



May 8, 2007

Department of Homeland Security  
Attn: NAC 1-12037  
Washington, DC 20538

VIA Federal Rulemaking Portal: <http://www.regulations.gov>

Re: DHS Docket No. 2006-0030, Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes

Dear Sir or Madam:

The American Immigration Lawyers Association ("AILA") hereby submits comments on the proposal of the Department of Homeland Security ("DHS") to establish minimum standards for state-issued driver's licenses and identification cards that federal agencies would accept for official purposes in accordance with the REAL ID Act of 2005. AILA is a voluntary bar association of more than 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field.

We appreciate the opportunity to comment on the proposed regulation and believe we are particularly well qualified to do so. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status and are familiar with the ever-changing complexities and subtleties of immigration law and the many documents and combinations of documents that can show lawful status. Additionally, through our Social Security Administration ("SSA") Liaison Committee, we have extensive first-hand knowledge of the practical difficulties and delays encountered in verifying immigration status through the Systematic Alien Verification for Entitlements ("SAVE") system, which is prerequisite to alien enumeration.

### Summary

We are deeply concerned with the method that the proposed rule contemplates for determining an applicant's immigration status for purposes of driver's license eligibility. The short list of documents acceptable to show status leaves out so many real-life variations that hundreds of thousands or millions of noncitizens who are in a lawful immigration status will be denied REAL ID driver's licenses.

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As explained in detail below, we believe that the proposed rule, like the REAL ID Act itself, grossly oversimplifies a tremendously complex immigration system. The Rule improperly excludes in its short list of lawful statuses many categories recognized by immigration authorities. Moreover, immigration status can be a moving target in that one's status can change frequently, and Congress and DHS itself create new statuses and retire old ones.

Further, the proposed rule should not and cannot reduce to a small handful the numerous documents or combinations of documents that may be uniquely available to show lawful status. Many foreign nationals who are lawfully present simply will not have the documents required by the Rule to demonstrate identity and status. Others will possess only documents that are not included in the list provided in the proposed rule. Still others will have the required documents but those documents will appear to be expired when, in fact, they are not. Our comment illustrates the many categories of foreign nationals who will be unfairly and improperly denied REAL ID licenses for these reasons.

We also caution that the USCIS Form I-688B or I-766 Employment Authorization Document, which many aliens who possess documentation of status or identity not on the "short list" may obtain, should not be viewed as an "omnibus" sort of document to fill the voids in the list. An EAD is not the cure all for the visa classifications and immigration statuses left off the "short list." Except in rare circumstances, USCIS only issues an EAD with a period of validity of one year from approval; the present filing fee is \$180.00, and the USCIS has proposed to increase it to \$340.00 soon; the USCIS recommends that an EAD holder apply for an extension 120-180 days in advance; if the USCIS approves the extension right away, the validity is for one year from the date of approval, not the date of the yet-unexpired EAD, no matter how much time is left on the expiring EAD, which means the alien will have to pay another filing fee sooner; and, if the state issues a license for a duration tied to the validity of the EAD, the license will only be valid for a year, and, the alien will have to pay license fees at least annually.

Accordingly, we believe that if DHS must regulate foreign national access to licenses, which is properly a state function, it cannot and should not do so in a regulatory "short list." Instead, the only way it can do so accurately, fairly, and properly is to publish and maintain dynamic guidance to be incorporated by reference in a regulation. In addition, any restrictions must at a minimum include an exceptions process to allow the many foreign nationals who are lawfully present in uncommon statuses with uncommon but proper documents to qualify for REAL ID documents.

We also strongly object to the proposed rule's reliance on SAVE verification of immigration status, which our long experience troubleshooting delays and wrongful denials of SSN issuance shows to be fraught with problems. Thus, reliance on SAVE is premature and should await such time as the system in is demonstrably fixed, foreign nationals are afforded a way to correct the numerous errors in SAVE, and SAVE is linked to other necessary databases, such as SEVIS. We also believe that a

one-year limit on REAL ID licenses for individuals who are lawfully present for the duration of program status, which can extend many years, will work undue hardship and is improper.

We recognize that DHS is required to issue regulations to implement the REAL ID Act. As it does so, we urge DHS to bear in mind that denying driver's licenses to noncitizens who can prove identity undermines rather than enhances national security by pushing our large undocumented foreign national population deeper into the shadows and fueling a black market in false documents. Moreover, such restrictions weaken the potentially invaluable law enforcement utility of Department of Motor Vehicles (DMV) databases by reducing, rather than expanding, government data about individuals in this country. Thus, the so-called security benefits of the Rule are compromised and do not justify the high cost of implementation. We hope that DHS carefully considers our suggestions and facilitates, rather than restricts, the ability of lawfully present foreign nationals to obtain REAL ID licenses.

Finally, we take issue with the comment in the preamble to the proposed rule that the many foreign nationals that will be denied REAL ID licenses, even though they are lawfully present, can obtain a non-REAL ID alternative. A driver's license increasingly has become a ticket to daily living. A REAL ID license will soon take its place. A non-REAL ID license will become the "Scarlet Letter" of all identity documents as it will unfairly and improperly tag the holder as "illegal" and result in discrimination. Thus, we think it is unrealistic to believe that a non-REAL ID driver's license is an acceptable substitute for a REAL ID license that should never have been denied in the first place.

**I. The Proposed Rule Fails to Reflect the Complexities of Immigration Law and Will Improperly Deny REAL ID Licenses to Millions of Foreign Nationals Who Are in Lawful Status.**

**A. DHS Should Develop and Maintain Extra-regulatory Guidance on Immigration Statuses and Documents, which Cannot Be Reduced to a "Short List" Without Adversely Impacting Many Foreign Nationals Who Are Lawfully Present.**

U.S. immigration laws and regulations are among the most complex of American legal regimes, and statuses and documentation showing statuses change daily. The Immigration and Nationality Act of 1952 ("INA") is administered by various components of multiple federal agencies through a constantly-changing maze of regulations, policies, cables, and other guidelines. Immigration statuses are nuanced, and Congress and DHS regularly create new ones and occasionally retire old ones.

The proposed rule grossly oversimplifies the types of documents required or available to show lawful status, either alone or in combination. Thus, we anticipate that hundreds of thousands or millions of individuals in "lawful status" will not have the documents required by the proposed rule to prove identity or status. Conversely,

many of the documents that are uniquely available to prove numerous lawful statuses are excluded from the proposed rule.

Therefore, DHS should not attempt to freeze in a regulation a static, limited list of statuses, documents, or even form numbers, as those are incomplete and subject to change without warning. Rather, AILA proposes that DHS maintain regular extra-regulatory guidance on statuses and acceptable documentation to be incorporated in any regulation by reference. At the very least, if DHS does proceed with a regulatory list, it must include an exceptions process that allows foreign nationals to establish their identity and immigration status in ways not contemplated by the proposed rule. AILA would be pleased to lend its expertise to this effort. AILA also urges DHS to develop a process to provide ongoing training to state DMV agencies to assist them in understanding the complex and ever-changing landscape of documents that can be used to verify lawful status.

Our suggestion is critical because of the enormous number of persons who will be impacted by the deficiencies in the proposed rule. To look at just one category of persons adversely affected, the USCIS Yearbook reports that in FY 2005, 1,573,000 temporary workers and family members were admitted to the U.S.<sup>1</sup> A large percentage of these will be unable to meet the proposed documentary requirements, as described below. In another example, USCIS estimated that Temporary Protected Status has been granted to 248,000 Salvadorans, another lawfully present group that will be largely excluded from the Act's benefits.<sup>2</sup>

Further compounding this catastrophic and avoidable result is that people wrongly denied a REAL ID driver's license will potentially be impacted for years. Depending on the status, many non-citizens reside lawfully in the United States for 5, 10, or as long as 15 years. All the while, they will remain unable to obtain documentation to meet the overly-restrictive requirements of the proposed rule.

Finally, the denial of a REAL ID driver's license does more than merely preclude one from engaging in activities envisaged by the statute, such as entering federal facilities and flying on domestic flights. From cashing checks to purchasing liquor to obtaining a library card, driver's licenses have become the *de facto* required photo identity of choice for so much of daily life. Whether justified or not, persons not holding REAL ID driver's licenses once the regulations are implemented inevitably will be seen as "illegal," second-class citizens in many respects, even if they hold some other type of valid photo identification.

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<sup>1</sup> <http://www.dhs.gov/ximgtn/statistics/publications/yearbook.shtm> (last visited May 8, 2007).

<sup>2</sup> *Id.*

B. The Definition of Lawful Status and the Severely Restricted Manner in Which It Can Be Demonstrated Under the Proposed Rule Excludes Many Foreign Nationals Who Are Lawfully Present.

The proposed rule defines a person in “lawful status” as any of the following individuals: a U.S. citizen or national; an alien lawfully admitted for permanent or temporary residence; a conditional permanent resident (CPR); an asylee or a person who has entered in refugee status; a person in a valid nonimmigrant status; a person with a pending asylum application; a person with an approved or pending application for TPS (temporary protected status); a person with approved deferred action status; or, a person with a pending application for lawful permanent resident (LPR) or CPR status.

This list is shockingly incomplete. As illustrated below, it excludes many categories of foreign nationals who are in the United States in a status recognized as lawful by immigration authorities.

US immigration law recognizes many statuses. As a starting point, it divides foreign nationals into immigrants – those admitted for lawful permanent residence on a “green card” – and nonimmigrants – those admitted temporarily for a specific purpose in a category denoted by letter, e.g., F-1 student or H-1B specialty occupation worker. There are many variations of lawful status in addition to and within these categories. Among others, these include conditional residents, asylees, refugees, parolees, applicants for many of these statuses, individuals who have applied for or have been granted voluntary departure, cancellation of removal, or other specialized relief from removal, applicants for extension or change of status, individuals who are in the country pending an appeal of an allegedly improper denial of a benefit, individuals who have applied for or are in TPS pursuant to an Executive determination related to adverse home country conditions, individuals present under a treaty with the United States, (such as certain Pacific Islanders), and more. The list is long and is frequently changed or modified by treaty, statute, regulation, and/or agency guidance. As illustrated below, these foreign nationals are “maintaining status,” “lawfully present,” or in a stay “authorized by the Attorney General.”

The list of acceptable documents under the proposed rule is similarly wholly inadequate. To qualify for a REAL-ID license under the proposed rule, an applicant is presented with extremely limited options. To prove identity and lawful status, one must produce either a valid, unexpired U.S. passport; certified copy of a U.S. birth certificate (or equivalent); a Consular Report of Birth Abroad; an unexpired I-551 permanent resident card; an unexpired Employment Authorization Document (EAD); an unexpired foreign passport with a valid, unexpired U.S. visa; a Certificate of Naturalization or Citizenship; or, a REAL ID license or ID card. The next section of this comment illustrates the many categories of foreign nationals in a lawful status recognized by immigration law who will not possess these documents. Either they will not be eligible to obtain any of the listed documents, will only have an expired

version of an acceptable document, and/or will be able to prove status only through documents that are improperly excluded from the proposed list.

In contrast to the miniscule list of acceptable documents provided by the proposed rule proposed rule, the array of documents issued by USCIS, the State Department, and other federal agencies as evidence of these and other lawful classifications is extensive. Evidence of lawful status includes visa stamps, laminated cards, unlaminated handwritten cards, forms, letters, court orders, and others. While this is a messy and confusing list, any final rule must not exclude any documents which legitimately demonstrate one's eligibility for a driver's license under REAL ID.

Additionally, many immigrants and other noncitizens in lawful status will be unable to present documentation of their status due to common and extensive delays in agency processing and/or due to the continued validity of facially-expired documents. Thus, AILA strongly urges DHS to return to the drawing board, and we stand ready to provide our insight and expertise however we can be most useful.

### C. There Are Many Examples of Lawfully-Present Foreign Nationals Who Will Be Unfairly and Improperly Denied a REAL ID Driver's License Under the Proposed Rule.

The list that follows is only a partial list of categories of persons who will receive unfair and improper denials due to the failure of the proposed rule to accommodate them:

1. The Proposed Rule will deny REAL ID licenses to foreign nationals who are lawfully admitted on a valid passport and visa that have since expired. The proposed rule requires an *unexpired* visa in an *unexpired* foreign passport. However, many people remain in lawful status long after one or both of these documents expire. The requirement that the passport and visa remain current is not grounded in law or practice and will serve as an unnecessary bar to thousands.

To qualify for a visa, a foreign national must have an unexpired passport. To qualify for admission to the United States, he or she must present an unexpired visa. Under our "double-check" system of entry, the visa, which is issued by a U.S. Consul abroad, reflects a preliminary determination of admissibility, and, like a "doorknocker," allows the holder to board a plane and apply for admission and inspection at a port of entry. The visa does not guarantee admission or confer status and can expire immediately after admission. The initial status and period of admission is determined by DHS through the CBP Inspector as recorded on the applicant's I-94 Arrival Departure Record (a small white card stapled in the passport). (The I-94 also can be issued by DHS through the USCIS on the grant of a change of status or extension of status to an individual in the United States.)

The following foreign nationals will be in lawful status as long as they are engaging in activities consistent with the category of admission within the period of stay

authorized by CBP, or any extension of stay granted by the USCIS, or the category of admission to which the alien has been changed by the USCIS, regardless of visa or passport expiration:

- A and G international organization representatives and their employees and derivatives
- E-1 treaty investors, E-2 treaty traders, E-3 Australian specialty occupation workers, any E spouses who lack an EAD, and all E dependent children
- H-1B specialty occupation workers, H-2B workers in short supply, H-3 trainees, and H-4 derivatives
- I international media representatives and their derivatives
- F and M students who cannot qualify for an EAD and their derivatives
- B-1 and B-2 visitors many of whom are authorized to remain in the country for extended periods to work in domestic service, accompany family members or domestic partners or for other reasons
- J exchange visitors and any derivatives who do not qualify for or obtain EADs
- L-1 employees of multinational companies and their derivatives (except spouses who obtain EADs)
- O extraordinary ability aliens, P artists and performers, Q cultural exchange visitors, R religious workers, and all of their derivative spouses and children
- All Canadian nonimmigrants (except Es and those few with an EAD), since Canadians are visa exempt.

While passports or visas may be renewable, the burden and cost of renewal may be excessive and highly disruptive. The only time a new visa is necessary for immigration purposes is to reenter the United States after foreign travel, and the only way to obtain the visa is to apply at a U.S. Consul overseas. Thus, many highly skilled and other nonimmigrants are authorized by DHS to remain in the country for years on end and do so lawfully with expired visas. Requiring them to renew a visa to obtain a REAL ID license would entail the high cost and disruption of foreign travel solely to apply for the visa abroad, which also would unduly tax the resources of U.S. Consuls. Mandatory passport renewals for driver's license purposes also will be costly and adds nothing to the reliability of the passport as a lawful status document.

Additionally, the reliability of a visa or passport as an identity document is unrelated to its expiration date within reasonable limits. Thus, we believe that these documents should be acceptable proof of identity provided they expired not more than five years ago. Accordingly, the proposed rule should include foreign passports that have expired within the past five years, as well as U.S. visas that have expired within the past five years.

We note that the Form I-94 Arrival Departure record is not discussed at all in the body of the proposed rule, and is only mentioned once in the Supplementary information. The I-94 document, which is affixed to the passport, is the document that indicates the visa category and period of authorized stay of a nonimmigrant alien who has been inspected and admitted to the U.S. At admission, a CBP Inspector at a port of entry notes on the I-94 card the visa classification under which the alien is admitted to the United States, and the period of time the alien is authorized to remain in the United States. Subsequent to entry, an alien may seek an extension of stay or a change of visa classification from the USCIS. If the USCIS grants the extension of stay or change of classification, the USCIS issues a substitute I-94 as proof of the extension of stay or change of classification. Thus, the I-94 is a key indicator of the status of an alien. We strongly urge the addition of the I-94 to the list of immigration documents which can be presented to indicate the fact of, and expiration date of, lawful status.

2. The Proposed Rule will deny REAL ID licenses to asylees and refugees and their derivatives. Many asylees and refugees will not possess the identity or lawful presence documentation required by the proposed rule. In some instances, an asylee may not even possess a valid passport, and, because an asylee is not required to obtain an EAD as proof of employment authorization, many forego applying for the EAD because of cost and processing times. The list of identity and lawful presence documents acceptable under the proposed rule does not include the documents issued to confer asylee status. These include an I-94, an Immigration Judge's Order granting asylum, a USCIS letter granting asylum, or a BIA or federal court decision.

Additionally, the proposed rule does not include the Form I-571 Refugee Travel Document. Refugees and asylees can apply for a Form I-571 Refugee Travel Document, but, this document is only required for reentry after foreign travel, adjudication times are lengthy, and, because the document is only needed for foreign travel, many do not obtain the document because of the cost.

Therefore, the list of acceptable documents in the proposed rule should be expanded to include the above documentation of asylee and refugee status to the extent it can be reasonably verified with the USCIS.

