

American Immigration Lawyers Association

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September 25, 2006

U.S. Customs and Border Protection
Office of Regulations and Rulings
Border Security Regulations Branch
1300 Pennsylvania Avenue, NW
Washington, D.C. 20229

**Re: Regulatory Information No. 1651-AA66 (Docket No. USCBP 2006-0097)
Documents Required for Travelers Arriving in the United States at Air
and Sea Ports-of-Entry From Within the Western Hemisphere**

Dear Sir/Madam:

The American Immigration Lawyers Association (“AILA”) hereby submits comments on the proposal outlined in the joint Notice of Proposed Rulemaking (“NPRM”) of the Bureau Customs and Border Protection (“CBP”) of the Department of Homeland Security and the Department of State to amend 8 C.F.R. § 212 and 235 to require the presentation of a passport as the primary document to be provided upon application for admission to the United States (“U.S.”) at a U.S. Port of Entry. The NPRM explains that the general rule is that any U.S. citizen must bear a U.S. passport when departing or entering the U.S. The NPRM also explains that currently, this requirement is not applied to U.S. citizens when departing from or entering the U.S from within the Western Hemisphere, other than from Cuba. The proposed changes would change this practice so that all U.S. citizens would be required to present a U.S. passport, with some exceptions upon application for admission into the U.S., even after travel from anywhere within the Western Hemisphere. Also, nonimmigrant aliens from Canada, Mexico, and Bermuda would be required to present a passport issued by their respective countries when applying for admission to the U.S. at air and sea ports of entry, effective January 1, 2007. This requirement would be implemented at land border ports of entry effective January 1, 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. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field.

We appreciate the opportunity to comment on the proposed regulation and believe we are particularly well qualified to do so. AILA members regularly assist foreign nationals in the process of applying for entry into the U.S. We customarily advise clients, whether they are individuals from foreign countries or the U.S., as well as U.S. and foreign companies, regarding U.S. immigration law. Thus, we have developed a special expertise and understanding of the procedural aspects of admission into and departure from the U.S. due to our daily work with these issues for our clients.

Further, through our national liaison committees, AILA has experienced a longstanding productive relationship with various U.S. government agencies, including the Department of Homeland Security, the Department of Labor, and the Department of State. Thus, we also have a deeper understanding of the issues of admission to and departure from the U.S. from the government's perspective.

In sum, we believe that the proposed documentary requirements outlined in the NPRM are ill-suited to facilitate travel into the U.S. or to enhance this country's safety and economic security.

A. The Proposed Rule Fails to Address Negative Impacts on Economic Security and International Relations.

1. Tourism and Trade

A "passport only" requirement would impede travel and tourism by causing lengthy delays at the border and deter individuals without a passport from traveling. The proposed requirement would also have a detrimental affect upon the U.S. economy in that it would serve to impede the free flow of commerce and travel within the Western Hemisphere. To date, the closest we have to an economic impact study of the effect of the WHTI on the American economy is a

research report from the Canadian Tourism Commission.¹ Although the report concentrates primarily on the effects of the WHTI on the Canadian tourism industry, it gives some insight into the effect of the WHTI on the American tourism industry. The current estimate of trips by Canadians to the U.S in 2004 is more than 35 million, and without the new stringent requirements imposed by the WHTI, that number would be expected to increase to over 40 million by 2008, when the WHTI land border identification requirements become effective.² It is expected that by 2008, a passport requirement under the WHTI would reduce Canadian tourist travel to the U.S. by about 5.1%.³ In fact, research shows that some Canadians already think the passport requirement is in place for travel to the U.S., which will cause an estimated cumulative economic impact shortfall on total U.S. receipts from Canadian travel from now until the end of 2008 of about \$667 million.⁴

Also, the economic impact assessment of the requirements outlined in the NPRM indicates that gains in domestic travel of U.S. citizens, who would no longer travel to Mexico and Canada due to the WHTI regulations, would offset the indirect losses from a reduction in visits by Canadians and Mexicans to the U.S. However, based on the assumption that the rate of spending of U.S. citizens on domestic trips is less than the rate of spending of international visitors to the U. S., that offset may not be as significant. Moreover, it is not clear that the reduction of revenues introduced into the U.S. economy from international visitors who decide not to visit the U. S. has been considered.

In a speech given on April 20, 2006 by the Honorable Stockwell Day, Canadian Minister of Public Safety, the following points were expressed.

It is surprising sometimes, to our citizens and maybe to yours, when you consider the magnitude of what takes place at our borders: 90 million crossings between Canada and the U.S. land borders per year; more than \$2 billion in trade per day;

Canada as the number one foreign market to 39 of your states.

¹ Canadian Tourism Commission, *The Potential Impact of a Western Hemisphere Travel Initiative Passport Requirement on Canada's Tourism Industry*, Research Report 2005-2.

² Id. at 25.

³ Id.

⁴ Id. at 26.

Do you know that more trade crosses the Detroit-Windsor Ambassador Bridge each year than the entire value of the U.S.-Japan economic relationship? On one bridge.

260,000 travelers per day cross at some 119 different land border points, nine airports and three seaports.⁵

We believe that the impact on the U.S. economy from Western Hemisphere visitors is being discounted given that Canadians alone spent more than \$10 billion in the U.S. last year.

The U.S. share of the international tourism market has fallen sharply since 1992, translating into a loss to our economy of \$286 billion in potential GDP growth, \$43 billion in 2005 alone, and millions of jobs.⁶ Assuming that international travelers customarily take longer trips and spend significantly more during each trip than U.S. citizens on domestic trips, this decline has serious economic consequences to businesses across the U.S. The exceptions to this decline where the U.S., instead, has increased its international travel market share, is as to travelers coming from Canada and Mexico; the two countries most affected by any new WHTI regulation. Thus, we continue to recommend that the U.S. General Accounting Office or another independent entity conduct further research as to the economic impact of the WHTI under different document requirements before any final decisions are made. A reasonable solution will not be found until the total economic impact is realistically and objectively analyzed.

AILA is deeply concerned about the adverse impact of these proposed actions on U.S. business, as a further negative change in addition to U.S. visa policies at consulates overseas. The U.S. is already experiencing the outsourcing of manufacturing jobs in the automotive industry; the loss of U.S. educated foreign talent, and the inability to bring in foreign professionals due to the H-1B cap limitations each fiscal year. We are concerned that the U.S. is being also perceived as being “closed for business” at an international level. The proposed regulatory changes exacerbate that negative perception.

⁵Remarks by the Honorable Stockwell Day, Minister of Public Safety to the Fifth Annual Counter-Terrorism Conference, “Public and Private Partnerships”, Washington, D.C., April 20, 2006. <http://www.psepc.gc.ca/media/sp/2006/sp20060420-en.asp>.

⁶U.S. Travel and Tourism Advisory Board, *Restoring America’s Travel Brand: A National Strategy to Compete for International Visitors*, September 5, 2006, p. 5. The report can also be found at www.commerce.gov/opa/press/Secretary_Gutierrez/2006_Releases/September/TTAB%20National%20Tourism%20Strategy.pdf.

2. Reciprocal Reactions

Changes proposed in the NPRM would negatively impact U.S. relations internationally and could prompt other countries within the Western Hemisphere to enact similar reciprocal requirements adverse to travel by U.S. citizens. While the Department of Homeland Security is merely attempting to implement U.S. law, the WHTI implementation process should be multilateral versus unilateral. There must be both a U.S.-Canadian partnership and a U.S.-Mexican partnership going forward. The border is shared, and a serious decision, such as changing well-known traveling documentation requirements should also be shared. Such partnerships already exist, as evidenced by both the Smart Border Declaration and the Security and Prosperity Partnership and should be pursued in developing the WHTI.

Any approach that is unilateral in nature, or that is even substantially perceived as unilateral, could be troublesome in terms of effective implementation, economics, international relations and public reaction. An unintended consequence could be that a U.S. citizen might be allowed into Canada or Mexico based on more liberal admission requirements, such as recognition of state identification cards, and then the U.S. citizen could be denied entry back into the U.S. and stranded in the foreign country unless the passport requirement is waived.

It is critical that the process not only be multilateral between the federal governments, but also be multilateral in a meaningful way by engaging the states and provinces (especially those along the border). Border states and provinces with so much at stake, and as the most directly impacted jurisdictions, should also be given the opportunity to play a key role in addressing the various documentation issues and possibilities. These border communities have always answered the call when given a chance, and our federal government should commit to bringing them directly to the table without delay.

3. Native Americans

The passport requirement would infringe upon the treaty rights of Native Americans to travel freely across the border due to their membership in a particular indigenous tribe or nation. Currently, Native Americans are permitted to travel between the U.S. and Canada without U.S. or Canadian passports, if the Native

American fulfills certain criteria under U.S. law.⁷ This principle was developed over a long course of history between the U.S., Canada, and the Native American Nations.

In 1794, Britain and the U.S. entered into a new treaty, known as the Jay Treaty after Chief Justice John Jay, the American negotiator. It was a treaty of “friendship, commerce, and navigation.” Article III of the Jay Treaty provided for free border-crossing rights for U.S. citizens, British subjects, and “the Indians dwelling on either side of the boundary line.” Indians were also not to pay duty or taxes on their “own proper goods” when crossing the border.

In the Treaty of Ghent in 1815 (after the war of 1812), Britain and the U.S. promised to restore the rights of the Indian Nations that had existed before the war. However, legislation implementing these rights in Upper and Lower Canada was allowed to lapse in the 1820’s and has not been reenacted since. Instead, it was the informal practice of both Canada and the U.S. for many years to allow aboriginal people free border crossing, and not to collect custom duties from them.

In the 1920’s, largely as a result of the actions of the Indian Defense League, and as a result of the court case of Paul Diabo, a Kahnawake Mohawk, the U.S. changed its immigration laws. Ever since, Canadian-born people with at least 50% Aboriginal blood can enter, live in, and work in the U.S. without immigration restrictions; they cannot be deported for any reason. However, the U.S. has never implemented its promises about the duty-free carriage of “proper goods.”

On the Canadian side, the law is in a state of rapid change. In 1956, in the case of Louis Francis, the Supreme Court of Canada decided that the Jay Treaty and the Treaty of Ghent were not treaties with Indian Nations; that the Jay Treaty was not part of the law in Canada because it had not been ratified by legislation; and that Article IX of the Treaty of Ghent, while the treaty was a self-implementing peace treaty, did not come into effect automatically, because it only “*promised*” to restore the rights of Indian Nations. Article IX, in fact, says that the Crown “*engages...forthwith to restore the rights*” of Indians to what they were before the War of 1812.

In 1982, the new *Constitution Act* recognized and affirmed both treaty and aboriginal rights. Since then, the *Watt* case in British Columbia established the

⁷ 8 U.S.C. § 1359.

possibility of citizens of Aboriginal Nations bisected by the border to enter Canada as of right. This case awaits a final decision from the Canadian Supreme Court.

The *Mitchell* case fought to establish the aboriginal right of the Mohawks of Akwesasne to bring goods across the border -- duty and tax-free for personal and community purposes, and for small-scale trade between First Nations. In May 2001, the Supreme Court of Canada denied the aboriginal right to exemption from duties on trade goods, but was silent on goods meant for personal or collective use. Other cases, like the *Vincent* case, have established that customs duties and taxes apply to large-scale trade with non-aboriginal people.⁸

The statute entitled “Application to American Indians Born in Canada” provides, “Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the U.S., but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.”⁹

The above are legitimate concerns that were discussed in the NPRM and remain worthy of consideration, as the solutions proposed in the NPRM do not address the above issues adequately.

B. The Proposed Rule Creates Disparate Treatment Among Various Groups of Citizens and Noncitizens.

1. Evidence of Lawful Permanent Resident Status

According to the NPRM, the new passport requirements will not apply to Lawful Permanent Residents (“LPRs”) returning from foreign travel within the Western Hemisphere. According to the NPRM, LPRs will continue to be able to enter the U.S. upon presentation of a valid Form I-551 or other valid evidence of lawful permanent residence. We agree that LPRs should not be required to present passports when traveling within the Western Hemisphere and returning to their home in the U.S. Lawful Permanent Resident cards are issued by the U.S.

⁸ This explanation may be found at the website for the Wabanaki Legal News located at <http://www.ptla.org/wabanaki/jaytreaty.htm#Cross%20Border>.

⁹ 8 U.S.C. § 1359.

Department of Homeland Security and meet the security concerns of that agency and address the technological documentation integrity standards enacted by the U.S. government. The NPRM correctly acknowledges that the Lawful Permanent Resident card is a sufficiently secure document issued by the U.S. Government.

2. Border Crossing Cards/Laser Visas

Similar to the Lawful Permanent Resident Card, the Border Crossing Card (“BCC”) or laser visa is a document issued by the U.S. Government. To be issued a laser visa, a citizen of Mexico must present a valid Mexican passport, and must go through biographic and biometric screenings. Unlike the Lawful Permanent Resident Card that is issued to LPRs who reside within the U.S., the BCC is a document that is issued to Mexican Nationals who visit the U.S. for business or pleasure. Although the U.S. Government issues both the LPR card and the BCC, the proposed rule would eliminate the BCC as an acceptable entry document for CBP inspection when used without a passport by Mexican Nationals entering the U.S. This is a curious result because the laser visa was specifically created to replace the former, less secure, BCC. A laser visa card is created post the intake of two digital fingerprints and a digital photo, which are the base biometric processes used in the US VISIT registration process. The laser visa also has an encryption area on the reverse side of the card to allow for the placement of information.

The NPRM states that the BCC is not compatible with the Advance Passenger Information System (“APIS”), but no explanation of the incompatibility is offered. We question why the BCC is not compatible with APIS, when APIS is a biographic system and thus can use the biographic information provided in the Department of State database from the BCC visa application. Further, US VISIT houses both biographic and biometric data, leading us to question why the prints housed in the Department of State laser visa database cannot be shared with the US VISIT system. The U.S. Government already does more complex database integration work in the IAFIS/IDENT integration project.

The laser visa is a vital tool in maintaining economic commerce and strong international relations with Mexico. The U.S. Government also promoted the laser visa replacement of the BCC based on the secure features of the new laser visa, including its biometric capacity. As a result, more than 6 million laser visas have been issued. Under the proposed rule, laser visa holders will be required to have current passports, though Mexican passports have fewer security features and are issued without background checks. The requirement of a Mexican passport in

addition to a laser visa provides no additional security or identity benefits, and basically serves no economic or security interests.

B. Additional Concerns

The NPRM proposes that LPRs need only provide their LPR Cards and not a passport from their country of citizenship or nationality when traveling to the U.S. within the Western Hemisphere. The NPRM requires that U.S. citizens present a U.S. passport when traveling to the U.S. within the Western Hemisphere. LPRs have an additional privilege that U.S. citizens do not possess under the NPRM since U.S. citizens are required to possess passports, whereas LPRs are not required to possess passports. This incongruity in documentation requirements raises concerns of fairness and constitutional equal protection. The NPRM as currently drafted imposes a barrier to U.S. citizens in the exercise of their rights to travel by limiting them to one form of evidence of their nationality: a U.S. passport. It discriminates against U.S. citizens by requiring U.S. citizens to travel within the Western Hemisphere with a passport and in favor of LPRs by permitting them to travel without a passport from their country of citizenship or nationality.

The NPRM is also silent as to how to resolve issues concerning the facilitation of entry into the U.S. of a U.S. citizen, who is not in possession of a U.S. passport or one of the other acceptable documents for entry into the U.S. Under what circumstances will waivers of documentary requirements be applied? Can the U.S. citizen opt to provide alternative documents and voluntarily agree to provide a ten print fingerprint for an IAFIS and IDENT check to create a record for future admissions? Why frequent traveler programs such as the SENTRI program are not acceptable as an alternative means of identification, since such enrollments on the southern border require a ten print fingerprint check and extensive background checks?

The only impediment is the recognition of the PORTPASS card as an admission document. Again, the information should be loaded into US VISIT, if the holder of the card consents, to be treated as such an admission document.

C. Instead of Imposing Restrictive Cross-Border Documentation Requirements, the U.S. Should Pursue Perimeter Security Initiatives With Liberalized Documentation Requirements Within the Perimeter.

The proposed changes do not comport with the liberalized trend for border crossing between adjacent nations. In particular, in the European Union, the trend

is toward the free flow of commerce and people across borders, and not on imposing restrictive document requirements.

In the European Union, the Schengen Agreement provided for the abolition of internal frontiers between the signatory Nations. Convention Applying the Schengen Agreement of June 14, 1985, Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84 (Schengen Agreement). All signatories are expected to maintain efficient controls on external borders, and sanctions are imposed on anyone who aids non-EU nationals in entering an EU country.

The Schengen Agreement started as an inter-governmental agreement principally between the Benelux States (Belgium, Netherlands and Luxembourg) to allow elements of free movement between those states for nationals of those states only. The idea was to have an area of free movement without internal borders. Gradually, the boundaries of Schengen have increased so that today most of the member states on the European continent are members. For example, an EU citizen in France can travel freely to Belgium without showing a passport.

To date, 26 countries have signed the Agreement and 15 have implemented it so far, as follows:

- **June 14, 1985** - Belgium, France, West Germany, Luxembourg, Netherlands
- **November 27, 1990** - Italy
- **June 25, 1992** - Portugal, Spain
- **November 6, 1992** - Greece
- **April 28, 1995** - Austria
- **December 19, 1996** - Denmark, Finland, Iceland, Norway, Sweden
- **May 1, 2004** - Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (not yet implemented)
- **October 16, 2004** - Switzerland (ratified by referendum on June 5, 2005)

The Agreement among member countries of the European Union allows for a common policy and border system. The freedom of movement of people and

trade in Europe has been one of the main goals of the European Union ever since it was established, and the Schengen Agreement is an important step to this goal.

Before Schengen, the border controls around the European Continent permanently disrupted trade and traffic, caused huge delays and immense costs to business and visitors. Today, border checkpoints and controls within the Schengen area have been abolished to a great extent, facilitating trade and travel across the Schengen area.

Within the Schengen area there are no more passport checks, and there is no requirement for citizens of member countries to bear a passport in order to travel, though proof of identity is still needed within the countries. Further, citizens of non-EU or non-EEA countries who wish to visit Europe are simply required to get the common Schengen visa and may then visit any member country as tourists without hindrance. Through this system, the EU nations employ a form of perimeter security.

Instead of imposing restrictive cross-border documentation requirements, the U.S. should pursue perimeter security initiatives. Leaders of Canada, Mexico and the U.S. have discussed a plan to improve continental security and expedite movement across their borders.

The regulatory changes proposed ignore calls for the creation of a common economic and security community by the end of the decade. Key reports have supported the creation of a secure perimeter around the continent, while making it easier for people and goods to move across the shared borders. One report was jointly sponsored by the U.S. Council on Foreign Relations, the Canadian Council of Chief Executives and the Mexican Council on Foreign Relations.¹⁰ Among its chief recommendations are the following:

- **Build a North American economic and security community by 2010.** To enhance security, prosperity, and opportunity for all North Americans, establish a community defined by a common outer security perimeter.

¹⁰ Building a North American Community, Independent Task Force Report No. 53, John P. Manley, Pedro Aspe, and William F. Weld, co-chairs, Council on Foreign Relations Press 2005, c. 175pp.

- **Develop a border pass for North Americans.** Develop a border pass, with biometric indicators, which would allow expedited passage through customs, immigration, and airport security throughout North America.

The proposed regulatory changes fail to provide for expedited passage into the U.S., and do not enhance security, prosperity, or opportunity for citizens of the U.S. Instead, the changes would exude an image of Fortress America. The consequence could be to divert trade and development to the more liberalized European Union.

Conclusion

For the foregoing reasons, we believe the proposed regulation is premature as a matter of policy and practice. At a minimum, implementation should wait for the adoption of clear procedures taking into account the issues addressed in this comment and after careful consultation with stakeholders on its implications

Sincerely,

AMERICAN IMMIGRATION
LAWYERS ASSOCIATION