

American Immigration Lawyers Association

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Ms. Theresa Brown
Office of Policy and Planning
Bureau of Customs and Border Protection
1300 Pennsylvania Avenue NW, Room 4.4-D
Washington D.C. 20229

Ms. Sharon Palmer-Royston
Office of Passport Policy
Planning and Advisory Services
Bureau of Consular Affairs

Dear Sir or Madam,

RE: Request for Comments Relating to the "*Documents Required for Travel Within the Western Hemisphere*," 70 *Fed. Reg.* 52037-52039, September 1, 2005; RIN 1400-AC10

The American Immigration Lawyer's Association ("AILA") submits the following comments on the Notice published in the *Federal Register* on September 1, 2005, advising of the documents required for travel within the western hemisphere pursuant to Section 7209 of the *Intelligence Reform and Terrorism Prevention Act of 2004* signed by the President on September 17, 2004.

Section 7209 directs that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan relating to new requirements as expeditiously as possible. These comments are related to the documents required for travel within the western hemisphere in order to satisfy section 7209 of the *IRTPA*.

AILA is the immigration bar association of more than 9,200 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association ("ABA").

AILA supports the enhancement of our national security through the efficient and effective control of the cross-border flow of goods and people over our land borders, but with a critical view as to the cost benefit analysis and accountability

for the measures implemented to achieve these objectives. Thus, we are submitting these comments as to the potential benefit or burden of the document requirements under Section 7209 of the *IRTPA*.

COMMENTS

Currently, Mexican citizens visiting the United States for business or pleasure who are in possession of a Form DSP-150, B-1/B-2 Visa and laser visa are exempt from the passport requirement. As stated in the notice, the DHS anticipates that the laser visa will continue to be acceptable under the *IRTPA*. Mexican citizens other than visitors carrying laser visas are currently required to present a valid visa and passport for admission to the United States. As Canadians do not require visas to enter the United States, they do not regularly carry passports when entering the United States. As a result, the change of the cross-border culture will be infinitely more significant on the Northern border than on the Southern border. The Northern border has a very different relationship with the United States, both from an economic and an historical vantage point.

We are concerned that this initiative will create tension that otherwise would not have existed between the U.S. and Canada. As such, the law of unintended consequences would prevail and millions of dollars could be lost.

It would be devastating to the U.S. border economies if this initiative were carried out as proposed. Many entities would be impacted, such as hospitals and their patients, students, and athletic teams, and others who enter to undertake many cross-border and cross-cultural activities.

(A) The types of documents denoting identity and citizenship that should be acceptable as alternatives to a passport under section 7209 or *IRTPA*

(1) Passports

- (i) A passport or passport-like document issued under secure and frequent travel programs should not be the only document accepted for legal travel between Canada and the United States. There are 300,000 citizens moving between Canada and the United States on a daily basis, including businesses, tourists, family friends and neighbors.
- (ii) Passports do not necessarily address security concerns. Until the documents required to be presented when applying for a passport are enhanced and secured, the passport requirement will not address the security issues or improve security.

- (iii) Requiring passports or passport-like documents will impact the relationship by virtue of formalizing a very informal relationship that historically has facilitated the free flow of movement of citizens between Canada and the United States.

(2) NEXUS Travel Card

The NEXUS Travel Cards may present a possible lower cost alternative to the passport so that officers may focus on high-risk travelers and let other non-risk travelers move more easily. However, the NEXUS program must be thoroughly expanded. Application forms must be more readily available, for example, in shopping malls, casinos and other tourist locations. We recommend that a wide advertising campaign be implemented to better inform visitors about where to obtain these documents.

(3) North American Travel Card

The DHS and State Department should consider the creation of a laser visa-like land border card to be issued to Canadian citizens for use on the Northern border as a less costly alternative to the passport.

(4) Birth Certificates and Driver's License

As the security of birth certificates is improved, the DHS should consider accepting the more secure birth certificates and/or drivers' licenses that contain citizenship information, as a less costly and more convenient alternative to the passport for visitors.

(5) Naturalization Certificates

For American citizens, Naturalization Certificates may be used with photo identification and if the port of entry desired, they could run the naturalization number through CLAIMS.

(6) Other Documents

The DHS WHTI document matrix also lists I-551 (legal permanent resident cards), refugee travel document, and re-entry permits. All of these should be allowed as substitutes for a passport. In addition, the current employment authorization card ("EAD"), which has been biometrically enhanced, should serve as a substitute for admissions from contiguous territories. Finally, since an original naturalization certificate can be verified through Citizenship and Immigration Services databases, DHS and the State Department should consider accepting original naturalization certificates.

(B) The economic impact (both long-term and short-term, quantifiable and qualitative) of the implementation of Section 7209 of IRTPA

The 60-day comment period allocated to providing comments to this regulation does not provide sufficient time to respond adequately to the overall economic impact of section 7209 of the IRTPA. We suggest that the implementation of this initiative requires a comprehensive economic impact analysis. Some preliminary information suggests a number of impacts:

- (i) Canada is the largest trading partner with New York state in particular. Some 350,000 jobs in New York state depend on cross-border travel. Large companies such as Bombardier, St. Lawrence Cement, IBM and General Motors, to name a few, depend on easy cross-border movement. In addition to its security responsibilities, the DHS mission includes facilitation of cross-border travel and trade. Accordingly, the agency should be cautious about imposing documentary requirements that carry the potential for a dramatically negative impact on travel and trade between the United States and Canada.
- (ii) Approximately 35.9 million Canadians visited the U.S. and put \$11.7 billion into the American Tourism industry. The proposed passport barrier would diminish lucrative traffic of Canadian visitors to such border cities as Buffalo, Detroit, Seattle and Niagara Falls, to name a few. Athletes enter the U.S. for tournaments as teams, as well as day trips for school children that would be diminished on account of requiring a passport. It could also affect golf courses, restaurants, hotels and resorts as far south as Myrtle Beach, S.C., Virginia, Texas and Florida, where Canadian visitors can make a significant difference in profit.
- (iii) Tourism will be impacted by virtue of the fact that much of the cross-border traffic that occurs is impulsive and unplanned. As such, the requirement of a passport would prevent individuals from taking the initiative to travel and therefore significantly diminish cross-border travel and consequent tourism in the United States.

(C) Monetary and other costs anticipated to be incurred by United States citizens and others as a result of the new document requirements such as the costs in time and money that an individual may incur to obtain a passport or other document(s) determined to be sufficient.

Costs for applications will be high. For example, currently 25% of Americans hold passports, while 35% of Canadians hold passports. Passports from both countries can be costly. A Canadian passport costs \$87 per person

for a 24-page passport, and takes about 4 weeks to obtain. This fee jumps to over \$100 for individuals applying from outside of Canada. A U.S. passport costs \$55 and takes 4 to 6 weeks. For a family, passport costs can run in the hundreds of dollars. The timing on passports is to serve the current volume: this volume will increase if and when this proposal is implemented. The timing and the cost could pose a deterrent for individuals who would like to visit across the border and would have to make a passport application to do so.

This requirement would also create a monetary impact for companies that are located in the United States that wish for their employees to travel through Canada to another location within the United States. For example, General Motors in Detroit may wish for employees to enter Canada to re-enter the United States to get to Buffalo, which is a less expensive and more direct route to travel. These companies would have to apply for passports on behalf of their citizens, which could also be an expensive endeavor for companies.

(D) The benefits of this rulemaking

In order to fully understand the impact of this rulemaking, the agencies must understand the spontaneity of travel and the dramatic changes of culture and attitude that will be impacted. As noted above, a comprehensive economic impact assessment is necessary to determine whether the purported security and facilitation benefits would be realized by undertaking this proposal. The benefits should be weighed not just against the perceived risk to security from the current policies, but also against the potential for widespread economic effects in both the United States and Canada.

(E) Any alternative methods of complying with the legislation

It would be advisable for the Administration to seek an exception to the legislation so that Canadian and U.S. citizens do not have to present passports. We also recommend that the DHS and State Department examine utilizing the advances in biometric technology created by the US VISIT program. The US VISIT enrollment process is used during visa issuance data intake at U.S. consular posts abroad to tie an identity to a two fingerprint set with a digital photo. Secretary Chertoff has announced that US VISIT will eventually require a ten fingerprint intake. The US VISIT database is reviewed again upon most applications for admission to the U.S. at air and sea ports of entry to confirm identity. Given the expense and time necessary to process passports both for Canadian and U.S. citizens and the limited biometric data required (photo), DHS should consider allowing Canadian and U.S. citizens to voluntarily enroll in US VISIT at U.S. ports of entry and/or at Application Support Centers (“ASC”s) and provide a state driver’s license and state certified birth certificate for admission as a passport alternate. Further checks could be conducted post admission as needed, but the

inconvenience and cost associated with passport issuance could be avoided and the government would have more biometric data on the applicants than is available through the use of the passport.

(F) The proposed stages for implementation of the requirements of section 7209 of IRTPA.

Any proposed solutions will require a large investment of people and technology and cannot be achieved by January 1, 2008. Creating the prospective documents and testing the appropriate options at land borders will require additional time beyond the January 1, 2008 deadline. Flexibility will be needed in order to respond appropriately to the security issues. We need a common-sense approach to responding.

Recommendations

1) Full Environmental Impact Statement

We would suggest that a full environmental impact statement be prepared for the requirement of passports within the western hemisphere.

Federal agencies are required to take a “hard look” at the possible environmental consequences of a proposed action in the environmental assessment process. In their review, agencies must also take into consideration the possible socioeconomic effects of the action, including the direct, indirect, cumulative and reasonably foreseeable effects. An Environmental Assessment (“EA”) should briefly determine whether to prepare an environmental impact statement (“EIS”) or a finding of no significant impact (“FONSI”), aid an agency’s compliance when no EIS is necessary and to facilitate the preparation of a statement when one is necessary. 40 C.F.R. § 1508.9.

As such, a full environmental impact statement should be prepared so that interested citizens can be satisfied that DHS has sufficiently considered all reasonably foreseeable effects that will flow from the western hemisphere travel initiative.

The National Environmental Policy Act of 1969 (“NEPA”) requires that federal agencies give adequate consideration to the *social* impacts of proposed projects as well as the *natural* impacts. According to 40 C.F.R. § 1508.14, the “human environment is to be interpreted *comprehensively* to include the natural and physical environment *and the relationship of the people with that environment.*” Further, the United States Supreme Court established in Robertson v. Methow Valley, 490 U.S. 332 (1989), that agencies must take a “*hard look*” at the environmental consequences prior to taking a major action. We are concerned that the DHS has not yet taken a

“hard look” at the full spectrum of possible social and environmental effects, both locally and nationally, that may flow from this initiative.

Specifically, the Council on Environmental Quality’s regulations and the environmental assessment process require that several social impacts, such as economics, population density and growth rates, patterns of land use, cultural and health impacts be considered both individually and cumulatively. 40 C.F.R. § 1508.8. The regulations also require DHS to consider reasonably foreseeable indirect effects that are caused by actions that are later in time or farther removed in distance. 40 C.F.R. § 1508.8(b).

Further, to properly determine whether an action is “significant,” the agencies must evaluate both the context and the intensity of their proposed action. 40 C.F.R. § 1508.27. The regulations say several “contexts” must be adequately considered, such as society as a whole (human, national), the affected region and interests, and the locality. As an example, the regulation states that in a site-specific action, significance would usually depend upon the effects in the locale, rather than in the world as a whole. Short and long term effects are also relevant.

Concerning intensity, 40 C.F.R. § 1508.27(7), also specifically states that agencies need to consider whether an action is individually significant but is related to other actions that are cumulatively significant impacts. In determining significance, the regulation also states that agencies must consider whether the effects on the quality of *human environment* are likely to be highly controversial, whether the effects present highly unknown risks, and whether the action establishes a precedent for future actions or a decision in principle about a future consideration. A full environmental impact statement should be prepared prior to implementation of this initiative.

2) Frequent Traveler programs must be expanded - Assessing low risk travelers for frequent traveler accelerated admission for legitimate travel to the U.S. must be expanded to allow limited security resources to be focused on higher risk travelers.

3) Create exemptions to the rule for Canadians and Americans - Due to the unique border relationship, the government should consider creating an exception to the passport requirements, specifically for Canadians and Americans and not require them to carry passports.

Conclusion

While we continue to seek and employ methods to improve our ability to protect our country, we must first be sure that such measures will actually work and are not merely an illusion of safety through increased efforts and expenditure of resources. Moreover, we must maintain those principles of

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fairness and process on which this country was founded. To protect our economic and cultural future, we must ensure the orderly flow of tourists and business travelers in and out of the United States.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION