1, 17-18 (1st Cir. 2022).

⁵⁷ See *State Audit Affirms ACLU of California Concerns on Gang Database*, ACLU N. Cal. (Aug. 11, 2016) <https://www.aclusocal.org/press-releases/state-audit-affirms-aclu-california-concerns-gang-database/>

⁵⁸ Yawu Miller, *Are there really 160 gangs in Boston?*, Bay State Banner (July 30, 2019), <https://www.baystatebanner.com/2019/07/30/are-there-really-160-gangs-in-boston/.33>

⁵⁹ 91 Fed. Reg. at 34353.

⁶⁰ *Id.*

b. The NPRM Fails to Acknowledge or Consider Noncitizens, Families, and Communities' Reliance Interests.

The NPRM would deprive many families and communities of a primary source of financial stability, leaving households unable to meet basic needs. Losing access to employment authorization translates to lost income, potential eviction, hunger, loss of medical care, and potential exploitation. Moreover, the NPRM is likely to have a disproportionate impact on Black and Latine noncitizens who experience much higher arrest rates than white individuals for similar conduct⁶¹—meaning more Black and Latine people will be without employment authorization because of persistent racial profiling and racial disparities in policing and the criminal legal system in the United States. The NPRM does not acknowledge these foreseeable disparate impacts nor considers what the discriminatory effect of its discretionary framework.

c. The NPRM is Unduly Burdensome on Noncitizens, Families, and their Employers.

While the ILRC is of the position that all the proposed changes are unduly burdensome, we highlight the impact of the following:

Validity periods

The NPRM's EAD validity periods of one year for categories (c)(11), (14), and (18) imposes substantial and unnecessary burdens on applicants, employers, and USCIS. Individuals whose underlying immigration status authorization remains unchanged would be required to seek renewal every year solely because of the shortened validity period. This increases administrative costs and the likelihood of employment disruptions without evidence that annual renewals improve "program integrity" or eligibility determinations.

DHS has not adequately explained why a one-year validity period is necessary to ensure ongoing eligibility or why less burdensome alternatives, such as longer validity periods would be insufficient. Shortened validity periods will predictably increase renewal filings, increase the need for USCIS adjudicative resources, heighten the risk of employment adjudicative resources, and heighten the risk of employment authorization gaps caused by processing delays rather than any change in eligibility. Additionally, applicants will have to annually travel, take time off work, and wait for their biometrics appointment. The NPRM would also cut off many immigrants from government identification, driver's licenses, and professional licenses if their applications are denied or processing is delayed - all against the backdrop of DHS's end of automatic work extension permits and increased enforcement for individuals without legal status.⁶² By failing to meaningfully consider these foreseeable consequences or explain how the

⁶¹ Jessica G. Finkeldey & Stephen Demuth, *Race/Ethnicity, Perceived Skin Color, and the Likelihood of Adult Arrest*, 11 *Race & Just.* 567 (2021).

⁶² *Removal of the Automatic Extension of Employment Authorization Documents*, 90 Fed. Reg. 48,799 (Oct. 30, 2025); Muzaffar Chishti, Kathleen Bush-Joseph & Colleen Putzel-Kavanaugh, *Unleashing Power in New Ways: Immigration*

benefits outweigh the substantial burdens, the proposed rule is arbitrary and capricious and is yet another attempt to funnel even more immigrants into the deportation pipeline.

Economic necessity showing

The NPRM would expand or create a new economic necessity requirement for those seeking work authorization under 8 C.F.R § 274a.12(c).⁶³ While noting that guidance on what constitutes economic necessity will be provided through form changes and subregulatory guidance, the agency does not appear to have a cohesive strategy for assessing economic necessity. Instead, the NPRM indicates that economic necessity will be assessed on the category of EAD. For example:

- An applicant for an OSUP EAD may demonstrate economic necessity by showing that he or she must provide for dependents (children, spouse, parents), but only if those dependents are U.S. citizens or lawful permanent residents.⁶⁴
- An application for a parole EAD must also establish economic necessity but no such restriction on dependents is contemplated.⁶⁵

The NPRM's language states that an applicant will have to provide evidence of assets, income, and expenses to show economic necessity to work, but no guidelines have been shared as to any cut off thresholds or other parameters that will cause an adjudicator to find that an applicant does not need to work.⁶⁶ Only a vague reference to the Federal Poverty Guidelines indicates that thresholds are being considered.⁶⁷ These inconsistencies and vagaries lay bare the patchwork policy evidenced in this (and other) regulations promulgated by the Trump administration. The promise of additional guidance does ease the concern of discriminatory and inconsistent adjudications should this rule go into effect. The confusion and chaos that these types of changes engender ensures that fewer people will be able to access work authorization.

