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FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.



FEDERATION FOR AMERICAN IMMIGRATION REFORM

October 17, 2022

Ms. Sharon Hageman, Deputy Assistant Director
Office of Regulatory Affairs and Policy
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

Via Electronic Submission: www.regulations.gov

RE: DHS Docket No. ICEB-2021-0010, Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)

Dear Ms. Hageman,

The Federation for American Immigration Reform (“FAIR”) respectfully submits the following public comment to the Department of Homeland Security (“DHS”) in response to the agency’s Notice of Proposed Rulemaking, as published in the Federal Register on August 18, 2022. *See Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9) (DHS Docket No. ICEB-2021-0010).*

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation’s immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high volume immigration, and advocates for sensible solutions that enhance America’s environmental, societal, and economic interests today, and into the future.

FAIR has over three million members and supporters of all racial, ethnic, and religious backgrounds, and across the political spectrum. The organization was founded in 1979 and is headquartered in Washington, D.C.



I. Relevant Statutory and Regulatory Provisions

Pursuant to Section 274A(b)(1)(A) of the Immigration and Nationality Act (“INA”), an employer must attest that a prospective employee is not an unauthorized alien by examining documents. “A person has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine...”¹

At issue in this proposed rule, presently pursuant to 8 CFR § 274a.2(b)(1)(ii)(A), an employer must “Physically examine the documentation presented by the individual establishing identity and employment authorization as set forth in paragraph (b)(1)(v) of this section and ensure that the documents presented appear to be genuine and to relate to the individual.”² The referenced paragraph (b)(1)(v), meanwhile, stipulates that “the individual may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity.”³ The commonsense requirement that documents be original and that the employer physically examine them precludes the employer from viewing documents solely on an electronic device.

II. Summary

During the height of the COVID-19 pandemic, U.S. Immigration and Customs Enforcement (“ICE”) instituted temporary flexibilities to the above-referenced regulatory provision and waived the physical examination of documentation for employers facing a sudden and near-total shift to a remote workforce. The agency now seeks the authority, on a discretionary basis, to cement those flexibilities when certain conditions are met.

Any action taken under the authority provided by this rule, if finalized, will be viewed as an attempt to ease the requirements of employment verification. While a welcome change for employers contending with large-scale remote workforces, it will be abused by bad actors who will hide behind a far easier good faith compliance defense. With the unprecedented numbers of illegal alien apprehensions and encounters along the southern border and the ever-growing crisis that we are presently witnessing, the demand for work is high, and any attempt to diminish verification will be routinely used by smugglers, traffickers, and unscrupulous employers. Any authority used to weaken document verification requirements will erode the intent of the underlying statute aimed at ensuring that only lawful aliens are eligible to work in the United States.

¹ 8 U.S.C. § 274a(b)(1)(A)

² 8 C.F.R. § 274a.2(b)(1)(ii)(A)

³ 8 C.F.R. § 274a.2(b)(1)(v)

Additionally, the proposed rule is arbitrary. It fails to justify any policy determination or provide a reasoned analysis at all. Accordingly, this regulatory amendment appears to be a solution in search of a problem. It is patently unclear why DHS believes that this change is necessary and, assuming *arguendo* that such authority is necessary, why it must be so broad. Lacking any well-reasoned justification, the proposed rule should be withdrawn.

Lastly, the proposed rule fails to properly assess the costs to the affected population as required by relevant executive orders. The included economic analysis is half-baked and inconclusive and does nothing to address more than the time that it would take for an employer to comply with the form change.

If DHS finalizes this NPRM, FAIR will support litigation against this rule to ensure that it's held unlawful and set aside.

III. The Proposed Rule Fails to Justify Its Policy Decisions

The Administrative Procedure Act (“APA”) prohibits agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁴ While the Biden Administration is within its discretion to take a different approach from previous administrations, proposed rules require justification and stated reasoning when amending regulations.⁵ In the instant case, the basis for the agency action is hollow and not well-reasoned.

In discussing the need for the amendments, the agency discusses the evolving state of the workforce and the move toward telework and remote work settings given the influence of COVID-19.⁶ The proposed rule states that DHS anticipates that a large population of the workforce will continue to work remotely by choice even when given the opportunity to return to an office setting.⁷ Based on this conjecture alone, DHS wants to formalize and cement its authority to ease employment verification requirements and explore alternative verification technology.

That the workforce prefers to work from home is not *per se* justification to ease physical documentation requirements or even, in this instance, the basis to provide authority to do so in the future. This vague justification is insufficient reason for DHS to seek to provide

⁴ 5 U.S.C. § 706(2)(A).

⁵ “The APA requires an agency to provide notice of a proposed rule, an opportunity for comment, and statement of the basis and purpose of the final rule adopted. *American Medical Ass’n v. Reno*, 57 F. 3d 1129, 1132 (DC Cir. 1995).

⁶ Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form (I-9), 87 Fed. Reg. 50786, 50789 (proposed Aug. 18, 2022) (to be codified at 8 C.F.R. part 274a).