3. The Proposed Rule will deny REAL ID licenses to applicants for asylum and their spouses and dependents. Applicants for asylum are not "unlawfully present" but rather are in a stay authorized by the Attorney General for certain purposes under the INA.<sup>3</sup> For instance, where the DHS Asylum Unit has referred an

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<sup>3</sup> The proposed rule will adversely impact many individuals who are deemed to be not "unlawfully present," but rather, are considered to be in a stay authorized by the Attorney General under INA Section 212(a)(9), added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. These operate against a person who is "unlawfully present" (including many who have overstayed the expiration date on their I-94, or entered without inspection) for certain time periods.

asylum case to the immigration court, the asylum application is considered pending while the foreign national is in proceedings, while an appeal is pending with the Board, and while review is pending in federal court. During this process, which can last years, asylum applicants are deemed to be lawfully present. The list of acceptable documents in the proposed rule should be expanded to include all documents that these individuals might possess that indicate their lawful status.

4. The Proposed Rule will deny REAL ID licenses to LPRs with expired I-551 cards. It is black-letter immigration law that LPR status survives the expiration of a green card. The expiration simply denotes the expiration of evidence of the status, not of the LPR status itself. For instance, employers may not re-verify the work authorization of an LPR based on the expiration of an I-551 card, as re-verification could constitute unlawful “document abuse.” Thus, the requirement of an *unexpired* I-551 card is inconsistent with the INA and is improper. Moreover, LPR status can be verified through SAVE whether the card is expired or not. Finally, USCIS is currently taking the better part of a year, and often much longer, to adjudicate many green card replacement applications. Therefore, it is irrational and grossly unfair to exclude expired green cards from the list of documents acceptable to show identity or lawful status.

5. The Proposed Rule will deny REAL ID licenses to all Conditional Permanent Residents (CPRs) whose statuses have expired but who have filed timely applications to remove conditions. CPR status is granted to the spouses of US Citizens who are married for less than two years and to certain employment-creation investors. These individuals are issued CPR cards that expire at the end of the conditional period and have all the benefits of LPR status except that they must file a timely “removal petition” to remove the conditional nature of their status. In response to a timely filing, USCIS issues Form I-797 acknowledging receipt and authorizing continued work authorization.

Adjudication easily can take a year or more (current processing times show that USCIS is working on cases filed six to eight months ago), and practitioners often file naturalization applications to trigger adjudication of the removal petition. A CPR cannot obtain an EAD. Moreover, even if USCIS denies a timely filed application to remove conditions and issues a Notice to Appear commencing removal proceedings, the alien may renew the application to remove conditions on status in removal proceedings, and is considered to be lawfully present during those proceedings..

Thus, all CPRs with an expired I-551 will be unable to satisfy the identity or lawful presence documentation requirements in the proposed rule, even though they are lawfully present on a permanent basis, albeit conditionally. Accordingly, the list of acceptable documents in the proposed rule should be expanded to include evidence that a CPR applicant has filed a timely petition to remove conditions or for a waiver of the removal requirement, including an I-797 Receipt that specifically authorizes employment.

6. The Proposed Rule will deny REAL ID licenses to foreign nationals who qualify to apply for adjustment of status under Section 245(i) of the INA but for USCIS or DOL processing backlogs or immigrant visa quota retrogression. Tens of thousands, and perhaps hundreds of thousands, of foreign nationals in the United States qualify to apply for adjustment of status under Section 245(i) of the INA even though they have overstayed or failed to maintain status. (To be eligible for 245(i), the foreign national must be the beneficiary of an immigrant visa petition filed before April 30, 2001. This benefit extends to the spouse and dependent children.)

For some, DOL processing backlogs in the permanent labor certification program have delayed processing of labor certification applications, a predicate to submitting an I-140 visa petition and applying for adjustment of status, which makes an alien eligible for an EAD. Even among these individuals, many cannot apply for adjustment for many, many years due to visa retrogression under our per-country quota system. Further, they also cannot leave the country in the interim without triggering a 10-year bar to reentry.

Thus, even though these persons are on the threshold of eligibility to apply for permanent residence, they generally will lack the documents needed to obtain a REAL ID driver's license. The list of documents in the proposed rule should be expanded to allow Section 245(i) beneficiaries to obtain a REAL ID license by presenting a foreign passport and proof of Section 245(i) eligibility.

7. The Proposed Rule will deny REAL ID licenses to all nonimmigrants who have filed timely applications for extension or change of status. A nonimmigrant is deemed to be in lawful status even after expiration of the period shown on the I-94 card as long as a timely, non-frivolous application for an extension or change of status has been filed, regardless of how long it takes for USCIS adjudication. Further, almost all non-immigrants that are authorized and required to work incident to status are granted an automatic extension of work authorization by operation of law, as long as a timely application for extension of status has been filed. Consistent with the extensive delays associated with USCIS adjudications, regulations provide that such work authorization is automatically extended for up to 240 days. This benefit extends to the following workers who do not qualify for an EAD or any other paragraph (c) identity document:

- E-1 treaty traders and E-2 treaty investors
- E-3 Australian specialty occupation workers
- H workers and trainees
- J exchange visitors
- L-1A and L-1B intracompany transferees
- O extraordinary ability aliens
- P athletes and performers
- Q cultural exchange visitors
- R religious workers and
- TN business professionals under NAFTA.

It is possible to request “premium processing” of an extension or change of status application in many of these categories, which should provide an initial adjudication within 15 days. However, this requires payment of an additional \$1,000.00 fee, which is an egregious and wholly unnecessary tax for issuance of a REAL ID driver’s license and regular annual renewals. Thus, the list of acceptable documents in the proposed rule should be expanded to include evidence of a pending application for change or extension of status upon proof of timely filing, insofar as a DMV can verify that the application is pending.

8. The Proposed Rule will deny REAL ID licenses to all Canadians except those few with an EAD or Green Card. Canadians are visa-exempt. Without a visa, only Canadian LPRs and Canadians with an EAD will qualify for a REAL ID license. All other Canadians will lack the documents needed to show identity and lawful presence under the proposed rule. Thus, even Canadians who are present in the United States under NAFTA would be denied licenses. Before adopting a rule with such far-reaching implications, DHS should evaluate whether this is consistent with our obligations to our NAFTA partners.

