Dated: August 16, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

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DEPARTMENT OF STATE

22 CFR Part 40

[Public Notice: 12464]

RIN 1400–AF77

Visas: Visa Ineligibility

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State (''Department'') is amending a regulation relating to the effect of certain pardons on criminal-related grounds of visa ineligibility.

DATES: This final rule is effective on August 22, 2024.

FOR FURTHER INFORMATION CONTACT: Jami Thompson, Office of Visa Services, Bureau of Consular Affairs, Department of State; telephone (202) 485–7586, *VisaRegs@state.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

The Department of State (''Department'') is amending its regulations at 22 CFR 40.21(a)(5), and 22 CFR 40.22(c) regarding the effect of a pardon on a visa applicant's ineligibility under section 212(a)(2)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(2)(A)) and INA section 212(a)(2)(B) (8 U.S.C. 1182(a)(2)(B)), respectively. The current regulation at 22 CFR 40.21(a)(5) provides that an alien is not ineligible for a visa under INA section 212(a)(2)(A) if a full and unconditional pardon has been granted by the President of the United States, by a governor of a state of the United States, or by certain other specified officials. Similarly, the current regulation at 22 CFR 40.22(c) provides that an alien is not ineligible for a visa under INA section 212(a)(2)(B) based on having been convicted of two or more offenses, if a full and unconditional pardon has been granted by the President of the United States, by a governor of a state of the United States, or by certain other specified officials. The Seventh Circuit Court of Appeals recently examined the regulation at 22 CFR 40.21(a)(5), finding that it conflicts with INA's provisions in section 212(a)(2)(A)(i) governing inadmissibility based on conviction or admission of certain crimes, which do not include an exception or waiver to that inadmissibility for applicants who receive a pardon.

> . . . the [INA] is clear that a pardon does not make an otherwise inadmissible noncitizen admissible, even if a pardon can save a resident noncitizen from being removed . . . and where agency regulations conflict with statutory text, statutory text wins out every time. We simply cannot square [22 CFR 40.21(a)(5)] with the text and structure of the INA as it was amended in 1990.

Wojciechowicz v. *Garland,* 77 F.4th 511, 514, 518 (7th Cir. 2023) (internal citations and parentheticals omitted). The Department agrees with the Seventh Circuit's opinion in *Wojciechowicz* as it applies to gubernatorial pardons and finds that the court's analysis regarding the lack of underlying authority in the INA giving effect to such pardons also extends to the Department's regulation at 22 CFR 40.22(c) regarding ineligibility for multiple criminal convictions.

B. Legal Background

The Department first promulgated these rules in 1959 at 22 CFR 41.91(a)(9)–(10).[1] At the time the regulations were first promulgated, the Immigration and Nationality Act of 1952, as amended (''1952 Act''), provided that noncitizens were excludable [2] from the United States and ineligible for visas if they had been convicted of a crime involving moral turpitude or two or more criminal offenses. Unlike the 1952 Act's provisions on grounds of deportation, which did provide that the criminal-related ground of deportation ''shall not apply'' to individuals who had received a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, the 1952 Act did not include a provision on the effect of a pardon on excludability. Section 222(a) of the 1952 Act did, however, speak to the possible relevance of a previous pardon or amnesty to an individual's eligibility for an immigrant visa, requiring that all immigrant visa applicants provide such information among a range of other specified fields.

While the 1952 Act did not expressly include a provision on the effect of a pardon on excludability, the Board of Immigration Appeals (BIA) held in 1954 that such pardons also remove excludability under now-INA section 212(a)(2)(A)(i). *Matter of H—,* 6 I&N Dec. 90, 96 (BIA 1954) (''As long as there is a full and unconditional pardon granted by the President or by a Governor of a State covering the crime which forms the ground of deportability, *whether in exclusion or expulsion,* the immunizing feature of the pardon clause applies . . .'') (emphasis added).

Following promulgation of the Department's 1959 rule, amendments to the Immigration and Nationality Act and multiple court decisions have removed any ambiguity about whether there is a statutory basis to except individuals from inadmissibility under INA section 212(a)(2)(A)(i) or INA section 212(a)(2)(B) based on a gubernatorial pardon. Congress revised the grounds of deportation relating to convictions of crimes involving moral turpitude and aggravated felonies under section 602(a) of the Immigration Act of 1990 (''IMMACT 90'') and, among the revisions, added a new clause to that ground expressly authorizing waivers of that ground in cases of certain pardons, including gubernatorial pardons. In the same Act, Congress similarly revised the INA's ground of inadmissibility in INA section 212(a)(2)(A)(i) for conviction of certain crimes to include a separate clause of exceptions to that ground and did not include any such language excepting applicants from ineligibility if their relevant conviction had been pardoned. Congress also subsequently amended INA section 222(a) to no longer expressly require that all immigrant visa applicants provide information on a previous pardon or amnesty.[3]

In more recent years, courts have also consistently reached the opposite conclusion of *Matter of H—* regarding the effect of a pardon on a conviction that leads to criminal-related inadmissibility, like the court's findings in *Wojciechowicz.* Each court that has considered the effect of a gubernatorial pardon on admissibility has uniformly found that Congress did not include an exception to inadmissibility under INA section 212(a)(2)(A)(i) based on having received a pardon as it had done in the corresponding section outlining the criminal grounds for deportation. For example, in *Balogun* vs. *U.S. Attorney General,* a case involving a gubernatorial pardon, the Eleventh Circuit held that because the criminal-related inadmissibility ground ''does not have a pardon provision like [8 U.S.C.]

[1] *See* 24 FR 6678 (Aug. 18, 1959).

[2] The 1952 Act referred to ''classes of aliens [that] shall be ineligible to receive visas and [that] shall be *excluded* from admission into the United States'' (emphasis added). The Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, introduced the language of ''inadmissible aliens'' as part of a broader reorganization of the INA.

[3] Immigration and Nationality Technical Corrections Act of 1994, Public Law 103–416, Section 205(a).

section 1227 does,'' the logical conclusion was that Congress must not have ''intended to extend the pardon waiver to inadmissible aliens.'' *Balogun* v. *U.S. Atty. Gen.,* 425 F.3d 1356, 1362 (11th Cir. 2005). The Ninth Circuit subsequently reached the same conclusion in another case involving a gubernatorial pardon, with the court finding that the ''statutory language dealing with pardons applies only to aliens who are charged based upon convictions under [8 U.S.C. 1227] . . . It does not apply to aliens charged with inadmissibility under [8 U.S.C. 1182(a)].'' *Aguilero-Montero* v. *Mukasey,* 548 F.3d 1248, 1250 (9th Cir. 2008).

Consistent with these courts' uniform findings on the issue, the BIA has also consistently reached the opposite conclusion of *Matter of H—,* and specifically held that the statutory language on effects of pardons applies only to the criminal-related grounds of deportation and not inadmissibility.[4] *See, e.g., Matter of Suh,* 23 I&N Dec. 626, 628 (BIA 2003); *Matter of Dillingham,* 21 I&N Dec. 1001 (BIA 1997).

While the Department agrees with the uniform findings from the courts and the BIA that the text and structure of the INA do not provide a basis for a pardon waiver of inadmissibility under INA section 212(a)(2)(A)–(B), these cases do not address the constitutional authority of the President to pardon an offense against the United States, and the effect of such pardons on a criminal-related inadmissibility. Irrespective of express statutory authority to waive the effects of a criminal conviction, a pardon granted by the President of the United States removes the attachment of all consequences based on the offense. *See* U.S. Const. art. II, § 2; *Effects of a Presidential Pardon,* 19 Op. O.L.C. 160 (1995) (quoting *Ex Parte Garland,* 71 U.S. (4 Wall.) 333, 380 (1866)). Consequently, this rule retains language in both regulations regarding the effect on ineligibility under INA section 212(a)(2)(A)–(B) by reason of a conviction for which the President of the United States has granted a full and unconditional pardon.

This rulemaking also removes references to the effect of a pardon granted by either the former High Commissioner for Germany acting pursuant to Executive Order 10062 or the U.S. Ambassador to the Federal Republic of Germany acting pursuant to Executive Order 10608. These executive orders were issued in 1949 and 1955, respectively, and pertained to the functions and authorities of the United States in Germany following World War II. Actions undertaken pursuant to these executive orders are now generally obsolete given the time that has passed since the United States occupied Germany. As these provisions pertain to adjudication of visa applications from individuals granted pardons under these executive orders, the provisions are now obsolete and are being removed in the interest of keeping Department regulations clear and up to date.

Regulatory Findings

A. Administrative Procedure Act

The Department is publishing this notice as an interpretative rule which, under the Administrative Procedure Act (APA), is not subject to the general requirement for public notice and comment or the requirement for a 30-day delayed effective date. 5 U.S.C. 553(b)–(c), (d)(2). ''[T]he critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'' *Perez* v. *Mortgage Bankers Ass'n,* 575 U.S. 92, 97 (2015) (quoting *Shalala* v. *Guernsey Mem'l Hosp.,* 514 U.S. 87, 99 (1995)). As explained above, this rule amends the existing regulation to implement the plain meaning of statutory authorities and the President's constitutional authority regarding the effect of pardons on inadmissibility under INA sections 212(a)(2)(A)(i) and 212(a)(2)(B). Any rule that is ''based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate'' is likely legislative. *See United Tech. Corp.* v. *EPA,* 821 F.2d 714, 720 (D.C. Cir. 1987). This rule, however, conveys the Department's interpretation of Congress having expressly *not* provided an exception to inadmissibility based on a pardon, reflecting a plain reading of the inadmissibility ground in INA section 212(a)(2)(A)(i) that multiple courts have shared; therefore, because it is not based in any exercise of the Department's judgment or discretion regarding these authorities, it is an interpretative rule.

Moreover, whether a rule is legislative or interpretative is assessed by reviewing a range of factors related to: (1) whether the agency would not have an adequate basis to perform duties in the absence of the rule; (2) whether the agency has published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked a legislative authority; or (4) whether the rule effectively amends a prior legislative rule. *Am. Mining Cong.* v. *Mine Safety Health Admin.,* 995 F.2d 1106, 1112 (D.C. Cir. 1993). If any of the answers to these questions are affirmative, then the rule is considered legislative and not interpretative. *Id.*

None of the factors in *American Mining* apply to this rule. First, even absent this rulemaking, the lack of any ambiguity regarding the effect of a gubernatorial pardon on a conviction of a crime involving moral turpitude makes clear that the Department lacks authority to except applicants from ineligibility under INA section 212(a)(2)(A)–(B), regardless of this rule. Second, while this rule will result in an amended regulation that is published in the Code of Federal Regulations, the changes are not based in legislative authority, which the court in *American Mining* explained is the purpose of assessing publication there. *See id. at 1109* (''[A]n agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations[.]''). Third, the Department is not invoking its general legislative authority to support or justify this rule, as it is merely restating existing statutory and Constitutional authority with respect to the effect of pardons. *Id.* at 1110; *Fertilizer Institute* v. *EPA,* 935 F.2d 1303, 1308 (D.C. Cir. 1991). Finally, this rule does not amend a prior legislative rule, as a rule does not become an amendment of a prior legislative rule merely because it clarifies an authority being interpreted. *See Id.* at 1112 (''If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with a rule.''). The existing rule appears based on implementation of a 1954 BIA decision for which courts have consistently reached the opposite conclusion regarding authority in the INA to give effect to a pardon on a conviction of a crime involving moral turpitude. *See Matter of H—*at 96. Consequently, the prior rule appears to have also been interpretative and not legislative.

As this rule amends visa policy, which is a foreign affairs function of the United States, it is also exempt from both the notice and comment and

[4] *Wojciechowicz,* as well as other judicial and administrative decisions confronting the impact of a pardon on inadmissibility, involved pardons not issued by the President of the United States. This rule implements *Wojciechowicz's* interpretation of the INA vis-à-vis a gubernatorial pardon, which the court found conflicted with the Department's regulation at 22 CFR 40.21(a)(5). The Department therefore need not address whatever separation of powers concerns may or may not exist regarding the INA and the President's Article II pardon authority. *See Aristy-Rosa* v. *Att'y Gen.,* 994 F.3d 112, 117 (9th Cir. 2021) (''These separation of powers concerns are absent here, however, because Aristy-Rosa's case concerns only a state pardon[.]''); *see also Aguilera-Montero,* 548 F3d at 1255 n.9.

delayed effective date requirements of 5 U.S.C. 553 per subsection (a)(1).

B. Regulatory Flexibility Act

As this rulemaking is not required to be published for notice and comment under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory Flexibility Act. Nonetheless, as this rule only directly impacts visa applicants, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act (5 U.S.C. 801 *et seq.*). 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 significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

D. Executive Orders 12866, 13563, and 14094

Executive Orders (E.O.) 12866, 13563, and 14094 do not apply to this rule, as it pertains to a foreign affairs function.[5] Notwithstanding the above, the Department has submitted this rule to OIRA for review and OIRA has deemed this rule not to be a significant regulatory action. For the reasons stated above, as this rule affects only visa applicants, the Department is confident this rule will not result in significant impacts to U.S. persons, including U.S. citizens or lawful permanent residents.

E. Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

F. Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

G. Other

The Department has also considered this rule under the Unfunded Mandates Reform Act of 1995 and Executive Orders 12372, 13132, and 13272 and affirms this rule is consistent with the applicable mandates or guidance therein.

[5] *See* E.O. 12866 Sec. 3(d)(2) (excepting from the definition of regulation those rules ''that pertain to a . . . foreign affairs function of the United States'').

List of Subjects in 22 CFR Part 40

Administrative practice and procedure, Aliens, Foreign relations, Immigration, Passports and visas.

Accordingly, for the reasons set forth in the preamble, 22 CFR 40 is amended as follows:

PART 40—REGULATIONS PERTAINING TO BOTH NONIMMIGRANTS AND IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 1. The authority citation for part 40 continues to read as follows:

Authority: 8 U.S.C. 1104, 1182, 1183a, 1641

■ 2. Revise § 40.21(a)(5) to read as follows.

§ 40.21 Crimes involving moral turpitude and controlled substance violators.

(a) * * *

(5) *Effect of pardon by appropriate U.S. authorities/foreign states.* An alien shall not be considered ineligible under INA 212(a)(2)(A)(i)(I) by reason of a conviction of a crime involving moral turpitude for which a full and unconditional pardon has been granted by the President of the United States. A legislative pardon, a pardon by the Governor of a State of the United States, or a pardon, amnesty, expungement of penal record or any other act of clemency granted by a foreign state shall not serve to remove a ground of ineligibility under INA 212(a)(2)(A)(i)(I).

* * * * *

§ 40.22 [Amended]

■ 3. Revise § 40.22(c) to read as follows.

§ 40.22 Multiple criminal convictions.

* * * * *

(c) *Effect of pardon by appropriate U.S. authorities/foreign states.* An alien shall not be considered ineligible under INA 212(a)(2)(B) by reason in part of having been convicted of an offense for which a full and unconditional pardon has been granted by the President of the United States. A legislative pardon, a pardon by the Governor of a State of the United States, or a pardon, amnesty, expungement of penal record or any other act of clemency granted by a foreign state shall not serve to remove a ground of ineligibility under INA 212(a)(2)(B).

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Julie M. Stufft,

Deputy Assistant Secretary for Visa Services, Consular Affairs, Department of State.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9993]

RIN 1545–BQ64

Transfer of Certain Credits; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule; correction and correcting amendment.

SUMMARY: This document includes corrections to the final regulations (Treasury Decision 9993) published in the **Federal Register** on Tuesday, April 30, 2024. Treasury Decision 9993 contains final regulations concerning the election under the Inflation Reduction Act of 2022 to transfer certain tax credits.

DATES: These corrections are effective on August 22, 2024 and for dates of applicability, see §§ 1.6418–1(r), 1.6418–2(g), 1.6418–3(f), 1.6418–4(d), and 1.6418–5(j).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, James Holmes at (202) 317–5114 and Jeremy Milton at (202) 317–5665 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9993) subject to these corrections are issued under section 6418 of the Internal Revenue Code.

Corrections of Publication

Accordingly, FR Doc. 2024–08926 (TD 9993), appearing on page 34770 in the **Federal Register** of Tuesday, April 30, 2024, is corrected as follows:

1. On page 34772, in the first column, in the fourth line from the top of the first partial paragraph, the language ''apples'' is corrected to read ''applies''.

2. On page 34774, in the first column, the seventeenth line from the top of the second full paragraph, is corrected to read ''the IRS confirm that the proposed''.

3. On page 34781, in the first column, the fourth line from the top of the