



October 15, 2007

Office of Legal Affairs and Law Enforcement  
United States Department of State  
2100 Pennsylvania Ave. NW  
Suite 300  
Washington, DC 20037

By email: [ExpediteRuleComments@state.gov](mailto:ExpediteRuleComments@state.gov)

RE: Passport Procedures—Amendment to Expedited Passport Processing  
Regulation  
Public Notice: 5888  
RIN 1400–AC39  
72 Fed. Reg. 45888

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits this comment with respect to the interim final rule of the Department of State (“the Department” or “DOS”) published at 72 Federal Register 45888 (Aug. 16, 2007), amending regulations governing time within which the Department of State will process passport applications on an expedited basis.

We appreciate the opportunity to comment on the proposed rule and believe that we are particularly well qualified to do so. 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. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

AILA is opposed to the Department’s modification of the definition of “expedited passport processing” from “3-business days” provided in the prior rule, to “the number of business days published on the Department’s Web site, <http://www.travel.state.gov>” under the interim final rule. The previous “3-business day” rule allowed for truly expedited service from the Department in cases where a passport was urgently needed, provided the public with a clear understanding of the timeframe within which a passport would be provided under expedited processing, and the Department, and the public, had clear benchmarks by which to assess agency performance. The interim final rule offers none of these characteristics.

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*

There have been severe delays in the processing of passport applications by the Department, including requests for expedited passport processing service. In the Supplementary Information accompanying the interim final rule, the Department admits that the general crisis in passport processing is the result of its own inability to anticipate and respond to the increased demand for expedited passport processing brought on by the mandatory passport requirements of the Intelligence Reform and Terrorism Prevention Act (IRTPA) and the Western Hemisphere Travel Initiative (WHTI).<sup>1</sup> However, in responding to a temporary influx of expedite requests, the Department has promulgated permanent rules that essentially gut a valued tool for U.S. citizens seeking to travel abroad.

Although the interim final rule was proposed in an effort to continue to offer this benefit in the face of increased demand and to ensure transparency regarding processing times, it encourages wholly inadequate service by the Department. It fails to provide US citizens with adequate or consistent notice of how long it will take to receive a passport via expedited processing, places an undue burden on applicants to locate and determine potentially shifting processing times, and may ultimately deny U.S. citizens the opportunity to travel abroad in emergency situations.

### **Service Provided When Submitting Expedited Processing Request**

The previous “3-business day” rule as announced in 59 Fed. Reg. 48998 (Sep. 26, 1994) clearly established what service would be provided by the Department if the additional “expedited processing fee” was properly submitted. Additionally, it established that expedited processing was to be used only by those with urgent travel plans by requiring that the applicant provide evidence of imminent departure. Therefore, each applicant rightfully had the expectation that, by submitting the expedited processing fees with the proper documentation, he or she would receive a passport within 3-business days of receipt of the application by a Passport Agency and would thus be able to travel as needed.

The new rule does not guarantee the same return on investment. To the contrary, it allows the Department to move the yard stick whenever it cannot meet demand. Constant fluctuations in the processing times guarantee that each applicant may not receive the same service from the Department. This is evidenced even by looking at <http://www.travel.state.gov>, which, on August 16, 2007 indicated that it was now taking 10 days to complete expedited passport processing. As of October 3, 2007, the period had increased to three weeks. Therefore, applicants with urgent travel plans today are not receiving the same service they would have received prior to August 16, or the same 10-day service they were presumably receiving after August 16.

---

<sup>1</sup> See also: Testimony of Assistant Secretary of State for Consular Affairs Maura Harty before the Senate Foreign Relations Committee, International Operations and Organizations, Democracy and Human Right Subcommittee, June 19, 2007 (<http://foreign.senate.gov/testimony/2007/HartyTestimony070619.pdf>). (“Harty testimony.”)

Additionally, there are no repercussions if the Department fails to complete expedited processing during the announced timeframe. Although 22 CFR §51.66(e) allows that the expedite fee may be waived “where the need for expedited processing was necessary due to Department error, mistake or delay,” the interim rule, which allows constantly changing processing times, ensures that no waivers of the expedite fee will ever be necessitated due to Department “delay.”

The proposed solution to the problem of the inability of the Department to meet the previously-established 3-day processing time by permanently adopting a variable processing time is extreme. There is no indication that the Department considered alternatives, such as establishment of a lengthier fixed time period (for example, seven business days) that, though longer, is realistic and identifiable, or, the establishment of a temporary program with longer processing times to address current demand, but which will sunset at a date certain in the future when demand declines, with processing times returning to the previous three business days, or, perhaps a lengthier, but nonetheless defined, expedited processing time. By so doing, all applicants will continue to receive consistent service from the Department upon submitting a proper expedite request and fee. Finally, government accountability will be maintained if there is error, mistake or undue delay on the part of the Department.

#### **Adequate and Consistent Notice to Applicants**

Under the previous rule, all passport applicants were aware that, if urgently needed, a passport could be obtained within 3 business days of the Department’s receipt of an application. To the contrary, the interim final rule provides insufficient notice of the amount of time the Department will need to process an expedited passport request. Additionally, the Department is not required to forewarn potential applicants of any change in processing times.

Should the Department adopt the scheme in this interim rule as a final rule, the final rule should include a requirement that the Department announce in advance when the processing time will be modified and updated on the Department’s web site. For example, new processing times could become effective on the first day of each month after being posted on the Department’s web site for 30 days prior to the effective date. Thus, potential applicants would have notice that the processing time would change at the beginning of the next month, while any applicants submitting a passport application for expedited processing during that month would have a guarantee that the application would be processed within the given timeframe.

Regardless of the Department’s procedure for providing adequate and consistent notice to prospective expedited passport processing applicants, it must continue to be accountable if it fails to meet the processing times it announces. Therefore, it is imperative that some timeframe by which Department “delay” can be measured is included in the expedited passport processing regulations. Applicants must be guaranteed a fee waiver or refund if the Department fails to process expedited passport processing requests in the time announced by the Department.

### **Burden to Locate Processing Times**

Though the Department states that the expedited processing times can be found at <http://www.travel.state.gov>, a recent search indicates that this valuable information is not as readily accessible as the Supplementary Information implies. From <http://www.travel.state.gov>, potentially unsophisticated internet users are required to click on either “Get or Renew Passport” or “Checking the Status of Your Application” to get to a page that has a side link to “Application Processing Time.” Only there are the expedited processing times listed inconspicuously amongst other text.

If the Department is going to rely on its web site to convey this important information it must, at a minimum, make the expedited processing times conspicuous and easy to access from <http://www.travel.state.gov>. Additionally, as the increase in passport demand is due to federal law requiring a passport to reenter the U.S. from any location abroad, it is incumbent upon the government to engage in a publicity campaign to inform the public of this change.

### **Ability to Travel in Emergency Situations**

Although “urgent” is not defined in 22 CFR §51.66 in either the previous regulation or interim final rule, under the “3-business day” rule, it could be concluded that when requesting expedited processing, the evidence of an “urgent departure” that is required by 22 CFR §51.66(d) could include a departure within a week of the expedited processing being requested.

On the other hand, in the interim final rule, the Department no longer provides a consistent application of “urgent departure” and ensures an ever-changing definition of urgent travel needs. One day, an individual seeking to travel abroad within a week may be able to receive a passport through expedited processing; the next, an individual seeking to travel in a month may not receive a passport prior to his or her intended departure utilizing expedited processing. Therefore, there is no consistent means for the public to “self-select” urgent cases needing expedited processing.

Additionally, under 22 CFR §51.66(d), the Department may expand its discretion to “decline to accept the request if it is apparent at the time it is made that the request cannot be granted.” This use of discretion is arbitrary and may cause unnecessary delay. If an applicant can document an “urgent departure” the Department must offer expedited processing, regardless of the reason for departure.

Given that the Department cannot guarantee any specific processing time, thousands of U.S. citizens will be left in limbo every month wondering if they will be able to travel as planned. Even more devastating, for those individuals who truly need to travel due to an emergency, there is no realistic option ensuring a passport can be quickly obtained. Assistant Secretary Harty testified that “same-day” service was

available at the Passport Agency offices to those with emergent travel needs.<sup>2</sup> However, according to FAQs on the Department website, it appears that this service is limited to “Life or Death Emergencies.” (See [http://travel.state.gov/passport/fri/faq/faq\\_1741.html#emergency](http://travel.state.gov/passport/fri/faq/faq_1741.html#emergency).) Moreover, an applicant must appear at one of the fifteen Passport Agency offices located throughout the U.S., which may be exceedingly burdensome or impossible. No provision for submission of a passport application by mail for such emergent circumstances appears to exist. At a minimum, the Department has an obligation to provide an emergency processing service for U.S. citizens with urgent travel needs consistent with Assistant Secretary Harty’s testimony.

### **Conclusion**

The inability of the Department to meet the demand for passports is a result of it being ill-prepared to deal with the onslaught of passport applications and the accompanying expedited processing requests received in response to IRTPA and WHTI. Clearly the Department was overwhelmed by this temporary influx. However, instead of dismantling a program that the public came to rely upon, the Department should work hard to find better solutions and institute a clear plan to provide the same or similar service it did under the “3-business day” rule. The “unanticipated” demand for expedited passport processing will likely diminish over time. Therefore, the Department should utilize the specific interim solutions described above in an effort to reinstate the “3-business day” rule within a specific timeframe instead of reducing service on a permanent basis.

For these reasons, the American Immigration Lawyers Association opposes final adoption of the interim rule of the Department of State with respect to expedited processing of passport applications and urges the Department to review and consider alternative solutions that address current demand, while at the same time establishing clear timeframes within which an applicant can expect to receive a passport, and by which the Department, and the public, can assess agency performance.

Your consideration of these comments is appreciated.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

---

<sup>2</sup> Harty testimony, *supra*, at page 5.