



AILA National Office  
918 F Street, NW  
Washington, DC 20004

Tel: 202.216.2400  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

Jeanne A. Butterfield  
*Executive Director*

Susan D. Quarles  
*Deputy Director, Finance & Administration*

Crystal Williams  
*Deputy Director, Programs*

August 27, 2007

U.S. Customs and Border Protection  
Office of International Trade  
Office of Regulations and Rulings  
Border Security Regulations Branch  
1300 Pennsylvania Avenue, NW (Mint Annex)  
Washington, DC 20229

**Re: Request For Comments Relating to "Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere; Proposed Rule" 72 Fed. Reg. 35088, June 26, 2007**

**Docket Number: USCBP-2007-0061**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following response to the Request For Comments Relating to "Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere; Proposed Rule" 72 Fed. Reg. 35088, June 26, 2007 (the "WHTI proposal"). The WHTI proposal advises of new requirements for "WHTI-compliant documents" that travelers departing from or arriving in the United States must present at sea and land ports-of-entry from within the Western Hemisphere, with a proposed effective date in January 2008.

AILA is a voluntary bar association of more than 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA takes a very broad view on immigration matters because our member attorneys represent many types of persons seeking entry into the United States, including persons who have become naturalized U.S. citizens from all parts of the world, including some countries disfavored under U.S. foreign policy. AILA members represent U.S. businesses and industries that sponsor and support foreign nationals' entry into or return to the United States after travel abroad, as well as U.S. citizens with questions about travel abroad and return to the United States. Our members also represent asylum seekers, often on a *pro bono* basis. Relevant to these comments, it is important to note that AILA members represent countless nonimmigrant visa holders who travel to and from the United States for business and pleasure, from the Western Hemisphere and elsewhere.

AILA recognizes that it is vitally important to enhance our nation's security and that we must do so in a way that balances our need for security with the cross-

border flow of people, goods, and services that are the foundation of the economy and American way of life. We support the “secure borders, open doors” policy articulated by the U.S. Department of State.<sup>1</sup> We also support allocation of the appropriate government resources to develop a smart border policy that balances economics and security. We hereby offer our comments.

**a) DHS and DOS Have Failed To Establish How Requiring Passports and the Identified Alternatives Will Increase Security**

While, in theory, documentary requirements represent a form of entry control, the requirement alone will not accomplish the goals outlined. According to a recent GAO report, there remains likelihood of fraud: “Although State has updated or changed the security features of its travel documents, State does not have a structured process to periodically reassess the effectiveness of the security features in its documents against evolving threats and to actively plan for new generations.” United States General Accountability Office, GAO-07-1006, Border Security: Security of New Passports and Visas Enhanced, but More Needs to be Done to Prevent Their Fraudulent Use (July 2007).

AILA recognizes the importance of securing our nation against terrorist attacks from foreign sources that have a high cost on our way of life. As the 9/11 Commission noted in its report, “Overreactions can impose high costs, too – on individuals, our economy, and our beliefs about justice.”<sup>2</sup>

The 9/11 Commission recommended that “programs to speed known travelers should be a higher priority, permitting inspectors to focus on greater risks.” The 9/11 Report, at 388. The WHTI proposal accepts certain forms of trusted traveler program documentation, such as NEXUS, SENTRI, and FAST. These programs need to be more fully developed, along with the infrastructure to expand them, so resources are not misallocated toward screening low-risk travelers who simply forgot a passport at home, before the WHTI proposal is implemented.

**b) A Full Environmental Impact Statement Should Be Prepared.**

The DOS and DHS have moved forward with this proposed regulation without completion of a programmatic environmental assessment (PEA). 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

---

<sup>1</sup> The concept of “Secure Borders, Open Doors” was described in January, 2006 in a joint announcement of Secretary of State Condoleezza Rice and Department of Homeland Security Secretary Michael Chertoff. Their “joint vision” calls for “maintaining the right balance between stronger security and facilitating travel.” See, “Rice-Chertoff Joint Vision: Secure Borders and Open Doors in the Information Age,” (<http://www.state.gov/r/pa/prs/ps/2006/59242.htm>).

<sup>2</sup> The 9/11 Commission Report, ed. W.W. Norton & Co. (2004), at 387 (“9/11 Report”).

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.

Implementing a change affecting millions of travelers per year, making about 300 million crossings,<sup>3</sup> at more than 300 ports of entry, is a “significant” federal action, with the potential to affect the human environment of border communities and the United States in general. As such, a full environmental impact statement should be prepared, so that interested communities, citizens, and government agencies can be satisfied that DHS has sufficiently considered all reasonably foreseeable effects that would flow from the implementation. At a minimum, sufficient advance fact-finding and analysis is necessary (and compelled by law) to adequately address the full spectrum of possible socioeconomic and environmental impacts the WHTI implementation may have.

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 project.

Specifically, the Council on Environmental Quality’s regulations and the environmental assessment process require DHS 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 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 insignificant but is related to other actions that are cumulatively significant impacts. In determining

---

<sup>3</sup> See 72 Fed Reg. 35103.

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 passport or documentation control.

**c) The State Department Continues to Experience Passport Application Backlogs Resulting From Implementation of the Passport Requirement for Air Travelers.**

The NPRM proposes to amend 8 C.F. R. §235.1(b) to require that a U.S. citizen applying for admission at a land or sea port of entry must present a passport, or must present a document from a limited list.

The State Department experienced an unprecedented demand for passports following the implementation of the passport requirement for air travel. On May 23, 2007, the DOS announced that new records were set for passport demand and passport production.<sup>4</sup> On June 19, 2007, Assistant Secretary of State for Consular Affairs Maura Harty testified before the International Operations and Organizations, Democracy and Human Rights Subcommittee of the Senate Foreign Relations Committee that as of May 31, the State Department has issued 10.3 million passports in FY2008, and was on pace to issue over 17 million by the end of the year.<sup>5</sup> This testimony was preceded by an announcement on June 8, 2007, that the State Department and DHS would relax the air travel passport requirement for those who had applied for passports, but had not received them due to the DOS passport backlog.<sup>6</sup> Finally, on August 16, 2007, the Department of State published an interim final rule amending the timeframe within which they are to process a passport application submitted with a request for expedited processing from three business days to a period of time the DOS will announce from time-to-time on its Website.<sup>7</sup>

This combination of factors gives rise to a concern that the Department of State still lacks the capacity to meet the demand for passports, which will increase upon implementation of a requirement that U.S. citizens possess passports or other qualifying documents.<sup>8</sup>

---

<sup>4</sup> <http://www.state.gov/r/pa/prs/ps/2007/may/85433.htm>

<sup>5</sup> <http://foreign.senate.gov/testimony/2007/HartyTestimony070619.pdf>

<sup>6</sup> <http://www.state.gov/r/pa/prs/ps/2007/jun/86206.htm>

<sup>7</sup> 72 Fed. Reg. 45889 (Aug. 16, 2007).

<sup>8</sup> AILA notes that concern over the capacity of the DOS to meet demand has been expressed by Sen. Patrick Leahy. See: Comments Of Senator Patrick Leahy (D-Vt.) On DHS Announcement of Draft Plan for New WHTI Border-Crossing Requirements (Wednesday, June 20, 2007). <http://leahy.senate.gov/press/200706/062007a.html>

Imposition of the passport requirement should be delayed until it is clear that the Department of State has achieved the capability to process passport applications and issue passports in a reasonable period of time.

**d) The Department of State Has Not Yet Adopted a Passport Card.**

The NPRM proposes that a U. S. citizen may present a “passport card” in lieu of a U. S. passport. The Department of State has neither finalized the “passport card,” nor begun its production. Thus, one of the alternate documents is as yet unavailable. This factor alone will contribute to an increased demand for U. S. passports, burdening even more the already-stretched capacity of the Department of State.

**e) Timing of Elimination of “Oral Declaration” as Proof of U. S. or Canadian Citizenship at Land Borders is Premature and Requires a Change in Regulation.**

In the Supplementary Information accompanying the proposed rule, the DHS has announced its intention to “...end the routine practice of accepting oral declarations [of U. S. or Canadian citizenship] alone starting January 31, 2008.” Thereafter, an applicant for admission to the U. S. claiming U. S. or Canadian citizenship will be required to present “(1) A document specified in this NPRM as WHTI-compliant for that individual’s entry; or (2) a government-issued photo identification document presented with a birth certificate.” (In a footnote, the DHS notes that for U. S. citizens, a government-issued photo identification, combined with a Consular Report of Birth Abroad or a Certificate of Naturalization, could also be presented.)<sup>9</sup>

As the DHS notes, the “oral declaration” is a “routine practice.” Under current 22 C.F.R. §53.2, a U.S. citizen is not required to present a passport under certain circumstances, one of which is when the U.S. citizen seeks admission to the United States from a foreign port or place within the Western Hemisphere, excluding Cuba, by land or by sea. Neither that regulation of the State Department, nor any regulation of the DHS, requires a U. S. citizen to present any specified document.

