



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

November 12, 2010

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

Mr. Richard D. Holcomb
Commissioner
Virginia Department of Motor Vehicles
Post Office Box 27412
Richmond, Virginia 23269-0001

Dear Commissioner Holcomb:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask three interrelated questions concerning the authority of the Department of Motor Vehicles (the "Department") in implementing the provisions of § 46.2-328.1, which require an applicant to present valid documentary evidence of lawful status in the United States in order to obtain a driver's license, permit or special identification card ("ID card") from the Department. You first inquire whether the Department has the authority to accept or to refuse to accept the Employment Authorization Document,¹ standing alone, as documentary evidence of lawful status as required by § 46.2-328.1. Second, you ask what steps the Department may take pursuant to § 46.2-328.1 with regard to an individual who has been issued a Virginia driver's license, permit or ID card in accordance with § 46.2-328.1, but who subsequently has become subject to removal or deportation proceedings under federal law. Finally, you ask whether the Department is authorized under § 46.2-328.1 to cancel the driver's license, permit or ID card of that individual if he has been deported by federal authorities.

Response

It is my opinion that the Department has authority to accept or to refuse to accept an Employment Authorization Document, standing alone, as documentary evidence of lawful status in the United States as required by § 46.2-328.1. It is further my opinion that the Department is not authorized to take any steps with regard to an individual who has been issued a driver's license, permit, or ID card in accordance with § 46.2-328.1, but who has subsequently become subject to removal or deportation proceedings, other than to require such individual, when application for a renewal, duplicate or reissue of the license, permit, or ID card is made to the Department, to provide again documentary evidence of lawful status, provided that the Department has been notified by a government agency that the individual is not legally in the United States. Finally, it is my opinion that § 46.2-328.1 is designed solely to require documentary evidence of lawful status in the United States at the time of application for a driver's license, permit, or ID card, and

¹ The Employment Authorization Document is Form I-765, issued by the United States Citizenship and Immigration Services bureau of the United States Department of Homeland Security.

that there is no authority under § 46.2-328.1 for the Department to cancel a driver's license, permit, or ID card once it is issued in accordance with § 46.2-328.1, even if the individual has been deported.

Background

The General Assembly enacted § 46.2-328.1 in 2003, to become effective January 1, 2004.² In anticipation of the law's implementation, the Department created a list of documents it determined would be acceptable documentary evidence of lawful status in the United States as required by § 46.2-328.1, which provided then, and provides today, that:

A. [T]he Department shall not issue an original license, permit, or special identification card to any applicant who has not presented to the Department, with the application, valid documentary evidence that the applicant is either (i) a citizen of the United States, (ii) a legal permanent resident of the United States, or (iii) a conditional resident alien of the United States.

B. Notwithstanding the provisions of subsection A and the provisions of §§ 46.2-330 and 46.2-345, an applicant who presents in person valid documentary evidence of (i) a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States, (ii) a pending or approved application for asylum in the United States, (iii) entry into the United States in refugee status, (iv) a pending or approved application for temporary protected status in the United States, (v) approved deferred action status, or (vi) a pending application for adjustment of status to legal permanent residence status or conditional resident status, may be issued a temporary license, permit, or special identification card. Such temporary license, permit, or special identification card shall be valid only during the period of time 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....

Among the documents on that original list of documents the Department determined should be acceptable as evidence of lawful status was the Employment Authorization Document ("EAD"). The EAD remained on the Department's list of acceptable documents (which is posted on the Department's website as part of form "DMV 141") until September of 2010, when it was temporarily removed from the list. The Department took this action based on information it received indicating that the EAD might not be trustworthy evidence of lawful status in the United States.

The purpose of the EAD, popularly known as a "work permit," is to provide evidence to employers that the holder is authorized by the United States Citizenship and Immigration Services ("USCIS") to work in the United States.³

Applicable Law and Discussion

It should be noted that § 46.2-328.1 nowhere states what documents should be considered "valid documentary evidence" for purposes of establishing citizenship or lawful residency. Because of the lack of guidance in the statute, it is my opinion that the Department, of necessity, must first determine which documents should be considered acceptable as evidence of lawful status as provided in § 46.2-328.1. So

² 2003 Va. Acts chs. 817, 819.

³ See Instructions for I-765, Application for Employment Authorization, available at www.uscis.gov. See also 8 C.F.R. § 274a.13 (2010).

long as the Department's determinations were reasonably related to the purpose for which the statute was enacted and were not in conflict with other laws, those determinations would be considered a valid exercise of that authority.⁴

It also should be noted that at the time § 46.2-328.1 was enacted, there were few, if any, other states that required documentary evidence of lawful status in the United States in order to obtain a driver's license or ID card. The Department, therefore, had little or no guidance as to what documents might have been considered acceptable in other jurisdictions. In 2003, the Department evidently had little reason to suspect that the EAD was not trustworthy evidence of lawful status in the United States, and so its policy of accepting the EAD for that purpose was reasonable and within the authority granted to the Department pursuant to § 46.2-328.1.

The Department similarly has the authority to refuse to accept this document as evidence of lawful status in the United States as required by § 46.2-328.1, particularly when it concludes that the EAD does not provide trustworthy evidence of lawful presence in the United States.⁵ This conclusion is supported by a decision of the United States District Court for the Eastern District of Virginia.⁶ In addressing whether one of the plaintiffs had standing, the Court held that the plaintiff did not have standing to bring the suit because he was an illegal alien with no lawful status in the United States, even though he had a valid EAD. The EAD had been issued to him after he had filed for a special rule cancellation of removal under 8 C.F.R. § 240.66(a). The court held that:

While authorization to work in the United States implies some form of authorization to be in the United States, it does not necessarily mean that an alien enjoys lawful status in the United States.

. . . because [the plaintiff] is removable from the United States and is not in a period of stay authorized by the Attorney General, [the plaintiff] is an illegal alien under federal law.⁷

The Department, acting within its authority to accept reliable documentation of lawful presence, could, like the United States District Court, conclude that an EAD will not always be evidence of lawful status in the United States. Consistent with this decision, the United States Department of Homeland Security, in

⁴ The interpretation given to a statutory provision by the state agency charged with its enforcement is entitled to great weight. *See Forst v. Rockingham*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (according great weight to State Tax Commissioner's longstanding interpretation of statute). The General Assembly is presumed to be aware of the Department's interpretation of this statute and of the list of documents the Department determined to be acceptable as evidence of lawful status under § 46.2-328.1, a list that has been posted on the Department's website since the effective date of the statute. When, as here, an agency's interpretation of a statute has long continued without triggering legislative change, the General Assembly will be presumed to have acquiesced. *See Peyton v. Williams*, 206 Va. 595, 600-01, 145 S.E.2d 147, 151 (1965) (upholding state penitentiary superintendent's computation of term of confinement as reasonable and not in conflict with statute).

⁵ The EAD is often assumed to indicate that the person to whom it is issued is lawfully present in the United States. You have indicated that at present a significant number of states accept the EAD, standing alone, as evidence of legal presence or lawful status under their driver licensing laws, which now, unlike in 2003, almost universally require evidence of legal presence or lawful status in the United States before a license or ID card will be issued.

⁶ *See Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655 (E.D. Va. 2004).

⁷ *Id.* at 664-65.

regulations adopted in 2008,⁸ likewise has indicated that the EAD should not be considered, by itself, as evidence of lawful status in the United States.⁹

Accordingly, it is my opinion that the Department, having reasonably determined in 2003 that the EAD would be acceptable as documentary evidence of lawful status in the United States, retains authority to revisit that determination. If it now concludes that the EAD is not reliable evidence of lawful status in the United States, the Department reasonably may determine that the EAD, by itself, will not be acceptable as documentary evidence pursuant to § 46.2-328.1. In that regard, it should be noted that the EAD may sometimes be an indicator of lawful status in the United States, but that is not its primary purpose as a document. Any person who holds an EAD and who is also in a lawful status as provided in § 46.2-328.1 should be able to produce other documentary evidence of that lawful status in addition to the EAD. The Department continues to list a significant number of documents on its website that it continues to consider acceptable and which should be available to an applicant who actually is in lawfully present in the United States.¹⁰

As to your second and third inquiries, § 46.2-328.1 was enacted solely as a requirement that the individual provide valid documentary evidence of lawful status in the United States at the time of application for a driver's license, permit or ID card. The only sanction for failing to provide appropriate documentation is that no such driver's license, permit or ID card will be issued to the applicant by the Department. There is nothing in § 46.2-328.1, or elsewhere in the Code, that requires the individual to retain lawful status at all times during the validity period of a driver's license, permit, or ID card. The Code does not authorize the Department to impose any sanction for failure to maintain lawful status during the validity period of a driver's license, permit, or ID card lawfully issued pursuant to § 46.2-328.1. A change in the Code would be required to provide the DMV with such authority. The Code does require, in situations where the Department has been notified by a government agency that the applicant is not legally in the United States, that the person again show valid documentary evidence of lawful status in the United States upon application for renewal or the issuance of a duplicate or reissued driver's license, permit or ID card (and that the application be denied if he is unable to present such evidence).¹¹ Aside

⁸ 6 C.F.R. § 37.11 (g)(2) (2010).

⁹ 73 Fed. Reg. 5333 (Jan. 29, 2008).

¹⁰ I note further that the Department has on its website not only the "DMV 141" but also an interactive program entitled "Document Guide for Driver's Licenses and ID Cards" with which applicants can easily discover which documents they might have that will be acceptable as evidence of lawful status. See <https://www.dmv.virginia.gov/apps/documentbuilder/intro.aspx>

¹¹ Subsection C of § 46.2-328.1 provides that: "C. Any license or special identification card for which an application has been made for renewal, duplication or reissuance shall be presumed to have been issued in accordance with the provisions of subsection A, provided that, at the time the application is made, (i) the license or special identification card has not expired or been cancelled, suspended or revoked or (ii) the license or special identification card has been cancelled or suspended as a result of the applicant having been under medical review by the Department pursuant to § 46.2-322. The requirements of subsection A shall apply, however, to a renewal, duplication or reissuance if the Department is notified by a local, state or federal government agency that the individual seeking such renewal, duplication or reissuance is neither a citizen of the United States nor legally in the United States." As I understand it, the Department has interpreted subsection C to mean that applicants for renewal or for a duplicate or reissued license do not have to provide documentary evidence of lawful presence, unless the license or ID Card has expired or been cancelled, suspended, or revoked, or unless the Department has been notified that the applicant is neither a citizen of, nor legally in, the United States. Accordingly, if an individual has lost lawful status in the United States after being issued a driver's license, permit, or ID card, then the Department should require the individual to show again evidence of lawful status upon application for renewal, provided that the

from that provision, nothing authorizes the Department to cancel a driver's license, permit, or ID card on the ground that the person is in removal or deportation proceedings, or even if he has been deported.

Conclusion

Accordingly, it is my opinion that the Department has authority to accept or to refuse to accept an Employment Authorization Document, standing alone, as documentary evidence of lawful status as required by § 46.2-328.1. It is further my opinion that the Department is not authorized to take any steps with regard to an individual who has been issued a driver's license, permit, or ID card in accordance with § 46.2-328.1, but who has subsequently become subject to removal or deportation proceedings, other than to require that individual, when application for a renewal, duplicate or reissue of the driver's license, permit or ID card is made to the Department, to again provide documentary evidence of lawful status, provided that the Department has been notified by a government agency that the individual is not legally in the United States. Finally, it is my opinion that § 46.2-328.1 is designed solely to require documentary evidence of lawful status in the United States at the time of application for a driver's license, permit, or ID card, and that there is no authority under § 46.2-328.1 for the Department to cancel a driver's license, permit or ID card once it is issued in accordance with § 46.2-328.1, even if the individual has been deported.

With warmest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

Department has been notified by a government agency that the individual is not legally in the United States. If the Department has not been so notified, then it could not act pursuant to that provision. And there is no other provision in § 46.2-328.1 that addresses any other sanction for failure to maintain lawful status while holding a driver's license, permit, or ID card.