⁷ *Id.*

the Secretary with the authority to utilize alternative document inspection methods when as part of a pilot program, when the Secretary determines that the level of security is as good as physical examination, or during public health emergency or national emergency.⁸

Of particular concern, DHS provides no context for why the Secretary needs the Authority when faced with a public health emergency or national emergency. By its own admission, ICE was able to rapidly respond to the COVID-19 pandemic and provide temporary flexibilities to employers in 2020 and 2021 without a regulatory change.⁹ It is unclear how providing the Secretary with the authority “As a temporary measure to address a public health emergency...”¹⁰ differs from what previously took place or why it’s necessary. If the Secretary required some additional support for its action, that should be made clear in this proposed rule. If not, DHS should still provide a reasoned analysis as to why it requests this authority. In either scenario, DHS has not provided meaningful notice of its intended action.

Such analysis is also lacking with regard to the other two new authorities. As to the so-called “pilot program” or to another procedure “[u]pon the Secretary’s determination that such procedures offer an equivalent level of security...”¹¹, the public is left equally confused. No parameters or definitions are provided nor is there any explanation within the proposed rule about what might be expected from a Secretary’s certification. On an even more basic level, what is the difference between the two authorities? Is the public to understand that a pilot program does not require an equivalent level of security? This rule appears to be drafted to provide maximum flexibility not to employers, but to DHS. There is no reason stated in this proposed rule that the regulation should be amended in such a broad manner, or at all.

As DHS repeatedly references a phantom alternative approach, the public must wonder if such an approach has already been developed. If DHS has, in fact, made ready an alternative approach to verification for release or for a pilot program, such information should be provided to the public as part of this rule so that the public can provide meaningful comment after notice. If, however, DHS is only seeking theoretical authority, the proposed rule is too broad and is premature as the public cannot assess its efficacy while devoid of any justification or detailed information.

⁸ Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form (I-9), 87 Fed. Reg. 50786, 50794 (proposed Aug. 18, 2022) (to be codified at 8 C.F.R. part 274a).

⁹ Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form (I-9), 87 Fed. Reg. 50786, 50788 (proposed Aug. 18, 2022) (to be codified at 8 C.F.R. part 274a).

¹⁰ Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form (I-9), 87 Fed. Reg. 50786, 50794 (proposed Aug. 18, 2022) (to be codified at 8 C.F.R. part 274a).

¹¹ *Id.*

Lastly, the supposed justification fails to address the underlying rationale for employment verification and the need to ensure strong anti-fraud measures. While DHS purports to actively be working on better technology for verification, so too are forgers perfecting their skills with an ever-advancing litany of computer-based tools. It is getting easier to more convincingly forge identity and employment documents, but it is still very difficult for forgers to accurately reproduce the texture of genuine material. If employers are simply allowed to view scanned and emailed documents on electronic devices without viewing a physical copy, no amount of training, least of all a cursory hour-long version, will aid them in spotting false documents. No scan will pick up a hologram or demonstrate if it is a legitimately embedded hologram nor will it provide clues that the lamination on a driver's license or passport has been altered. Even someone with no training in fraud detection can pick up on some of these things when physically examining a document and, the statute requires that the examination be useful in reasonably determining the validity of the document on its face. An alternative method, one that does not require physical examination, flies in the face of that requirement and the whole intent of the statute.

As drafted, this proposed rule fails to demonstrate why it's necessary. It is in stark contrast to the statutory requirement that documents submitted for verification purposes be genuine on their face and provides no indication that DHS recognizes the dangers of rampant violations of unlawful employment in this country. The risk of the perception that DHS is becoming less vigilant and the risk of an influx of forged documents passing as genuine when viewed on electronic devices far outweigh the benefits, if there are any, of this proposed rule. There is no justification for DHS' proposed action and DHS should properly withdraw the proposed rule.

IV. The NPRM Fails to Adequately Provide an Economic Analysis

Pursuant to executive orders, the NPRM includes an economic analysis purporting to consider the cost of implementing this rule on the affected population as well as the government. This analysis is deficient as DHS acknowledges that it does not have enough information to properly analyze the effects of a possible alternative approach.¹² Instead, DHS provides some analysis on the impact of the form change and then offers little more than conjecture on the effects of an unknown alternative procedure.

DHS concludes that the potential impacts of the unknown alternative procedures are generally beneficial to the employers and employees – the affected populations – and that those benefits outweigh any costs of implementing the regulatory change.¹³ These

¹² Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form (I-9), 87 Fed. Reg. 50786, 50791 (proposed Aug. 18, 2022) (to be codified at 8 C.F.R. part 274a).

¹³ *Id.*

statements are self-serving and based on absolute nothingness. DHS' scenario is just hypothetical. The proposed rule cannot base a well-reasoned economic analysis on something that does not exist. Additionally, DHS should have included the anticipated impact on ICE worksite enforcement units as well as whether such a rule, or the alternative procedure that it provides, would negatively impact efforts to curb unlawful employment. Instead, DHS merely focuses on the net positive without a fully developed analysis.

V. Conclusion

For the reasons set forth above – and for other related issues not listed here – FAIR strongly opposes this proposed rule and urges DHS to withdraw it. Instead, DHS should promulgate regulations aimed at enhancing security and anti-fraud measures associated with the employment verification process and continually ensuring that, pursuant to statute, only lawful aliens are able to work in the United States.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Stein', written in a cursive style.

Dan Stein
President
Federation for American Immigration Reform (FAIR)