DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

[CS No. 2492–10; DHS Docket No. USCIS–2010–0003]

RIN 1615–AB67

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.


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;

By the Department of State with 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.

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 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 arrangement 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. 610(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
1. The authority citation for part 214 continues to read as follows:


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).

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


4. Section 214.2 is amended by:
   a. Removing the 
   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
   e. Adding a new paragraph (g)(2)(vi).

The additions read as follows:

§ 214.2 Special requirements for
documentation, admission, and maintenance of status.
" * * * * *
(a) * * *
(2) * * *
(g) * * *
(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.
* * * * *
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]
BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND
SECURITY

U.S. Customs and Border Protection

8 CFR Part 217


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:

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