9. The Proposed Rule will deny REAL ID licenses to parolees and other visa-exempt foreign nationals. In addition to Canadians, certain other foreign nationals do not require visas to enter the United States. These include individuals who may be paroled for extended periods for humanitarian reasons for extended periods and those admitted for up to 90 days under the Visa Waiver Program. These individuals will be denied a REAL ID driver’s license under the proposed rule.

10. The Proposed Rule will deny REAL ID licenses to nonimmigrants who were admitted to the United States under the automatic visa revalidation regulation of the U.S. Department of State. This regulation allows a CBP inspector to admit a nonimmigrant on an expired visa upon proof that he or she traveled to a contiguous country or territory for less than 30 days, has not applied for a visa while abroad, has maintained valid status and is returning within a period of stay authorized by the USCIS. Under the proposed rule, most individuals in this category will be unable to obtain a REAL ID license even though they are lawfully in the U.S. because their visa is expired and they are ineligible for an EAD. This is further grounds for amending the proposed rule to include expired visas.

11. The Proposed Rule will deny REAL ID licenses to foreign nationals in Temporary Protected Status. TPS is the statutory embodiment of safe haven for those aliens who may not meet the legal definition of refugee but are nonetheless fleeing – or are reluctant to return to -- potentially dangerous situations. TPS is blanket relief that may be granted for up to 18 months—and for renewable –periods— when the Secretary of DHS determines that ongoing armed conflict poses serious threat to personal safety; a foreign state requests TPS due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests.

TPS aliens are eligible for one-year EADs. In many instances, such as when the TPS period is renewed, these EADs are extended by operation of law as published in the Federal Register. Multiple renewals are common and confer status on hundreds of thousands of foreign nationals. For instance, Somalis were granted TPS for 15 years from 1991 through 2006 and Bosnians for 9 years. USCIS has estimated that TPS has been granted to 248,000 Salvadorans. All foreign nationals in TPS status whose EADs are extended in this manner would be denied REAL ID licenses and renewals, as would applicants for TPS status. The list of acceptable documents in the proposed rule should be expanded to include expired EADs issued to persons in TPS upon proof of a regulatory extension of status.

12. The Proposed Rule will deny REAL ID licenses to foreign nationals who have been granted other forms of relief. In addition to TPS, U.S. immigration law provides discretionary relief from deportation so that certain aliens may remain in the country either temporarily or permanently. These include withholding of removal, relief from removal under the Convention Against Torture, cancellation of removal, and deferred action.

These discretionary procedures are used to provide relief that the Administration deems appropriate considering foreign policy, humanitarian, and immigration concerns as well as international law. Unlike TPS, aliens who benefit from cancellation or EVD do not necessarily register for the status with USCIS, but they trigger the protection when they are identified for deportation. The only evidence of these statuses may consist of an Immigration Judge's order, a receipt for an application, a letter from USCIS, or a decision by the Board of Immigration Appeals or a federal court.

Conditional suspension grantees and conditional cancellation of removal grantees are not unlawfully present. While some individuals in these categories may be eligible to apply for a one-year EAD, this is not a practical solution given that a temporary license cannot last for more than one year and that EAD processing can easily exceed 100 days. Additionally, an EAD application requires payment of a \$180.00 filing fee, which, as noted previously, may increase to \$340.00 under a proposed USCIS regulation. This is an outrageous price to impose on the very populations that U.S. law deems to be in need of our protections.

13. The Proposed Rule will deny REAL ID licenses to foreign nationals awaiting adjustment of status to lawful permanent residence under NACARA and the Cuban Adjustment Act. Legacy INS has agreed that adjustment of status of certain persons from Central America and Cuba is mandatory under the Nicaraguan Adjustment and Central American Relief Act (NACARA) and the Cuban Adjustment Act. Individuals in these categories can wait months if not years for adjustment. During this period, these individuals will not have access to the identity and lawful presence documents required under the proposed rule for a driver's license. Again,

the only acceptable document is the EAD available to these aliens as applicants for adjustment of status.

D. The Lack of Expertise Among DMV Clerks in the Complexities of Immigration Law and Documents Is Improper Justification for Adopting a “Short List” of Acceptable Documents and Requires the Development of Extra-Regulatory Guidance on Acceptable Proof of Lawful Status.

We agree with DHS that DMV clerks cannot be expected to assess something as complex as immigration status. However, we believe that this challenge requires DHS to develop a comprehensive, extra-regulatory list of acceptable documents, rather than an unrealistically abbreviated list that will improperly “throw out the baby with the bathwater.” As discussed above, immigration status and documents are complicated and fluid. The Supplementary Information at page 10827 explains that the list of acceptable documents was kept short, in part, because “limiting the number improves the chances that DMV employees will be able to distinguish valid from fraudulent documents because there will be fewer categories of documents with which they will need to be familiar.”

We respectfully submit that this is faulty logic in two respects. First, determining the non-fraudulent nature of a document is distinct from the issue of determining the underlying status that it demonstrates. Second, the rationale is backward. Since the primary purpose of any set of regulations must be to fulfill the intent of Congress, the rules must not be unduly restrictive as to preclude eligibility purely in the name of administrative expediency. Instead, DHS must develop a list of acceptable documents that is inclusive and, then, develop a framework to provide the expertise and support necessary for state DMV personnel to determine lawful status and other indicia of eligibility.

**II. The Requirement of SAVE Verification Will Cause Extensive Delay and Error in Driver’s License Issuance and Is Premature.**

The proposed rule requires that immigration status be verified through SAVE, an inter-governmental, information-sharing program designed to aid federal, state and local benefit providers to verify an applicant’s immigration status. The Alien Status Verification Index (ASVI) database was developed for this purpose. However, speaking from experience, AILA can categorically say that SAVE is beset with serious shortcomings that have adverse impacts on non-citizens accessing the system. These impacts will likely multiply as the traffic on the system is increased due to implementation of REAL ID.

One primary limitation to the SAVE system is the entry of inaccurate or incomplete information. The SAVE database receives nightly downloads of new and updated immigrant records from such USCIS-owned systems as the Central Index System (CIS) and Computer Links Application Information Management System (CLAIMS). In addition, it receives daily downloads of CBP non-immigrant records.

The existence of erroneous information in SAVE from these sources is notorious and extremely problematic. In 2005, the DHS Office of Inspector General issued a report on challenges USCIS faces in modernizing its information technology. This document reported that downloads within both the CLAIMS and CIS systems encounter errors in transmission. When one's immigration status cannot be immediately established through "primary" verification, a "secondary" verification process is utilized. While referral to secondary—and the resulting long –delays— might be caused by the presentation of fraudulent documents, it might also be prompted by the electronic entry of erroneous information into SAVE, as discussed.

Those errors that are discovered require time-consuming manual corrections. Immigrant name changes – a frequent occurrence – must also be manually entered into CIS, a procedure obviously fraught with the risk of human error. Further complicating the problems is the inability of USCIS to update CBP-based records.

AILA members and their clients experience these resulting delays with regularity. Based on our extensive experience assisting clients with SSN issuance delays and denials based on SAVE errors, we believe that reliance on SAVE will result in long delays and numerous improper verification failures. We base this on our longstanding liaison relationship with SSA, which was established to troubleshoot erroneous denials and delays in the SSN application process. Time and again, foreign applicants who are admitted in work authorized statuses must wait extended periods for an SSN and face denials because of the inability of the SAVE system to verify status.

In addition, we note that the Supplementary Information to the proposed rule directs an individual who is denied a license based on a SAVE error to the appropriate USCIS office. As anyone who has practiced immigration law even briefly can attest, the current local office appointment system utilized by the USCIS, INFOPASS, requires Internet access in order to make an appointment on-line, and in many offices, demand far outstrips the available appointments. Furthermore, the many non-citizens in need of verification who have no attorney or interested individual to advocate for them will suffer longer delays due to system errors.

The SAVE program is an unevaluated system. No recent published reports exist by government oversight entities on SAVE. Also, there is little published data on the system. The result is that while we know that problems exist, particularly with regard to secondary verification, we do not know the extent of the problems and whether they are getting worse or better. The most basic question of how many applications are referred to secondary inspection, for instance, is not publicly known. We note that DHS, in its own Regulatory Evaluation regarding the REAL ID proposed rulemaking, assumed that 14.1%—or one out of seven—applications are referred to secondary with its attendant delays. The 2000 Census reported a foreign born or immigrant population of over 31 million. This would easily translate into millions of erroneous denials due to SAVE..

Further, SAVE will be taxed heavily on implementation of REAL ID. Currently, for instance, the majority of states do not use SAVE to verify documents for driver's licenses purposes. This increased traffic could well result in a slow-down of the entire system. Even if this does not occur, it will result in increasing numbers of applications being sent to secondary and the consequent delays in processing. This will be extremely problematic because of the strong need of qualified non-citizen applicants for a REAL ID compliant driver's license.

Given the heavy reliance that REAL ID places on SAVE, and the existing problems, the lack of evaluative information on the system is worrisome. Objective research and analysis is needed, for instance, on how many applications are sent to secondary, how long the typical application in secondary is pending, the major reasons applications are sent to secondary, the outcomes of these applications and the effectiveness of efforts to expedite resolution of these problems. Such information would pinpoint the problems and help provide a road map for resolution. It would also provide DHS and the public a better sense of whether the SAVE system has the capacity to handle large increases in traffic.

Based on our experience, we believe that SAVE verification for driver's licensing should not be implemented until the system is enhanced and can demonstrate reliability and accuracy and incorporates express mechanisms to allow foreign nationals to correct errors. Specifically, regulations and/or the statute should mandate the following provisions:

- Establish time limits for secondary verification and, in addition, require the issuance of some form of temporary REAL ID-compliant driver's license during the pendency of secondary verification;
- Enable non-citizens to correct errors in their records in SAVE by providing them timely and reasonable access to these records an efficient mechanism to correct any errors contained in them;
- Create a streamlined appeal process to challenge wrongful denial of SAVE verification or of a REAL ID drivers license as a result;
- Require the regular public reporting of numbers of SAVE verification requests. This reporting should include data on applications requiring secondary processing, such as the number, time frames for resolution, and result.

### **III. The One-Year Limit on Temporary Driver’s Licenses for Persons Who Are Lawfully Present Without an Expiration End Date Is Unrealistic and Unreasonable.**

The proposed rule provides that a temporary REAL ID License will be valid only for the duration of admission or, if there is no fixed end date, for one year. Even assuming these individuals can present an unexpired visa or EAD (which many cannot), this will work an extreme hardship on many classes of persons who are in lawful status for extended periods of time. For instance, many F and J nonimmigrants are admitted and lawfully present for the “duration of status” (i.e., D/S) to participate in courses of study and programs that can last up to seven years and more. These individuals and many others in similar circumstances will be required to undertake the time-consuming process of license renewal on an annual basis and, in addition, pay yet-unknown annual renewal fees. Therefore, the rule should allow for issuance of a license commensurate at least with program duration.

### **IV. DHS’s Cost-Benefit Analysis Severely Overstates the Security Benefit and Understates the Security Cost of Implementing the Proposed Rule.**

#### **A. The Proposed Rule Will Not Result in the Security Benefit Claimed and Does Not Justify the High Cost of Implementation.**

The principal benefit of the proposed rule as articulated by DHS is illusory and does not justify the tremendous costs of implementation. The Supplementary Information states that “[t]he primary benefit of REAL ID is to improve the security and lessen the vulnerability of federal buildings, nuclear facilities, and aircraft to terrorist attack.” (p. 10845). This benefit is significantly overstated. The unstated assumption behind the proposed regulation—as behind the REAL ID Act itself—is that the 9/11 terror attacks would have been prevented had the REAL ID Act been in effect. In fact, such is not the case.<sup>4</sup> The 9/11 hijackers did not use false identities when committing their terrorist attacks. All had unexpired foreign passports, all had obtained US visas, and all but one had unexpired I-94 cards or had filed change of status applications that legally extended their stay in the United States. Only one hijacker was unlawfully present in the United States at the time of the attack. Thus, under the proposed rule, all but one of the 9/11 hijackers could still have obtained a state driver’s license (although not multiple ones).

Even if the terrorists could not today obtain driver’s licenses or IDs, nothing would stop them from using their foreign driver’s licenses and international driving permits. In its proposed regulations, DHS recommends this as the preferred course of action for any alien who cannot obtain a state driver’s license or ID. (This option has the unintended consequence of taking the potential terrorist out of the national database of driver’s licenses and IDs, thereby making it harder after an attack to trace the

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<sup>4</sup> See, e.g., Margaret D. Stock, “Driver Licenses and National Security, Myths and Reality, 10 Bender’s Immigration Bulletin 422 (Mar. 1, 2005), available at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web785a.pdf>.

terrorist's past movements.) It is also important to note that terrorist attacks are not carried out solely by unauthorized aliens or aliens who cannot obtain driver's licenses; they are often carried out by United States citizens and other persons lawfully present in the United States.

Thus, the major premise underlying the REAL ID driver's license statute and the proposed regulation is false. Before this government spends massive amounts of money and effort on implementing REAL ID, and requires the states to do so, the costs and benefits should be properly evaluated. DHS should re-examine its "estimated benefits" in light of the flawed assumption behind its estimate of the "primary benefit" of the proposed rule.

**B. The Proposed Rule Does Not Implement the Recommendations of the 9/11 Commission, Which Is Another Claimed Benefit, and Therefore, Does Not Justify the High Cost of Implementation.**

The proposed rule states that "the Act itself is an effort to implement recommendations of the 9/11 Commission." With regard to driver's licenses, however, the 9/11 Commission merely recommended that the federal government "set standards for the issuance of birth certificates and sources of identification, such as driver's licenses."<sup>5</sup> The REAL ID Act of 2005 (H.R. 418) repealed the carefully crafted driver's license provisions of the Intelligence Reform Act<sup>6</sup> and dramatically limited the ability of many non-citizens to obtain driver's licenses.<sup>7</sup>

The proposed rule, like the REAL ID driver's license statute, goes far beyond the 9/11 Commission's recommendations, and undercuts them in many respects, making it more difficult for government to locate and track foreign persons present in the United States. Foreigners who cannot easily obtain state driver's licenses or other forms of U.S. identification will now likely utilize their home country driver's licenses and IDs, or international driving permits and so-called "international driver licenses." Since none of these documents is tracked in a state or federal database, implementation of this proposed regulation—ironically—will leave both state and federal governments with less information on foreign persons present in the United States.

DHS should therefore stop claiming that REAL ID implements the 9/11 Commission's recommendations, as that statement is not accurate. The 9/11 Commission did not recommend that states limit the issuance of driver's licenses to

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<sup>5</sup> Public Law 108- 458, the Intelligence Reform and Terrorism Prevention Act of 2004, implemented the 9/11 Commission's recommendations with regard to driver's licenses by enacting carefully-crafted federal standards for licenses.

<sup>6</sup> Section 207 of the REAL ID Act repeals Section 7212 of the Intelligence Reform Act, which deals with driver's licenses and state-issued identification cards.

<sup>7</sup> The REAL ID Act applies equally to state-issued identification cards.

non-citizens, nor did it recommend wholesale re-tooling of the state driver's license issuing regimes so that all states would share data on their residents with other states. It is more accurate to state that REAL ID repealed the statutory provisions that enacted the 9/11 Commission's recommendations.

C. The Proposed Rule Actually Creates Potential Security Threats by Exposing Sensitive Personal Data of All REAL ID Applicants to Theft, and, Therefore, Does Not Justify the High Cost of Implementation.

The proposed rule overstates the security benefits, as described above, and ignores the potential security threat created by REAL ID's mandate that increased numbers of persons now be given access to sensitive personal information on all US citizens and persons lawfully present in the United States. The value of REAL ID data will increase dramatically as REAL IDs become the standard for identification in the United States.

While DHS does discuss such issues as background checks for DMV employees, it fails to consider the real possibility that under REAL ID as proposed, a single DMV employee can obtain and use such valuable identity data on many more people than at present. Background checks on DMV employees are no guarantee that those employees will not "go bad" at some future point and decide to misuse the sensitive data that they can now access. Past history has shown that even employees of the Federal Bureau of Investigation (FBI) and other federal employees with Top Secret clearances have chosen to use sensitive data for their own benefit, selling this data to criminals and terrorists.

DHS should analyze the security threat created as a result of its proposed rule's expansion of access to sensitive data to more and more people. Non-citizens who seek REAL IDs may be particularly vulnerable to identity theft, given that many persons who are illegally present may have an especial incentive to adopt the identity of a foreign person of similar ethnicity who is legally present.

D. The Proposed Rule Actually Undermines National Security By Limiting Unnecessarily the Persons Who Can Obtain State Driver's Licenses and Does Not Justify the High Cost of Implementation.

Arguments in favor of requiring driver's license applicants to prove lawful immigration status have popular surface appeal.<sup>8</sup> Proponents of such "restrictive licensing" contend that undocumented immigrants have violated the law and should not be rewarded with a license. Moreover, the license, it is claimed, provides a cloak of undeserved legitimacy that allows the would-be terrorist to enjoy the benefits of American citizens. But moving beyond the superficial appeal of these considerations,

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<sup>8</sup> According to Fox News, a majority of persons polled in California and Arizona oppose licensing undocumented immigrants. See <http://www.foxnews.com/story/0,2933,140834,00.html> (last visited March 9, 2005).

the arguments in favor of licensing all persons in the United States who can establish their identity in a credible fashion, regardless of immigration status, are far more compelling from a national security and public safety perspective.

Over time, and in the absence of a U.S. national ID card, the driver's license has moved far beyond its original purpose and has assumed importance as a universally-accepted identity document. This trend has led to legitimate concerns about the integrity of the licensing process and the need to reduce opportunities for identity fraud that can be exploited by terrorists.<sup>9</sup> Consistent with the approach taken by the Intelligence Reform Act, state motor vehicle agencies have been taking steps to ensure that the driver's license applicant is who he or she claims to be.

Contrary to the fundamental premise of the REAL ID Act, however, immigration status bears no inherent relationship to an applicant's ability to prove identity.<sup>10</sup> Additionally, many immigrants who are out-of-status possess reliable and credible identity documents.<sup>11</sup> Accordingly, denying licenses to undocumented immigrants who are in a position to present credible identity documents promotes neither integrity nor security in the process. To the contrary, denying licenses impedes these goals significantly.

Though touted as a security measure, the restrictive licensing provisions of the REAL ID Act defy basic principles of counterterrorism security.<sup>12</sup> The Report of the 9/11 Commission established the overarching importance of effective intelligence-gathering and information-sharing in preventing terrorist acts. Restrictive licensing only widens gaps in intelligence gathering by excluding from motor vehicle databases millions of immigrants who are lawfully in the U.S. and millions more who have no lawful immigration status. This deprives law enforcement of valuable opportunities to screen individuals, confirm their identity, and develop intelligence on who is in our country. Indeed, information from the driver's licenses of the hijackers was invaluable after 9/11 in tracking where the terrorists had been in the United States and

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<sup>9</sup> See Public Discourse Project Fact Sheet, [http://www.9-11pdp.org/press/2004-12-03\\_factsheet.pdf](http://www.9-11pdp.org/press/2004-12-03_factsheet.pdf) (last visited May 8, 2007).

<sup>10</sup> In fact, many U.S. citizens apply for driver's licenses using false documents and fraudulently assume the identity of other persons in order to obtain licenses.

<sup>11</sup> The U.S. government implicitly concedes the reliability of these documents by relying upon them as proof of foreign nationality for purposes of deportation.

<sup>12</sup> See Statement of Kim Taipale, Executive Director of the Center for Advanced Studies in Science and Technology Policy and Director of the World Policy Institute's Program on Law Enforcement and National Security in the Information Age, "Not Issuing Driver's Licenses to Illegal Aliens is Bad for National Security," Dec. 17, 2004, <http://releases.usnewswire.com/GetRelease.asp?id=40902> (last visited March 9, 2005).

with whom they had associated.<sup>13</sup> This information was also used to prosecute many individuals who would not have been discovered otherwise.<sup>14</sup>

Finally, restrictive licensing fuels a black market in fraudulent documents. It increases the incentives for fraud in the driver's license application, issuance, and production process by transforming the license into a de facto immigration document, which artificially inflates its value. This, in turn, contaminates driver's licensing and other databases and undermines their integrity and utility in protecting our security.

The proposed rule restricts not only unlawfully present aliens from obtaining a REAL ID compliant license, but also restricts many lawfully-present aliens. Thus, when the rule is implemented, it will make the driver's license database less useful, and will fuel the black market in fraudulent documents. In its proposed regulations, DHS has failed to include these factors in its cost-benefit analysis.

The proposed rule also discusses "international driver's licenses," stating that "aliens [who cannot obtain a REAL ID license] can typically use either the driver's license from their home country or an international driver's license to be able to drive a car while lawfully in the United States." In fact, these "licenses" are documents sold around the world on the open market that falsely purport to authorize holders of them to drive inside the United States. The U.S. Federal Trade Commission has warned that numerous scam artists are now selling "international driver's licenses" to unsuspecting aliens.<sup>15</sup> Rather, the term "international driver's permit" is the correct term for the document that allows a foreign national to drive legally in the United States.

The "international driver's permits" are accepted in all states, and constitute a valid means for foreigners to drive legally—as long as the foreigner has previously obtained a driver's license in a foreign country. In the proposed regulation, DHS presumably means to refer to the term "international driving permit" when it uses the term "international driver's license." Yet, DHS's failure to distinguish between the two terms will likely lead to confusion among the public. In addition, the proposed rule that designates international driver's licenses as an acceptable alternative to immigration documents will considerably empower the scam artists who already prey on unsuspecting foreigners. DHS should revise the proposed regulation to allow all legally present aliens to obtain a REAL ID-compliant state driver's license.

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<sup>13</sup> American Ass'n of Motor Vehicle Administrators, *Access to Drivers License & Identification Card Data by Law Enforcement*, October 2003, available at <http://www.aamva.org/Documents/idsIDSecurityFrameworkAppendices278303.pdf> ("The 19 terrorists obtained driver licenses from several states and federal authorities relied heavily on those images for the identification of the individuals responsible for the horrific criminal acts on that fateful day" (emphasis added)).

<sup>14</sup> See Margaret D. Stock, "Driver Licenses & National Security: Myths and Reality," 10 *Bender's Immigration Bulletin* 422 (Mar. 1, 2005).

<sup>15</sup> See <http://www.ftc.gov/bcp/online/pubs/alerts/drivalrt.shtm>

### **Conclusion**

For the foregoing reasons, AILA strongly opposes the proposed rule and urges DHS to withdraw it and to publish a new proposed rule consistent with these comments and the immigration laws and regulations.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION