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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

[CIS No. 2492-10; DHS Docket No. USCIS-2010-0003]

RIN 1615-AB87

Employment Authorization for Dependents of Foreign Officials

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations governing the employment authorization for dependents of foreign officials classified as A-1, A-2, G-1, G-3, and G-4 nonimmigrants. This rule expands the list of dependents who are eligible for employment authorization from spouses, children, and qualifying sons and daughters of A or G foreign officials to include any other immediate family member who falls within a category of aliens designated by the Department of State as qualifying. This change to DHS regulations provides the Department of State with greater flexibility when entering into bilateral agreements and arrangements with other countries that would extend employment authorization to immediate family members who are recognized as such by the Department of State.

DATES: *Effective date:* This rule is effective August 9, 2010.

FOR FURTHER INFORMATION CONTACT: Julia C. Kennedy, Adjudications Officer, Business Employment Services Team, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529-2060, telephone (202) 272-8410.

SUPPLEMENTARY INFORMATION:

I. Background

As provided by section 101(a)(15)(A) and (G) of the Immigration and Nationality Act (INA), certain immediate family members of foreign officials are eligible for A-1, A-2, G-1, G-3, and G-4 derivative visa classifications. 8 U.S.C. 1101(a)(15)(A) and (G). Department of State (DOS) regulations at 22 CFR 41.21(a)(3) define immediate family to include “the spouse and unmarried sons and daughters, whether by blood or adoption, who are not members of some other household, and who will reside regularly in the household of the principal alien.” The “immediate family” of an A or G principal alien also includes individuals who:

- Are not members of some other household;
- Will reside regularly in the household of the principal alien;
- Are recognized as immediate family members of the principal alien by the sending Government as demonstrated by eligibility for rights and benefits, such as the issuance of a diplomatic or official passport, or travel or other allowances; and
- Are individually authorized by the Department of State.

This definition of “immediate family” reflects an amendment made by DOS in July 2009 removing the requirement that members of the A or G principal alien’s household, beyond the alien’s spouse and dependent children, must be related to the alien by blood, marriage, or adoption. 74 FR 36112. DOS explained that the purpose of this amendment was to provide for “greater flexibility in responding to requests by foreign governments to issue a diplomatic visa to a person who regularly resides with and is a member of the household of a qualified principal alien and is considered by the principal alien and the sending Government to be a member of the immediate family of the principal alien.” *Id.*

Once in the United States under A or G nonimmigrant status, certain immediate family members of A and G principal aliens may request employment authorization from U.S. Citizenship and Immigration Services (USCIS), after obtaining a favorable determination from DOS and meeting other eligibility requirements. *See* 8 CFR 214.2(a)(6) and (g)(6). These immediate family members are called “dependents”

under Department of Homeland Security (DHS) regulations.

Currently, the only dependents of A and G foreign officials listed in DHS regulations who are eligible to receive employment authorization, if habitually residing with such officials, include the:

- Spouse;
 - Unmarried children under the age of 21;
 - Unmarried sons or daughters under the age of 23 who are in full-time attendance as students at post-secondary educational institutions;
 - Unmarried sons or daughters under the age of 25 who are in full-time attendance as students at post-secondary educational institutions if a formal bilateral employment agreement permitting their employment in the United States was signed prior to November 21, 1988, and if such bilateral employment agreement does not specify 23 as the maximum age for employment of such sons and daughters. The Office of Protocol of the Department of State shall maintain a listing of foreign states with which the United States has such bilateral employment agreements;
 - Unmarried sons or daughters who are physically or mentally disabled to the extent that they cannot adequately care for themselves or cannot establish, maintain or re-establish their own households. DOS or DHS may require certification(s) necessary to document such mental or physical disability.
- See* 8 CFR 214.2(a)(2)(i) to (v) and (g)(2)(i) to (v); 8 CFR 274a.12(c)(1) and (4); *see also, e.g.,* <http://www.state.gov/documents/organization/95030.pdf> (Bilateral Agreement between the United States and Kenya).

The extension of employment authorization to select dependents of foreign officials is based on reciprocity stemming from formal bilateral agreements and informal *de facto* arrangements. *See* 8 CFR 214.2(a)(3), (a)(5), (g)(3), and (g)(5). A bilateral agreement is a signed, written agreement which has been negotiated by both the United States (through DOS) and a foreign country. Such agreements generally provide that, on the basis of their status, dependents of members of diplomatic missions and consular posts (“mission members”) in the United States will be issued employment authorization. In turn, such agreements generally provide employment authorization for dependents of United

States mission members in the foreign country that signed the agreement.

Informal *de facto* arrangements develop when DOS determines that a foreign government is issuing a work permit to a dependent of a U.S. mission member assigned to duty in that foreign country. Based on that determination, the U.S. government may provide reciprocal employment authorization for dependents of mission members of that foreign country assigned to duty in the United States. A *de facto* arrangement is based on current practices and policies rather than mutually-negotiated, well-defined obligations. However, such arrangements contribute to making duty in a foreign country more attractive to U.S. mission members whose dependents wish to work.

While DOS is authorized to enter into bilateral agreements and *de facto* arrangements, its authority to negotiate for the employment authorization of immediate family members of A or G foreign officials is limited by the definition of "dependent" in DHS regulations. DOS has advised DHS that the limitations in the current regulations are unnecessary and hinder DOS's ability to recognize, for policy reasons, a broader spectrum of individuals who may be eligible for employment authorization.

Determining which individuals are immediate family members of foreign officials and what benefits they may receive while in the United States is a matter of foreign policy within the purview of DOS. Accordingly, DHS, in consultation with DOS, is amending its regulations to be more flexible and allow DOS the necessary deference to determine which immediate family members of foreign officials are qualifying dependents for purposes of employment authorization.

II. Changes to the Definition of "Dependent"

This final rule amends the definitions of A and G dependents by adding a new category of dependents who may be eligible for employment authorization. This new category includes any immediate family member of an A or G foreign official with A or G nonimmigrant status who is covered by DOS regulations at 22 CFR 41.21(a)(3)(i) to (iv) and falls within a category of aliens recognized by the DOS as qualifying dependents. See new 8 CFR 214.2(a)(2)(vi) and (g)(2)(vi) (cross-referencing 22 CFR 41.21(a)(3)). This amendment means that, in addition to spouses, children, and unmarried sons and daughters of A and G principal aliens, other categories of immediate family members in the United States in

A or G nonimmigrant status could be eligible for employment authorization, as determined by DOS. Qualifying dependents must fall within a bilateral work agreement or *de facto* arrangement, listed on DOS's Web site at <http://www.state.gov/m/dghr/flo/c24338.htm>.

This final rule also makes conforming amendments to the employment authorization regulations at 8 CFR 274a.12(c)(1) and (4) governing dependents of relevant A and G visa holders. Specifically, the amendments remove references to the spouses and children of A and G principals.

III. Regulatory Requirements

A. Administrative Procedure Act

This final rule is exempt from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States. This rulemaking amends DHS regulations to extend eligibility for employment authorization to categories of dependents of A or G foreign officials in A or G nonimmigrant status, as determined by DOS, beyond the spouses and dependent children of such officials. This amendment will provide greater flexibility to DOS when negotiating bilateral agreements and arrangements with foreign governments regarding employment authorization for dependents of foreign officials. Specifically, DOS will be better able to respond to foreign government requests to issue diplomatic visas and extend employment authorization to persons residing with A and G principal aliens and considered by the sending Government to be immediate family members. Since this final rule involves U.S. foreign policy and bilateral agreements and arrangements, it is considered a foreign affairs function of the United States and is exempt from notice and comment rulemaking and delayed effective date requirements under 5 U.S.C. 553.

Further, DHS maintains that it is important to implement this rule as quickly as possible to allow U.S. foreign officials currently being assigned to overseas positions to obtain reciprocal recognition and benefits for immediate family members as defined under the revised Department of State regulations. We have been advised that immediate family members of U.S. foreign officials have been denied work authorization overseas. Delay in implementation of this regulation would have the definitive, undesirable consequence of the continued denial of work authorization for immediate family members of U.S. foreign officials in certain foreign countries.

Accordingly, DHS is not required to provide public notice and an opportunity to comment before implementing the requirements under this final rule.

B. Regulatory Flexibility Act

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth at sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 603 and 604. Consequently, no regulatory flexibility analysis has been prepared. DHS does note that this regulation does not directly regulate any small entities, as defined in 5 U.S.C. 601(6).

C. The Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. The Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

E. Executive Order 12866

Section 3(d)(2) of Executive Order 12866 provides that the Executive Order does not apply to a proposed regulation that involves a foreign affairs function of the United States, and thus it does not apply to this rule. As previously discussed in more detail in the "Administrative Procedure Act" section, this rule will provide DOS with greater flexibility when negotiating with foreign governments regarding employment authorization for certain dependents of A and G principal aliens.

F. Executive Order 13132

This rule will not have substantial direct effects on the States, on the

relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988: Civil Justice Reform

This final rule meets the relevant standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. This rule will require some minor edits to the Form I-566, Inter-Agency Record of Individual Requesting Change/Adjustment to or From A or G Status; or Requesting A, G, or NATO Dependent Employment Authorization, (currently approved OMB Control No. 1615-0027). Accordingly, USCIS has submitted an OMB 83-C, Correction Worksheet, to OMB for review and approval for the minor edits to the form and instructions.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

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

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; Title VII of Public Law 110-229; 8 CFR part 2.

- 2. Section 214.2 is amended by:
 - a. Removing the “.” at the end of paragraph (a)(2)(v) and adding “; or” in its place;
 - b. Adding a new paragraph (a)(2)(vi);
 - c. Removing the word “and” at the end of paragraph (g)(2)(iv);
 - d. Removing the “.” at the end of paragraph (g)(2)(v) and adding “; or” in its place; and by
 - e. Adding a new paragraph (g)(2)(vi).
 The additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(a) * * *

(2) * * *

(vi) An immediate family member of an A-1 or A-2 principal alien described in 22 CFR 41.21(a)(3)(i) to (iv) with A-1 or A-2 nonimmigrant status, who falls within a category of aliens recognized by the Department of State as qualifying dependents.

* * * * *

(g) * * *

(2) * * *

(vi) An immediate family member of a G-1, G-3, or G-4 principal alien described in 22 CFR 41.21(a)(3)(i) to (iv) with G-1, G-3, or G-4 nonimmigrant status who falls within a category of aliens designated by the Department of State as qualifying dependents.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

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

Authority: 8 U.S.C. 1101, 1103, 1324a; Title VII of Pub. L. 110-229; 8 CFR part 2

■ 4. Section 274a.12 is amended by revising paragraphs (c)(1) and (c)(4) to read as follows:

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

* * * * *

(c) * * *

(1) An alien dependent of a foreign government official A-1 or A-2 principal alien defined in 8 CFR 214.2(a)(2), and who presents a fully executed Form I-566 bearing the endorsement of an authorized representative of the Department of State;

* * * * *

(4) An alien dependent of an officer of, representative to, or employee of an international organization G-1, G-3, or G-4 principal alien defined in 8 CFR 214.2(g)(2), and who presents a fully executed Form I-566 bearing the endorsement of an authorized

representative of the Department of State;

* * * * *

Janet Napolitano,

Secretary.

[FR Doc. 2010-19620 Filed 8-6-10; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

8 CFR Part 217

[USCBP-2010-0025; CBP Dec. No. 10-25]

RIN 1651-AA83

Electronic System for Travel Authorization (ESTA): Travel Promotion Fee and Fee for Use of the System

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Interim final rule; solicitation of comments.

SUMMARY: Nonimmigrant aliens who wish to enter the United States under the Visa Waiver Program at air or sea ports of entry must obtain a travel authorization electronically through the Electronic System for Travel Authorization (ESTA) from U.S. Customs and Border Protection prior to departing for the United States. This rule requires ESTA applicants to pay a congressionally mandated fee of \$14.00, which is the sum of two amounts: a \$10 travel promotion fee for an approved ESTA statutorily set by the Travel Promotion Act and a \$4.00 operational fee for the use of ESTA as set by the Secretary of Homeland Security to ensure recovery of the full costs of providing and administering the ESTA system.

DATES: This interim final rule is effective on September 8, 2010. Comments must be received on or before October 8, 2010.

ADDRESSES: Please submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2010-xxxx.

- *Mail:* Border Security Regulations Branch, Office of International Trade, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW, (Mint Annex), Washington, DC 20229.

- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking.