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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR 37

RIN 1601-AA91

Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Implementation of the REAL ID Act Modification for Freely Associated States Act

AGENCY: Office of the Secretary, DHS.

ACTION: Final rule.

SUMMARY: This final rule implements the REAL ID Act Modification for Freely Associated States Act by amending the regulatory definition of "temporary lawful status." With this change, citizens of the Freely Associated States residing in the United States are eligible for full-term REAL ID licenses and identification cards, provided they satisfy the other requirements of the REAL ID Act and regulations.

DATES: Effective [INSERT DATE OF FEDERAL REGISTER PUBLICATION].

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SUPPLEMENTARY INFORMATION:

I. Background

The REAL ID Act of 2005¹ and its implementing Department of Homeland Security (DHS) regulations² authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliant driver's licenses and identification cards to certain nonimmigrant aliens who satisfy other REAL ID eligibility requirements. These temporary driver's licenses or identification cards cannot be issued with a validity period longer than the alien's authorized period of stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.³

Under the Compacts of Free Association between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau (collectively referred to as the Freely Associated States, or FAS), citizens of the Freely Associated States are eligible to be admitted to the United States as nonimmigrants without a visa, and live and work in the United States indefinitely.⁴ Because FAS citizens are authorized to have an indefinite period of authorized stay in the United States (known as "duration of status" or "D/S") – but FAS citizens are not U.S. citizens – States that issue temporary driver's licenses or identification cards to FAS citizens generally subject those FAS citizens' driver's licenses or identification cards to the one-year temporary license limitation. FAS citizens who present a USCIS Form I-766 Employment Authorization Document (EAD) to establish identity may obtain a REAL ID compliant driver's license or identification card with a validity period as long as the validity period of the EAD, which in the case of FAS citizens is up to five years.

¹ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, 119 Stat. 231, 302, Div. B (codified at 49 U.S.C. 30301 note).

² 6 CFR Part 37.

³ REAL ID Act § 202(c)(2)(c)(ii); 6 CFR 37.21(b)(1).

⁴ See Pub. L. 108-188 (48 U.S.C. § 1921 note) (Republic of the Marshall Islands and Federated States of Micronesia); Pub. L. 99-658 (48 U.S.C. § 1931 and 1931 note) (Palau).

The REAL ID Act Modification for Freely Associated States Act, Public Law 115-323, signed into law on December 17, 2018, addresses this issue by amending the REAL ID Act to authorize states to issue to FAS citizens residing indefinitely in the United States full-term REAL ID driver's licenses or identification cards.⁵ This final rule updates the REAL ID regulations to reflect this statutory change by amending the regulatory definition of "temporary lawful status" to specifically exclude individuals admitted as nonimmigrants under the Compacts of Free Association between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. With this change, citizens of the Freely Associated States residing in the United States are eligible for full-term REAL ID driver's licenses and identification cards, provided they satisfy the other requirements of the REAL ID Act and regulations.

II. The REAL ID Act Modification for Freely Associated States Act

The REAL ID Act prohibits federal agencies from accepting a State-issued driver's license or identification card for any official purpose unless the license or card is issued by a State that meets the requirements set forth in the REAL ID Act.⁶ Under Section 201(3) of the REAL ID Act, official purpose as defined in the REAL ID Act includes accessing federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purpose as determined by the Secretary of Homeland Security. Section 202(c) of the REAL ID Act requires an applicant for a driver's license or identification card to present, and for

⁵ The REAL ID Act Modification for Freely Associated States Act, Pub. L. 115-323, sec. 2(b). In addition to authorizing states to issue FAS citizens full-term REAL ID licenses and identification cards, the Act amended the REAL ID definition of "state" by striking the reference to the "Trust Territory of the Pacific Islands" which no longer exists. As DHS regulations already correctly do not include the Trust Territory of the Pacific Islands in the definition of "State," no change to the regulations is necessary to reflect that amendment. *See* 6 CFR § 37.3.

⁶ The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, 119 Stat. 231, 302, Div. B (codified at 49 U.S.C. 30301 note).

the State to verify, documentation and information evidencing the applicant's identity, date of birth, social security number or verification that the person is not eligible for a social security number, address of principal residence, and U.S. citizenship or lawful status. Id. Certain aliens including those who are in a valid nonimmigrant status, who have pending applications for asylum, who have pending or approved applications for temporary protected status, who have approved deferred action status, or who have pending applications for adjustment to permanent residence or conditional permanent residence, may only receive a temporary REAL ID driver's license or identification card. Id. Temporary driver's licenses or identification cards can be valid either until the expiration of the applicant's authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year. Id.

The Compacts of Free Association permit citizens of the Freely Associated States to be admitted as nonimmigrants to the United States without a visa and to live and work in the United States indefinitely. Because the Compacts of Free Association do not establish a specific time period for admission or duration of stay in the United States, under current regulations FAS citizens residing in the United States can be eligible for a temporary REAL ID driver's license or identification card that is valid only for one year, although as described above, the validity period can be as long as an EAD validity period of up to five years. According to the legislative history accompanying the REAL ID Act Modification for Freely Associated States Act, the inability to acquire full-term licenses impacts certain opportunities for FAS citizens including opportunities for jobs, housing, transportation, and education, notwithstanding the fact that these individuals may reside in the United States for lengthy periods.⁷

⁷ H.R. Rep. No. 115-945, at 2 (2018).

To address this issue, the REAL ID Act Modification for Freely Associated States Act amends the REAL ID Act to authorize States to issue REAL ID driver's licenses or identification cards to citizens of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau who are admitted to the United States as nonimmigrants under the Compacts of Free Association, for the maximum period of validity authorized by Section 202(d) of the REAL ID Act, which is up to eight years. This final rule updates the REAL ID regulation to reflect this statutory change. Specifically, this final rule amends the definition of "temporary lawful status" at 6 CFR 37.3 to specifically exclude individuals admitted as nonimmigrants under the Compacts of Free Association between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.⁸ As a result, these individuals are no longer subject to 6 CFR 37.21, prescribing requirements for temporary or limited-term licenses and identification cards for those with temporary lawful status. Therefore, these individuals are eligible to receive full-term REAL ID licenses and identification cards, provided they satisfy the other REAL ID requirements including requirements to present documentation establishing identity, date of birth, social security number, address of principal residence, and lawful status.⁹

III. Regulatory Analyses

A. Administrative Procedure Act

The Administrative Procedure Act (APA) provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for "good cause," finds that those

⁸ It is not necessary to amend the definition of "lawful status" in 6 CFR 37.3, because that definition already includes an alien "who has a valid nonimmigrant status in the United States," which includes (but is not limited to) nonimmigrants admitted under the Compacts of Free Association.

⁹ See 6 CFR 37.11. Note that an FAS passport with Form I-94, but no visa, is not acceptable evidence of identity under the REAL ID regulations. *Id.* at § 37.11(c)(1). The immigration document available to FAS nonimmigrants admitted under the Compacts of Free Association that is acceptable evidence of identity for REAL ID Act purposes is the unexpired employment authorization document (EAD). *Id.* at § 37.11(c)(1)(v).

procedures are “impracticable, unnecessary, or contrary to the public interest.” See 5 U.S.C. 553(b)(B). DHS finds that notice and comment rulemaking in this instance is impracticable, unnecessary, and contrary to the public interest. The amendment to the REAL ID regulation made by this final rule implements the REAL ID Act Modification for Freely Associated States Act by authorizing States to issue full-term REAL ID licenses or identification to FAS citizens. The amendment conforms the regulations to the statute and does not alter other REAL ID requirements necessary for citizens of the Freely Associated States to obtain REAL ID driver’s licenses or identification cards, including requirements to present documentation establishing identity, date of birth, social security number, address of principal residence, and lawful status. FAS citizens seeking to obtain a full-term driver’s license or identification card must still satisfy these and other REAL ID requirements. Additionally, because the bill was signed into law, citizens of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau residing in the United States will likely seek to start immediately obtaining full-term State driver’s licenses and identification cards. Based on the above, DHS finds that notice and comment rulemaking in this instance would be impracticable, unnecessary, and contrary to the public interest.

For the same reasons, DHS also finds good cause to make this rule effective immediately upon publication in the Federal Register. See 5 U.S.C. 553(d)(3).

B. Executive Orders 12866, 13563, and 13771

Executive Order 12866 defines “significant regulatory action” as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments

or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs directs agencies to reduce regulation and control regulatory costs and provides that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

This rule does not constitute a “significant regulatory action” under Executive Order 12866, as supplemented by Executive Order 13563, and therefore does not require review by the Office of Management and Budget (OMB). As this rule is not a significant regulatory action it is not subject to the requirements of Executive Order 13771.

As previously discussed, citizens of the FAS residing in the United States are eligible for a temporary driver’s license under the REAL ID Act. This rule will allow citizens of the FAS residing in the United States to be eligible for full-term REAL ID licenses and identification cards. These full-term licenses could last up to eight years.

FAS citizens should benefit from this rule. The inability to acquire full-term licenses impacts certain opportunities for FAS citizens including opportunities for jobs, housing, transportation, and education, notwithstanding the fact that these individuals may reside in the United States for lengthy periods.¹⁰

C. Regulatory Flexibility Act

¹⁰ H.R. Rep. No. 115-945, at 2 (2018).

The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires Federal agencies to consider the potential impact of regulations on small businesses, small government jurisdictions, and small organizations during the development of their rules. This final rule, however, makes changes for which notice and comment are not necessary. Accordingly, DHS is not required to prepare a regulatory flexibility analysis. See 5 U.S.C. §§ 603, 604.

D. Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. §§ 3501-3520).

E. Executive Order 12132 (Federalism)

A rule has implications for federalism under Executive Order 13132, “Federalism,” if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have these implications for federalism.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. §§ 1531 to 1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Unfunded Mandates Reform Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$100 million (adjusted for inflation) or more in any one year. This final rule will not result in such an expenditure.

G. Executive Order 13175 (Tribal Consultation)

This rule does not have Tribal Implications under Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” because it does not have a substantial direct

effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

H. Executive Order 13211 (Energy Impact Analysis)

DHS has analyzed this rule under Executive Order 13211, “Actions Concerning Regulations that Significantly Affect Energy Supply Distribution, or Use.” DHS has determined that it is not a “significant energy action” under that Order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

List of Subjects in 6 CFR Part 37

Document security, driver’s licenses, identification cards, incorporation by reference, motor vehicle administrations, physical security.

The Amendments

For the reasons set forth above, the Department of Homeland Security amends 6 CFR part 37 as follows:

PART 37 – REAL ID DRIVER’S LICENSES AND IDENTIFICATION CARDS

1. The authority citation for part 37 continues to read as follows:

Authority: 49 U.S.C. 30301 note; 6 U.S.C. 111, 112.

2. In § 37.3, revise the definition of “Temporary lawful status” to read as follows:

§ 37.3 Definitions.

* * * * *

Temporary lawful status: A person in temporary lawful status is a person who: has a valid nonimmigrant status in the United States (other than a person admitted as a nonimmigrant under

the Compacts of Free Association between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau); has a pending application for asylum in the United States; has a pending or approved application for temporary protected status (TPS) in the United States; has approved deferred action status; or has a pending application for LPR or conditional permanent resident status.

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David Pecoske,

Senior Official Performing the Duties of the Deputy
Secretary.

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