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VIA ELECTRONIC MAIL

May 2, 2007

Department of Homeland Security  
Attn: NAC 1-12037  
Washington, D.C. 20528

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

Dear Sir or Madam:

The National Immigration Law Center (NILC) submits the following comments regarding "Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes."

NILC is a national legal advocacy organization whose mission is to protect and promote the rights and opportunities of low-income immigrants and their families. Since its inception in 1979, NILC has earned a national reputation as a leading expert on immigration law and the employment and public benefit rights of low-income immigrants. We conduct policy analysis, advocacy, and impact litigation, as well as providing training, publications, and technical assistance for a broad range of groups throughout the U.S., including immigrants' rights coalitions, legal aid programs, community and faith-based groups, workers' rights advocates, labor unions, government agencies, policymakers, and the media.

NILC has substantial experience in dealing with the adverse impact of driver's license restrictions on immigrants and naturalized citizens seeking to obtain driver's licenses, as well as the public safety consequences of failing to ensure that all drivers are properly trained, tested, licensed and insured. We have studied, written about, and conducted advocacy around state and federal driver's license proposals for close to 15 years.

We believe that the REAL ID Act is fundamentally flawed, and that its deficiencies cannot be cured by the regulatory process. The statute is burdensome to states and individuals and presents risks to the personal information of millions of people. By its very terms, it imposes obstacles that will prevent citizens and immigrants alike from obtaining driver's licenses and identification cards.

For immigrants and naturalized citizens, the proposed rules are even more restrictive than the Act itself, imposing additional barriers for many who will not be able to meet its impractical and unnecessarily harsh requirements. Immigrants contribute significantly to their communities, and must drive safely to work, bring their children to school, to medical appointments, and other daily activities. The rules should be redrafted to ensure that the broadest groups of immigrants have access to licenses and identification.

The following comments focus on aspects of the regulations that particularly affect immigrants:

## SUMMARY

On December 20, 2005 representatives from immigration, civil rights and religious groups met with the Department of Homeland Security (DHS)/ Department of Transportation (DOT) work group to discuss immigration-related concerns that the REAL ID regulations should address. These included the statute's exclusion of certain immigration statuses from eligibility for a driver's license, the wide variety of documents that immigrants may have to prove immigration status, practical problems in providing documentary evidence of immigration status, the vagueness in the REAL ID Act of the term "period of authorized stay," the problems with limiting the use of foreign documents besides passports, the significant rates of inaccuracy in immigration databases, and the need for an appeal process.

The proposed regulations do not address a single immigration concern raised at that meeting. They fail to recognize or mitigate the obstacles in the REAL ID Act or the practical problems faced by lawfully present immigrants seeking to obtain licenses. Even worse, whether deliberately or through complete indifference, the regulations impose new and unnecessary barriers on immigrants.

The proposed rules show considerable flexibility in how states may meet the Act's general requirements. For example, the rules extend the time for states to comply and allow states to set up an exceptions process by which states may accept alternative documents to establish identity, date of birth, Social Security number (SSN) or principal address. By contrast, the rules are entirely inflexible in addressing immigrant issues, creating unnecessary hardships for states and license applicants.

Despite that fact that DHS oversees the agencies administering immigration laws, the proposed rules reflect a disturbing or even willful ignorance about these laws and the operation of the immigration system.

The consequences of the proposed regulations' interpretation of the REAL ID Act will be to prevent non-citizens from obtaining driver's licenses. This affects not only immigrants, but also undermines public safety, because it is in the public interest for all drivers to be tested, licensed and insured.

## **THE PROPOSED RULES DO NOT MITIGATE THE OMISSION IN THE REAL ID ACT OF CERTAIN IMMIGRATION STATUSES AS ELIGIBLE FOR A DRIVER'S LICENSE**

The REAL ID Act requires non-citizens to prove that they have one of the immigration status included in the statute's list of eligible immigration statuses.<sup>1</sup> This list is irrational and incomplete because it does not include significant categories

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<sup>1</sup> States must require documentary evidence that an applicant is a citizen or national of the U.S. or is a non-citizen who is lawfully admitted for permanent or temporary residence; has conditional permanent resident status; is an asylee or refugee; has a valid, unexpired nonimmigrant visas or nonimmigrant visa status; has a pending asylum application; has a pending or approved application for temporary protected status (TPS); has deferred action status; or has a pending application for adjustment of status to lawful permanent residence.

of non-citizens who are lawfully present in the U.S., either because they have a particular immigration status, their applications for status are pending, they are permitted to remain as a matter of U.S. foreign policy or the exercise of discretion, or they cannot be deported. These include persons who have applied for or have been granted withholding of deportation/removal, parolees (including Cubans waiting to apply for lawful permanent residence under the Cuban Adjustment Act), persons under a final order of supervision who cannot be deported, applicants for victim or witness non-immigrant visas, and applicants for cancellation of removal.

DHS oversees the administration and enforcement of immigration law and more than any other federal department should demonstrate an understanding of immigration law. Yet, in the proposed regulations, DHS does not even acknowledge that several groups of lawfully present immigrants are excluded from the eligible categories. Nor has DHS made the slightest attempt to analogize missing categories to the categories listed in the statute or to mitigate the exclusion of the missing categories so that these immigrants also could obtain licenses. For example, while the proposed rules could have concluded that withholding of removal is the equivalent of asylum, or that immigrants with an order of supervision or on parole have an equivalent status to those granted deferred action, DHS did not do so.<sup>2</sup>

The preamble to the proposed rules suggests that DHS presumes states will issue non-REAL ID licenses.<sup>3</sup> Perhaps such licenses would then be available to lawfully present immigrants who cannot obtain a REAL ID license. But nothing in the statute or proposed rules requires states to do this. Moreover, it is irresponsible for DHS to relegate immigrants to a third class license rather than providing reasonable opportunities for these immigrants to obtain first or second class licenses.

#### **THE PROPOSED RULES IMPROPERLY LIMIT THE DOCUMENTS NONCITIZENS CAN USE TO PROVE IDENTITY AND IMMIGRATION STATUS.**

Narrow, unreasonable list of immigration documents. The Act requires that non-citizens present documents establishing their identity and immigration status. Section 37.11 narrowly limits the list of documents that immigrants can provide for these purposes, allowing only an unexpired Permanent Resident Card (I-551), an unexpired employment authorization document (EAD), or an unexpired passport accompanied by a valid U.S. visa. This limitation is not required by the Act and will prevent many lawfully present non-citizens, including those listed specifically in the statute, from obtaining licenses.

The preamble to the rules indicates that the list of acceptable immigration documents is limited because these are the documents considered most secure; Department of Motor Vehicles (DMV) employees will need to be familiar with fewer documents and so will be better able to distinguish fraudulent documents; and verification will

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<sup>2</sup> Moreover, since the categories of lawful immigration status change constantly, it is virtually impossible to create a finite list.

<sup>3</sup> 72 FR 10844.

be simpler if there are fewer acceptable documents.<sup>4</sup> But this desire for simplicity completely ignores the reality of the complex and often dysfunctional operation of the immigration system that DHS itself administers.

DHS issues numerous documents that prove immigration status, not just the three that will be required for a REAL ID license. They include a receipt that an application was received, a refugee travel document, a form I-94 indicating admission into the country, a letter from U.S. Citizenship and Immigration Services (USCIS), or anything else that immigration authorities choose to provide.<sup>5</sup> A non-citizen's status may also be shown by a copy of an order from an Immigration Judge or a decision from the Board of Immigration Appeals or a Federal Court.

Moreover, certain non-citizens included in the list of eligible statuses are not required to have one of the listed documents. For example, asylees and refugees have work authorization incident to their status and are therefore not required to obtain and continually renew an EAD.<sup>6</sup> In contrast with DHS, the Social Security Administration accepts a greater variety of documents to establish immigration status for issuance of an SSN.<sup>7</sup>

DHS's reasons for limiting the list of documents are specious. First, the rule amounts to a rejection of DHS' own documents and documents issued by other federal agencies. Second, DHS gives a higher value to easing the job of DMV employees than it does to allowing lawfully present immigrants to obtain licenses. Third, DHS purports to solve the significant problem of verifying immigration documents by excluding the very documents it issues. Finally, DHS's own immigration status verification system, the Systematic Alien Verification for Entitlements (SAVE) Program, requires only a name and alien number or other minimal information, so there is no need for these DMV employees to become familiar with every potential (and ever changing) document in order to properly verify status.

Ineligibility for listed documents. As DHS explicitly acknowledges, some categories of immigrants who are eligible for a temporary license simply cannot obtain a listed document. For example, applicants for asylum or Temporary Protected Status (TPS) may not yet be eligible for an EAD and will not have the other acceptable immigration documents. They will be precluded from obtaining a license. But they will still need to drive their cars to take children to school or to go to a supermarket or the doctor. In a curious disregard for how the immigration system operates and the demands of ordinary life, the preamble to the rules asks for comments as to whether people who have applied for asylum or TPS might need a license during this period.<sup>8</sup>

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<sup>4</sup> 72 FR 10827.

<sup>5</sup> See, e.g. National Immigration Law Center, *Guide to Immigrant Eligibility for Federal Programs*, Typical Documents Used by Categories of "Qualified Immigrants," p. 63.

<sup>6</sup> 8 CFR 274.12(a).

<sup>7</sup> Social Security Administration Policy Site: POMS Section RM 00203.500  
<https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0100203500!opendocument>

<sup>8</sup> 72 FR 10830.

Moreover, DHS supports its restrictive list by assuming that certain groups do not need a driver's license or identification, even though they are explicitly permitted under the statute to obtain them. For example, persons admitted under the Visa Waiver Program, have a nonimmigrant visa status that would make them eligible for a temporary license. But they would not have one of the required documents. DHS concludes that such persons are present for a short time, are not permitted to work, would likely not qualify under typical state residency requirements, and could use home-country or international driver's licenses.<sup>9</sup> These are questionable and unsupported assertions.

No exceptions for documents that prove immigration status. In the preamble to the rules, DHS acknowledges that extraordinary circumstances beyond applicants' control might prevent applicants from meeting the documentation requirements to prove identity, citizenship or lawful immigration status, date of birth, SSN or ineligibility for SSN, and place of principal residence.<sup>10</sup>

In response to these concerns, the proposed rules would authorize states to create a written exceptions process to the documentation requirements.<sup>11</sup> However, proof of lawful status is the only area explicitly excluded from the exceptions process.<sup>12</sup>

Examples of non-citizens who, because of the absence of an exceptions process, would be precluded from obtaining a REAL ID license are:

- Non-citizens whose immigration documents were destroyed in a fire, flood or other catastrophe (such as survivors of Hurricanes Katrina and Rita) or who have lost their documents, even if a replacement document has been applied for.
- Non-citizens whose application for an EAD has been delayed because of backlogs and inefficiencies in USCIS.
- Non-immigrants who are not required to have visas, e.g. Canadian professionals in TN status.<sup>13</sup>
- Non-citizens who are ineligible for one of the listed documents.
- Non-citizens who have been issued an unlisted immigration document by DHS.
- Non-citizens with disabilities who may not have the resources or need to apply for a work permit (e.g. persons with withholding) but may need a state ID for other purposes, such as to secure critical services.

Though DHS could have allowed for an exceptions process for these predictable or obvious circumstances, it has chosen not to.

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<sup>9</sup> 72 FR 10828.

<sup>10</sup> 72 FR 10831.

<sup>11</sup> 72 FR 10834. Nothing in the statute suggests that an exceptions process is permissible, but this is a rational response to requirements that would otherwise prevent people from obtaining licenses.

<sup>12</sup> Sec. 37.11(h).

<sup>13</sup> [http://travel.state.gov/visa/temp/types/types\\_1274.html#3](http://travel.state.gov/visa/temp/types/types_1274.html#3)

Failure to recognize the realities and ever-changing nature of immigration documents. As DHS well knows, but ignores in the proposed rules, immigration documents do not always reflect actual status. For example,

- An immigration document, such as a Permanent Resident Card, may have an expiration date that has passed, but the actual status has not expired;
- An immigration document, such as an EAD issued to a TPS recipient, may appear to have expired but may actually have been extended by a notice in the Federal Register;
- A non-citizen may have applied for an extension or change of status and remains lawfully in the U.S. during the time the extension or change of status is considered;
- Visa holders may be admitted to the U.S. for longer than the expiration date on the visa. A visa may have expired but if the individual's I-94 (document authorizing stay) has not expired, then s/he is still in status.<sup>14</sup>

At the same time that DHS in the proposed rules severely restricts the list of acceptable immigration documents, it also seems to recognize in the preamble that these documents by themselves may be insufficient. For example, in the preamble it acknowledges that those proving immigration status through a passport with a valid visa will have to present additional documentation for verification of status through the SAVE system. According to DHS, “[t]his could be a passport stamp, I-797 Notice of Action, or some other documentation issued by USCIS.”<sup>15</sup>

But the regulations do not authorize acceptance of the additional documents. Nor do they give DMV employees any indication of precisely which documents would be sufficient for this purpose. Moreover, DHS’ inclusion of “some other documentation issued by USCIS” is a recognition – not found in the proposed rules themselves – of the realities of the immigration system, in which a wide latitude in documents issued by DHS in fact prove immigration status.

Limited list of documents leaves discretion in DMV employees to wrongfully deny licenses because of immigration status. Sec. 37.11 requires presentation of “an unexpired Permanent Resident Card, issued by DHS, Form I-551” or an “unexpired employment authorization document (EAD) issued by DHS,” (or other related documents) to prove identity and immigration status. But these requirements leave considerable discretion in the hands of DMV employees to deny licenses to lawfully present immigrants. For example, a DMV employee may deem a document facially unacceptable because it appears to have expired, such as an asylee’s work authorization card,<sup>16</sup> a TPS work authorization card that has been extended by a notice in the Federal Register, or an I-551 Permanent Resident Card which has an expiration date though the status of lawful permanent residence does not.

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<sup>14</sup> 22 CFR 41.112 (a) *Significance of period of validity of visa.* The period of validity of a nonimmigrant visa is the period during which the immigrant may use it in making application for admission. The period of visa validity has no relation to the period of time the immigration authorities at a port of entry may authorize the alien to stay in the United States.

<sup>15</sup> 72 FR 10832.

<sup>16</sup> Asylees have work authorization incident and need not obtain an EAD. If they do so, the card has an expiration date. But that expiration date only means the card should be renewed, not that the status has expired. 8 CFR 274a.12(a)(5).

Under section 37.21, in order to renew a license, immigrants must present valid documentary evidence that their immigration status has been extended. A request for extension of stay generally must be filed before the applicant's status expires. During the time the application is pending, the applicant is lawfully present in the U.S. While the proposed regulation could have provided that proof that an extension of stay has been applied for would be sufficient, the present provision instead would allow a DMV worker to deny a license during this interim period.

Section 37.21 also requires renewal applicants to establish they have qualified for another lawful status as verified through the SAVE Program. This puts the initial determination of whether the applicant has "qualified" for another lawful status (as opposed to having "received" that status) in the hands of a DMV employee. This is an immigration determination which DMV employees are not qualified to make.

No exceptions to the Act's limitation on the use of foreign documents other than a passport. The Act provides that the only foreign document that may be used to meet the Act's documentation requirements (including full legal name, date of birth, or gender) is a foreign passport.

Many immigrants who are eligible for a driver's license (such as applicants for asylum or TPS), do not have a foreign passport and will not yet have one of the listed documents. They will be unable to use other foreign documents to meet the Act's requirements, although these same foreign documents are regularly used to prove identity for the purpose of obtaining immigration status in the U.S., such as a birth certificate, marriage certificate, school records or the like.<sup>17</sup>

In contrast with other areas where states are permitted to develop exceptions to the rules, the regulations make no attempt to reconcile the circumstances of non-citizens with the rigidity of the rules.

### **THE PROPOSED RULES DO NOT PROVIDE EVEN MINIMAL DUE PROCESS PROTECTIONS DURING OR FOLLOWING THE VERIFICATION PROCESS.**

Current Problems in the use of the SAVE Program The Act and the proposed rules require that immigration status be verified through the SAVE Program. SAVE is an automated system for federal, state and local government agencies to verify the immigration status of non-citizens. Under the SAVE Program, when immigration status cannot be verified immediately, a secondary verification process is begun, which can include a manual review of immigration records and files.<sup>18</sup>

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<sup>17</sup> See, e.g. 8 CFR sec. 244.9.

<sup>18</sup> U.S. Citizenship and Immigration Services, Systematic Alien Verification for Entitlements (SAVE) Program  
<http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=71cf58f91f08e010VgnVCM1000000ecd190aRCRD&vgnnextchannel=91919c7755cb9010VgnVCM10000045f3d6a1RCRD>

Under the Act, states were required to enter into a Memorandum of Understanding by September 11, 2005 to use the SAVE Program (although actual use did not have to begin by that date). According to the DHS Verification Office, about 20 state DMVs currently use the SAVE system to verify immigration status.

The Act presumes the reliability and functionality of the SAVE system, although neither has been independently evaluated. Moreover, the SAVE system itself is not monitored and there is currently not a means to ensure compliance with its rules.

As reported by the General Accountability Office:

The SAVE system is the only available data source on the immigration status of noncitizens. We are aware of limitations in DHS's SAVE data but have not conducted an independent assessment of the quality of the records in that system. The Justice Department's Office of the Inspector General has issued several reports that questioned the reliability, accuracy, and management controls over nonimmigrant data in the SAVE system. (See *"Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays,"* Rept. No. 1-97-08, Sept. 1997; *"Follow-Up Report on INS Efforts to Improve The Control of Nonimmigrant Overstays,"* Rept. No. 1-2002-006, April 2002; and *"Immigration and Naturalization Service's Ability to Provide Timely and Accurate Information to the Social Security Administration,"* Rept. No. 1-2003-001, Nov. 2002.)<sup>19</sup>

The accuracy of immigration records and the reliability of immigration processes are continuing problems, as demonstrated in many GAO and Inspector General reports over the years, as well as in recent reports about issuance of faulty Permanent Resident Cards and missing immigration files.<sup>20</sup>

SAVE users are aware of the program's deficiencies. In a survey conducted by the American Association of Motor Vehicle Administrators, state DMV current users described the system as follows:

- "Many delays in responses from DHS"<sup>21</sup>
- "The [SAVE] system is not well developed, it requires a great deal of staff time to follow up on additional contact with USCIS and applicant."<sup>22</sup>

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<sup>19</sup> General Accounting Office, *Social Security Administration, Actions Taken to Strengthen Procedures for Issuing Social Security Numbers to Noncitizens, but Some Weaknesses Remain*, Oct. 2003, p. 7, ft. 5.

<sup>20</sup> National Immigration Law Center, *INS Data: the Track Record*, <http://www.nilc.org/immlawpolicy/misc/INS%20data%20accuracy.pdf>; General Accountability Office, *Immigration Benefits Additional Efforts Needed to Help Ensure Alien Files Are Located when Needed*, GAO-07-85, Oct. 27, 2006; Solomon Moore, *Green Cards Recalled Because of Glitch*, the Los Angeles Times, Dec. 6, 2005 .

<sup>21</sup> Illinois response to 2006 survey by the American Association of Motor Vehicle Administrators, available at [http://www.realnightmare.org/images/File/AAMVA\\_survey\\_all.pdf](http://www.realnightmare.org/images/File/AAMVA_survey_all.pdf)

- “To make [SAVE] an integrated function with license issuance ... would require INS to improve on the timely availability of data...Today, the data may not be there because of how long it takes for paper work to make it from the INS field office to the INS system.”<sup>23</sup>
- “SAVE database is notoriously unreliable...months behind.”<sup>24</sup>

In California, secondary verification is required 20-25% of the time and generally takes 30 days to resolve.<sup>25</sup> In testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs on March 26, 2007, the Mayor of Honolulu, Mufi Hannemann, described the SAVE system as requiring “major improvements to ensure appropriate functionality to operate in real time and with accessibility and reliability.”<sup>26</sup>

The Social Security Administration (SSA), which must verify immigration status before issuing SSNs to non-citizens, often experiences significant delays in verifying immigration status through SAVE and sometimes receives no response at all.<sup>27</sup> As a result, issuance of an SSN may be delayed.

The Proposed Rules completely ignore due process protections for non-citizen and naturalized citizen license applicants whose immigration status must be verified through SAVE. Given the recognition of known weaknesses in the SAVE Program and the mandated expanded use of the system, it is essential that due process protections be provided to non-citizens and naturalized citizens whose status must be verified through the system. Despite this, the proposed rules do not even mention the subject.

Under the SAVE Program, verification requests are sent to an Immigration Status Verifier for secondary verification when the system does not automatically verify status, when additional verification is required, or when material discrepancies exist between the information returned from the Verification Information System database and that on the non-citizen's immigration document.<sup>28</sup> This can include manual examination of immigration files.

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<sup>22</sup> Nebraska response to 2006 survey by the American Association of Motor Vehicle Administrators, available at [http://www.realnightmare.org/images/File/AAMVA\\_survey\\_all.pdf](http://www.realnightmare.org/images/File/AAMVA_survey_all.pdf)

<sup>23</sup> New Jersey response to 2006 survey by the American Association of Motor Vehicle Administrators, available at [http://www.realnightmare.org/images/File/AAMVA\\_survey\\_all.pdf](http://www.realnightmare.org/images/File/AAMVA_survey_all.pdf)

<sup>24</sup> South Carolina response to 2006 survey by the American Association of Motor Vehicle Administrators, available at [http://www.realnightmare.org/images/File/AAMVA\\_survey\\_all.pdf](http://www.realnightmare.org/images/File/AAMVA_survey_all.pdf)

<sup>25</sup> Telephone interview with California DMV official, March, 2007.

<sup>26</sup> <http://hsgac.senate.gov/files/Testimonyhannemann.pdf>

<sup>27</sup> Minutes of the Social Security Administration and CIS, AILA Liaison Meeting on SSA-Related Issues, May 8, 2006.

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<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543fd1a/?vgnextoid=71cf58f91f08e010VgnVCM1000000ecd190aRCRD&vgnnextchannel=91919c7755cb9010VgnVCM10000045f3d6a1RCRD>

States that currently use the SAVE Program recognize that this is a process that can take time. California, for example, issues a permit to drive (which may not be used for identification) while verification takes place. These permits can be re-issued multiple times depending on how long verification takes.

The proposed rules do not acknowledge that the verification process can be delayed, do not set a time limit during which verification must be completed, and do not require issuance of a driver's license during the verification process. Moreover, the rules do not provide for reasonable access to immigration records to review them for errors, a mechanism to correct immigration records, or an appeal if verification is wrongly denied.

Under section 37.13(a)(3) of the proposed rules, DMVs are instructed that, in the event of a non-match through SAVE, they must refer the applicant to a local USCIS office for resolution. But there may be no local USCIS office, non-citizens have no expectation of attention from a USCIS office in a reasonable time, that office will likely not have their records, and they have no straightforward route to review or correct their records. Moreover, if an error has been made by a different immigration agency such as Customs and Border Protection, USCIS would have no jurisdiction to correct the error.

The only mechanism for immigrants to gain access to their immigration records is through a Freedom of Information Act (FOIA) request. That request (which must be notarized and requires detailed information about the requester) is sent to the USCIS National Records Center in Lee's Summit, MO.<sup>29</sup> According to the General Accountability Office, processing times for FOIA requests to USCIS actually have increased, even as the number of requests themselves decreased. In 2005, the median time to process a "simple" request was 45 days, while a "complex" request took 55 days. Even an "expedited" request in 2005 took 15 days.<sup>30</sup> Tens of thousands of FOIA requests are currently pending.

A redress request to correct erroneous data may be submitted "as described by each program collecting the data or directly to the USCIS Privacy Officer who refers the redress request to the appropriate program office." But under new digitization proposals, immigrants will not be advised of procedures for correction of records.<sup>31</sup> This is illusory due process.

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<sup>29</sup> United States Citizenship and Immigration Services, Department of Homeland Security, *Privacy Impact Assessment for the Integrated Digitization Document Management Program (IDDMP)*, January 5, 2007, sec. 7.1, p. 13..

[http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_uscis\\_iddmp.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_iddmp.pdf)

<sup>30</sup> General Accountability Office, *Freedom of Information Act, Processing Trends Show Importance of Improvement Plans*, GAO-07-441, January 2007, p. 65.

<sup>31</sup> United States Citizenship and Immigration Services (USCIS), Department of Homeland Security, *Privacy Impact Assessment (PIA) for the Integrated Digitization Document Management Program (IDDMP)*, January 5, 2007, sections 7.1-7.5, [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_uscis\\_iddmp.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_iddmp.pdf)

In contrast with the total absence of due process protections for non-citizen license applicants, the proposed rules require notice and appeal for individuals denied employment with a DMV because of a criminal background records check, a determination of untrustworthiness because of financial history, or because the individual does not have lawful status based on a SAVE check.<sup>32</sup> Even in these circumstances, however, persons denied employment based on the lawful status check are told only that their “[a]ppeals... should be appealed to DHS.” This is not just a question of bad sentence structure. As a due process protection, this provision is meaningless.

The DHS Privacy Office has conducted a Privacy Impact Assessment of the proposed REAL ID rules, as required by subsection 4 of Section 222 of the Homeland Security Act of 2002. As reported by the Privacy Office, “[t]his analysis reflects the framework of the Privacy Office’s Fair Information Principles, which are: Transparency, Individual Participation, Purpose Specification, Minimization, Use Limitation, Data Quality and Integrity, Security, and Accountability and Auditing.”<sup>33</sup> These principles apply equally to use of the SAVE Program. But no such analysis has yet been done, despite the critical role the program will play for non-citizens in the implementation of the Real ID Act.<sup>34</sup>

No requirement for appeals process for errors in immigration determinations by the DMV. The Act and the proposed regulations require that license applicants prove citizenship or certain categories of immigration status in order to obtain a driver’s license or temporary driver’s license. These can be complicated determinations for which DMV employees are not equipped. For example, in recent examples from Kansas, applicants were denied licenses because DMV employees demanded Permanent Resident Cards from Puerto Ricans who are U.S. citizens by birth, and did not recognize a religious worker non-immigrant visa.

Examples of misunderstanding of immigration statuses by DMV workers are legion. The Act mandates changes for all states in the immigration categories that may obtain licenses, the documents that must be presented to prove identity and immigration status, and the verification process that must take place. But the regulations do not mandate training in these areas, or a process for applicants to appeal a wrongful denial based on a DMV employee’s misinterpretation of immigration law.

No requirement for issuance of a license where applicants have not been able to obtain an SSN through no fault of their own. As mentioned previously, the issuance of an SSN is often delayed by SSA’s inability to verify immigration status through SAVE. But issuance of an SSN is also delayed because of SSA misunderstanding of immigration statuses or where immigration status data has been improperly entered.<sup>35</sup>

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<sup>32</sup> Sec. 37.45(c)

<sup>33</sup> United States Citizenship and Immigration Services (USCIS), Department of Homeland Security, *Privacy Impact Assessment (PIA) for the REAL ID Act*, March 1, 2007, p. 2 [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_realid.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_realid.pdf)

<sup>34</sup> The Privacy Office reports such an assessment is underway. *Privacy Impact Assessment (PIA) for the REAL ID Act*, ft. 16.

<sup>35</sup> Minutes of the Social Security Administration and CIS, AILA Liaison Meeting on SSA-Related Issues, May 8, 2006.

Under Section 37.11(e), applicants must present proof that they have an SSN or they must present evidence that they are in a non-work authorized nonimmigrant status and are therefore ineligible for an SSN. CIS is well aware of delays in SSN issuance, whether they result from SSA or DHS processes. Yet the proposed rules take no steps to ensure that SSA and DHS actions that delay issuance of an SSN do not also cause denial or delay issuance of a license.

**THE PROPOSED REGULATIONS DO NOT RESOLVE AN UNANSWERED QUESTION IN THE STATUTE REGARDING HOW LONG A TEMPORARY LICENSE IS VALID.**

The Act limits the duration of a temporary license for which certain categories of non-citizens are eligible to the period of the authorized stay in the United States or, if there is no expiration date, for a period of one year. Sec. 37.21 of the regulations simply repeats the statutory provision, with no explanation of what “authorized stay” means. Under the regulations, it could mean the expiration date on the visa, or it could mean the period specified on an I-94 issued upon admission to the U.S.

The absence of a definition means that DMVs may choose their own interpretation of when a period of authorized stay ends. This is critical, since a misinterpretation could result in denial of a license or interruption in possession of a license. Moreover, the 50 states will inevitably interpret this question differently.

**THE REGULATIONS IMPOSE A UNIFORM SYSTEM OF NAMES THAT IS NOT AUTHORIZED BY THE ACT AND OVERTURNS COMMON LAW RULES AND STATE LAWS.**

The statute requires proof of “full legal name,” but does not define what this means. Section 37.1 of the proposed regulations defines “full legal name” as “an individual’s first name, middle names or family names, and last name, without the use of initials or nicknames. Under section 37.17, this name must appear on the face of the driver’s license, and it must match the name used to prove identity.

This is a dramatic shift in U.S. law and is an attempt to impose a uniform system of names in the United States. The federal government, in effect, would determine what an individual’s name is.

While the Act itself requires a full legal name, the proposed regulations provide a definition that is not required by the statute, conflicts with common law rules and state laws, and will place obstacles in the path of U.S. citizens and immigrants who seek driver’s licenses.

Under the common law, individuals may choose a name other than the name given to them at birth, provided that there is no fraudulent, criminal or wrongful purposes.<sup>36</sup>

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<sup>36</sup> 57 Am Jur. 2d, *Name*, ¶16 (2002)

While states have by statute established procedures for individuals to change their names, the common law rule remains in effect.<sup>37</sup>

The proposed regulations change the common law rule and abrogate the use of state statutory procedures for a name change for those who use a name that does not meet the regulation's definition. The regulation will require applicants for a driver's license to be identified by certain names, whether or not they choose to be identified by those names.

This is not simply a matter of overriding personal choice, though that is, by itself, a significant issue. Mandating names ensures that individuals will have difficulty in obtaining driver's licenses because they have established identities that do not match the exact structure mandated by the regulation's definition of "full legal name." For example, the name on their current identity documents or on their credit cards or bank accounts or utility bills may not match the name they will be required to put on their license. This may be because they use a nickname or an initial or have dropped part of their name.

Moreover, the proposed regulation imposes an unnecessary level of government intervention. Under section 37.11(c)(2) a name change must be proved by documents from a U.S. or State-level Court or government agency showing a legal name change. A married woman who chooses to use her husband's family name after her marriage or chooses to stop using her husband's family name would be required to go to court to do so, even when this is not required by state law.

For immigrants, the situation is even more complicated. In some countries, the family name precedes the individual's name, in others the mother's and father's last name may both appear as last names, or—for a married woman—the mother's last name may be dropped and her husband's family name added after the father's last name. Others may have changed their family name for ease of pronunciation when they come to the U.S. or may hyphenate or drop one of their family names. As a result, the names on various documents will not match. By failing to accommodate these realities, the rule makes it possible for DMV employees to wrongfully deny licenses and imposes unnecessary harm on eligible individuals.

Neither the statute nor the proposed regulations make any accommodation for the variations in names that may occur. Moreover, lawfully present immigrants may not be permitted to present an identity document that would establish their full legal name according to the regulation's definition, because they cannot use a foreign document (other than a passport) to do so.

## CONCLUSION

In sum, we strongly oppose the Department of Homeland Security's proposed regulations, entitled "***Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes.***" For all of the reasons set forth above, we request that the Department of Homeland Security withdraw the proposed rules in their entirety.

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<sup>37</sup> *Smithers v. Smithers*, 804 So. 2d 489, 2001 Fla. App. LEXIS (4<sup>th</sup> DCA 2001).

Sincerely,

A handwritten signature in cursive script that reads "Joan Friedland".

Joan Friedland  
Immigration Policy Director