While this NPRM provides notice that the DOS and DHS seek to amend regulations in order to require a U.S. citizen seeking admission at a land or sea port of entry from within the Western Hemisphere to present a passport or a specified alternate document, elimination of the “oral declaration” practice on January 31, 2008, and the imposition of a requirement that an individual claiming U.S. citizenship must present a passport, WHTI-Compliant document, or government-issued identification and birth certificate is tantamount to imposition of documentary requirements for which rule making, and not simply a statement in the Supplementary Information accompanying this NPRM, is required.

---

<sup>9</sup> 72 Fed. Reg 35096.

Any change in the “routine practice” that eliminates the “oral declaration” as sufficient to establish U.S. or Canadian citizenship must be implemented only after proper rule making, with appropriate notice and commentary.

**f) The WHTI Proposal Does Not Provide Sufficient Procedures for Travelers Who Arrive at a Land Crossing Without WHTI-Compliant Documents.**

The WHTI Proposal presumes virtually 100 percent compliance by arriving travelers at land ports of entry. The proposal includes no analysis of how many travelers at any given port of entry might seek entry into the United States, primarily at land border crossings, without WHTI-compliant documents. It does not provide any procedures for handling noncompliance of a lone traveler compared to a traveler in a group. It does not address under what circumstances the traveler lacking documents would be subject to secondary inspection or denied entry with or without negative implications. In fact, it does not specify that travelers lacking documentation would be denied entry.

Presumably, anyone lacking WHTI-compliant documentation would be returned to the country from which the traveler came. However, there are no procedures articulated. Many questions must be answered before implementation of WHTI. These include the following:

- If, for example, one passenger in a vehicle carrying several travelers lacks documentation, must all the accompanying passengers return to Canada or Mexico? What if the passenger lacking documentation is a baby or child? What if a U.S. citizen mother with a passport gives birth to a child outside the United States and wants to return to the United States with her newborn?
- Are there sufficient facilities and lanes for returning travelers to the country abroad, particularly at high volume ports of entry?
- What is the procedure if the country refuses to accept the traveler, for example, when permission to stay in the other country has expired?
- Will the procedure differ depending on whether the traveler claims U.S. citizenship or claims Canadian or other foreign citizenship?

The WHTI proposal creates an exception for the requirements when the State Department has determined there is an unforeseen emergency or humanitarian or national interest reason. However, it is CBP, not the State Department, which staffs the land and sea border crossings. An alternative should be created for CBP to waive documentation requirements if there is an unforeseen emergency or humanitarian or national interest reason.

AILA opposes implementation of the WHTI proposal unless it provides for sufficient procedures for handling travelers arrive at a port of entry without WHTI-compliant documents.

**g) The WHTI Proposal Fails to Coalesce With Any Overall Security Strategy.**

To achieve true border security, the United States needs a comprehensive strategy that incorporates all aspects of border security and integrates all government border security initiatives. To date, DHS and other responsible government departments have not created such a strategy, but are instead engaging in piecemeal implementation of various programs without considering how these separate programs should be integrated with each other so as to lessen the burden on the traveling public. Implementing separate programs in piecemeal fashion is costly, inefficient, and does not measurably increase security; it also forces American citizens to comply with expensive, burdensome, and duplicative governmental requirements.

Before implementing WHTI, DHS should explain how WHTI will fit with other existing or planned border security programs, and how WHTI documentation requirements will fit with other planned security programs such as the REAL ID driver's license statute.<sup>10</sup> REAL ID is scheduled to go into effect in May 2008, after the January 2008 planned implementation and its implementation will likely result in significant burdens on most Americans.

Implementation of WHTI should be delayed until REAL ID has been implemented and the impact of REAL ID can be assessed to see whether REAL ID-compliant documents will be suitable for WHTI purposes. It is premature to require all Americans to comply with WHTI at land ports of entry until REAL ID goes into effect and its efficacy can be assessed.

**h) Recommendations**

In sum, the proposal would prematurely end existing policy. Based on the above discussion and in order to implement feasible security objectives without seriously harming the international and cross border flow of trade and people, we submit the following recommendations:

- i) Do not use WHTI as a substitute for increasing our intelligence capacity: Security experts agree that our national security is best enhanced by increasing intelligence and database security checks performed outside the country. DHS should examine

---

<sup>10</sup> The REAL ID Act of 2005, PL 109-13, 119 Stat. 231 (May 11, 2005), Title II, Sec. 201, sets standards for new driver's licenses and identification documents issued by states. It includes minimum information requirements such as digital photo, signature, physical security features, and a common machine-readable technology. Before issuing a driver's license or identification card the applicant must show proof of lawful status and other documents.

ways to expand trusted traveler programs for low-risk travelers in a manner that will be successful and enable CBP to focus on unknown or high risk travelers. There must be accountability to ensure accuracy.

ii) Delay implementation at land border until an adequate infrastructure is in place: The Border Security Act requires that DHS not impede the flow of goods and people across our nation's borders. Furthermore, such delays would undermine the entire effort to maintain an efficient border, and efficiency is a vital component in increasing security. DHS must step-back and determine the realistic level of compliance, and develop rational procedures for handling situations involving urgent, humanitarian, and national interest issues.

iii) Develop a comprehensive plan for WHTI: DHS should use the above assessments to develop a comprehensive plan for WHTI that takes into account the achievable goals of the program, necessary funding levels, infrastructure and facility needs, and appropriate deadlines. Prematurely incorporating untested proposals will create uncertainty resulting in a chilling effect on international travel, without enhancing security. If the mission of WHTI is instead to track U.S. citizens' as well as foreign nationals' entry into the United States, the mission should be clarified. On the issue of national security, a false sense of security is a failure.

iv) Increase the interoperability of database systems: DHS should prioritize its efforts to increase the interoperability of database systems. Where there is evidence from a U.S. government database that the State Department has issued a traveler a passport, such evidence should be sufficient to add the U.S. citizen to enter the United States. Currently, some interoperability exists between DHS and State Department databases. CBP should be granted the access it needs to evidence about whether a traveler who claims U.S. citizenship has been issued a U.S. passport, without having to present the traveler being required to present the passport itself.

v) DHS must increase its outreach to the public concerning WHTI: DHS must inform U.S. citizens and foreign nationals in Western Hemisphere countries, particularly Canada, of the documentation requirements that are adopted, and information must be widely disseminated and presented in a timely manner. Without adequate public notice on how to comply with these new WHTI requirements, the program will not operate properly and will impede the flow of people who are essential to our economic well being.

vi) Place cameras at the ports of entry: Cameras have been used successfully at many ports to record the behavior and statements of the applicant and the officer. Inspections supervisors have praised the tool from a personnel perspective and embassies and applicants for admission have benefited from the recordings of this silent and objective witness. In addition, in some cases, these cameras could also implement cutting edge facial recognition technology to assist inspectors. These cameras should be installed at least in all secondary inspection areas.

vii) Access to counsel: Title 8 to the Code of Federal Regulations was modified to restrict access to counsel at ports of entry based on the law in existence at the time, which did not provide for expedited removal at ports of entry with no right to any administrative review. One of the bases cited for the ability to restrict such access was administrative remedy. When the law was changed to allow expedited removal from the U.S., no correction was made to the regulations. Because a U.S. citizen who lacks a passport may be deemed an alien, the law must allow access to counsel for all travelers seeking entry into the United States.

**i) Conclusion**

AILA concurs that enhancing our national security is in the interest of the United States. 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 the illusion of safety through increased efforts and expenditure of resources. Moreover, we must maintain those principles of 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, as well as U.S. citizens, in and out of the United States. Alarming absent from the WHTI proposal are procedures to manage innocent human and technical error, on the parts of both the traveling public and the government.

We urge DHS to consider whether requiring the WHTI-compliant documentation described is necessary to meet the stated security goals and whether the program, as a whole, merits the investment such an endeavor will require.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION