

Virginia Department of Motor Vehicles

August 11, 2011

Review of Virginia's Legal Presence Law

In September 2010, DMV stopped accepting Employment Authorization Cards as proof of legal presence in the United States. This change, in conjunction with the statutory requirements contained in Virginia's legal presence law, § 46.2-328.1 of the *Code of Virginia*, resulted in certain individuals who were previously able to obtain driver's licenses and ID cards no longer being able to do so. Consequently, DMV asked the Office of the Attorney General of Virginia to retain outside counsel to provide guidance regarding those classes of individuals who may be unable to present adequate proof of legal presence under the current statutory scheme.

The concept of "legal presence" under Virginia's licensing statute is not correlated to the concept of "unlawful presence" under the Immigration and Naturalization Act. Under federal law, an individual is deemed to be unlawfully present in the United States if he or she remains in the United States after the expiration of the period of stay authorized by the U.S. Attorney General, or has entered the United States without being admitted or paroled. Individuals who are "unlawfully present" as a matter of federal law are ineligible for a driver's license or ID card under Virginia law; however, there are several groups of individuals *not* unlawfully present under federal law who are likewise ineligible for a Virginia driver's license or ID card.

Section 46.2-328.1 of the *Code of Virginia* identifies only the following individuals as eligible for a Virginia license or ID card:

- a. Citizens of the United States
- b. Legal Permanent Residents of the United States
- c. Conditional Resident Aliens of the United States
- d. Holders of a valid, unexpired nonimmigrant visa status
- e. Individuals with a pending or approved application for asylum in the United States
- f. Refugees
- g. Individuals with a pending or approved application for temporary protected status in the United States
- h. Individuals with approved deferred action status
- i. Individuals with a pending application for adjustment of status to legal permanent resident status or conditional resident status

The following classes of individuals are among those who do not meet the eligibility criteria delineated in Virginia's statute:

- a. Parolees
- b. Aliens granted Cancellation of Removal or Suspension of Deportation
- c. Aliens present in the U.S. with pending Asylee/Refugee relative petitions
- d. Beneficiaries of Family Unity Protection Benefits
- e. Battered Spouses, Parents, and Children

Classes of individuals who do not meet Virginia's eligibility criteria – Continued

- f. Victims of Severe Form of Trafficking in Persons
- g. Applicants under NACARA, HRIFA, or the Cuban-Haitian Adjustment Act
- h. Aliens with pending Legalization applications, Special Agricultural Worker applications and LIFE Legalization applications
- i. Aliens granted Voluntary Departure
- j. Aliens granted Stay of Removal
- k. Aliens granted Withholding of Removal where removal to home country is not possible
- l. Applications for suspension of deportation or cancellation of removal
- m. Aliens granted Deferred Enforced Departure
- n. Aliens against whom a final order of removal exists but who is released under an order of supervision

NOTE:

- “Deferred action” is a term of art in the administration of federal immigration law, under which DHS agrees not to place an individual in removal proceedings or not to execute an order of removal. A decision to grant or deny a request is a purely administrative act and it is not subject to review by either administrative or federal courts. There is no statutory basis for deferred action.
- It is not clear why “deferred action status” was singled out for eligibility for a license or ID card while the many other forms of relief available to DHS and the immigration courts were not similarly covered. It is clear, however, that “deferred action” refers to a specific form of relief granted by DHS and the phrase cannot be interpreted to cover the many other forms of discretionary relief available.