Further, the agency intends to require applicants in the three EAD categories to provide documentation about their current income and assets to determine if there is a need to work.⁶⁸ The implication in this requirement is that if an applicant has an amount of money saved up that the federal government thinks is enough to survive on, work authorization will not be granted. The need for a person to work is self-explanatory and a person should not be forced to spend down any savings or liquidate personal assets to survive as a noncitizen in the United States. Requiring any group of applicants to show the need to earn a living is unnecessary and punitive.

Finally, the requirement of additional documentation and forms to fill out adds significant burden to the applying population and increases the need that applicants will need legal assistance to ensure the forms are filled out correctly. This requirement also burdens adjudicators with another determination that will cause further slowdowns and processing inefficiencies and strain agency resources. In addition to being punitive, this requirement is short-sighted and inefficient. In short,

in the First Year of Trump 2.0, Migration Pol'y Inst. (Jan. 13, 2026), <https://www.migrationpolicy.org/journal/policy-beat/unleashing-power-new-ways-immigration-first-year-trump-20>.

⁶³ 91 Fed. Reg. at 34383-84.

⁶⁴ *Id.* at 34382.

⁶⁵ *Id.* at 34354.

⁶⁶ *Id.* at 34378.

⁶⁷ *Id.*

⁶⁸ *Id.* at 34471.

the inclusion and enhancement of the economic necessity requirement appear designed to make it harder to access employment authorization, without regard for agency resources or the effect on the public.

Expanded auto termination grounds

The NPRM's attempt to expand when an employment authorization document (EAD) can be automatically terminated will not bring efficiency or maintain the integrity of EADs as it claims it will do. Instead, it will create more uncertainty and confusion for people who have a right to access work authorization.

First, there is no need to expand the reasons for automatic termination since the current grounds at 8 CFR 274a.14(a)(1) already ensure that the "integrity" of the EAD is maintained by ensuring that only those who qualify for the benefit can obtain the benefit of work authorization. 8 CFR 274a.14(a)(1) already clearly states that work authorization will terminate automatically when (1) the expiration date specified by the Service on the employment authorization document is reached; (2) exclusion or deportation proceedings are instituted, except as permitted by 274a.12(c), or (3) a person is granted voluntary departure. These three grounds already ensure that no one continues to benefit from a work authorization when they no longer are eligible for it.

Additionally, these grounds do not require that the agency take any further action therefore it does not increase the agency's workload. Because the current grounds already ensure efficiency; the new grounds are redundant and useless. Essentially, by adding that an EAD will terminate when a person has an administratively final order of removal under any of the removal statutes and when the underlying basis for employment authorization is terminated or denied, including DHS's termination of status or denial of the application that was the basis of the employment authorization, does not create efficiency. It reiterates aspects already met by the current regulation.

Second, even if there was a need to expand the automatic termination grounds, the grounds as they are written in this proposed rule will not create efficiency but rather cause confusion and be applied unjustly. Because these grounds are triggered by agency action, without ensuring that all legal proceedings have in fact concluded, it leaves many people without protection and the ability to access EADs as designated by 8 CFR 274a.12(c). For example, the NPRM states that once there is a final administrative order, as in the Board of Immigration Appeals (BIA) has issued its final decision, or a person decides not to appeal a final order, then the EAD related to that immigration benefit would be automatically terminated. What this does not account for is the fact that people may continue to seek administrative remedies, such as seeking a motion to reopen if they were wrongfully ordered removed or if they appeal the final order of removal to federal court. Automatic termination, while they pursue these options, will mean that they no longer will be able to work while they fight their legal case. This is contrary to the purpose of some the work permits noted at 8 CFR 274a.12(c). In addition to creating instability, it will also create confusion among both employers and immigrants alike. Though the NPRM claims that individuals could still access work authorization if they are eligible for another form of relief, it does not account for lapse in authorization while they seek other remedies they might be eligible for. This would result in people losing the ability to make a living since they could lose their job,

and result in creating greater instability in their lives. Automatic termination can also create disruption for employers, since they would be unaware of when a work permit is terminated.

IV. The NPRM's denial of Employment Authorization to All Individuals Applying for Discretionary Employment Authorization Who Have Been Arrested for a Crime, Who Admit to Committing a Violent or Dangerous Crime, or are Believed to be Members of a Gang or Terrorist Organization Violates the Procedural Due Process Clause of the U.S. Constitution.

The proposed rule denying employment authorization to individuals suspected of criminal activity violates the Procedural Due Process rights of these individuals. The Supreme Court has held that to determine whether an individual's procedural due process rights are violated, the adjudicator must consider three factors: (1) the interests of the individual in retaining their property and the injury threatened by official action; (2) the risk of error through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; (3) the costs and administrative burden of the additional process and the interests of the government in efficient adjudication.⁶⁹

a. This Proposed Rule Ignores the Interests of the Individual in Retaining Their Property and the Injury Threatened by Official Action.

Individuals who are eligible for employment authorization have an interest in receiving their employment authorization. The Supreme Court has held that public employees have a property right in continued employment and cannot be deprived of that property right by the state absent due process.⁷⁰ Similarly, individuals who are eligible for employment authorization by the federal government have a property right in employment and cannot be deprived of that right absent due process under the Fifth Amendment. As stated above, there is no process for individuals suspected of criminal activity to challenge that finding so that they may get employment authorization and be able to provide for themselves and their families.

b. The Risk of Error Through the Lack of Procedures Used to Determine if an Individual Suspected of Criminal Activity Should be Granted Employment Authorization is Very High and the Probable Value of Additional or Substitute Procedural Safeguards is Very High.

The NPRM does not provide for any procedures that adjudicators could use to determine if a person suspected of criminal activity should be granted employment authorization. As explained in Part III.a above, denying an individual employment authorization based on an arrest, a conviction that does not result in the individual being inadmissible, deportable, or ineligible for relief, or even a conviction that does result in the person being inadmissible, or deportable, is a violation of the individual's due process rights. Denying an individual employment authorization based on a presumed and racist assessment of gang membership or membership in a terrorist organization without any procedures in place to contest that finding is a denial of due process.

⁶⁹ *Mathews v. Eldridge*, 423 U.S. 319, 335 (1976).

⁷⁰ *Cleveland Bd. Of Educ. V. Loudermill*, 470 U.S. 532 (1985).

Denying an individual employment authorization based on an “admission” of a violent or dangerous crime where the critical terms “admission,” “violent,” and, “dangerous” are not defined is a violation of due process. To deny individuals employment authorization based on innuendo is contrary to the very fabric of the due process clause.

Conclusion:

The NPRM would harm immigrants, families, communities, and employers. It is legally flawed, unsupported by evidence, and contrary to basic due process principles. The current framework already allows USCIS to deny discretionary EADs on a case-by-case basis when appropriate. Instead, this rule imposes unnecessary barriers that will increase hardship, undermine public safety, and weaken the practical value of existing immigration protections and upend our immigration system.

For all of these reasons, the DHS should withdraw the NPRM.

Respectfully submitted,

The Immigrant Legal Resource Center

Attachment 1: Prior USCIS Guidance, superseded by the 2020 Policy Manual changes

USCIS Adjudicator's Field Manual (AFM) 10.15: Exercise of Discretion; Uniformity of Decisions.

Although all types of adjudications involve proper application of laws and regulations, a few also involve an exercise of discretion: adjustment of status under section 245 of the Act, change of status under section 248 of the Act and various waivers of inadmissibility are all discretionary applications, requiring both an application of law and a consideration of the specific facts relevant to the case. An exercise of discretion does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances. Although regulations can provide guidelines for many of the types of factors which are appropriate for consideration, a regulation cannot dictate the outcome of a discretionary application. [See, for example, HHS Poverty Guidelines in Appendix 10-3.] For each type of adjudication, there is also a body of precedent case law which is intended to provide guidance on how to consider evidence and weigh the favorable and adverse factors present in a case. The adjudicator must be familiar with the common factors and how much weight is given to each factor in the body of precedent case law. The case law and regulatory guidelines provide a framework to assist in arriving at decisions which are consistent and fair, regardless of where the case is adjudicated or by whom. It will be useful, particularly for inexperienced adjudicators, to discuss unusual fact patterns and novel cases requiring an exercise of discretion with peers and supervisors. In particularly difficult or unusual cases, the decision may be certified for review to the Administrative Appeals Office. Such certifications may ultimately result in expansion of the body of precedent case law. Discretionary decisions or those involving complex facts, whether the outcome is favorable or unfavorable to the petitioner or applicant, require supervisory review. NOTE: Even in non-discretionary cases, the consideration of evidence is somewhat subjective. For example, in considering an employment-based petition, the adjudicator must examine the beneficiary's employment experience and determine if the experience meets or exceeds, in quality and quantity, the experience requirement stated on the labor certification by the employer. However, a subjective consideration of facts should not be confused with an exercise of discretion. Like an exercise of discretion, a subjective consideration of facts does not mean the decision can be arbitrary, inconsistent or dependent upon intangible or imagined circumstances.