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## **DEPARTMENT OF STATE**

22 CFR Part 41

RIN: 1400-AD30

[Public Notice: 9458]

### **Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended**

**AGENCY:** Department of State.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of State proposes to reinstate a temporarily suspended amendment to its visa regulations to clarify procedures for waiver of documentary requirements due to an unforeseen emergency for nonimmigrants seeking admission to the United States.

**DATES:** Comments must be received on or before [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]

**ADDRESSES:** Internet: You may view this proposed rule and submit your comments by visiting the Regulations.gov website at [www.regulations.gov](http://www.regulations.gov), and searching for docket number DOS-2016-0010.

**FOR FURTHER INFORMATION CONTACT:** Lauren A. Boquin, Legislation and Regulations Division, Legal Affairs, Office of Visa Services, Bureau of Consular Affairs, Department of State, 600 19<sup>th</sup> St NW, Washington, D.C. 20006 (202) 485-7638.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

This rulemaking proposes to reinstate a 1999 regulatory amendment that was invalidated by court order in *United Airlines, Inc. v. Brien*, 588 F.3d 158 (2d Cir. 2009).

Pursuant to Section 212(a)(7)(B)(i) of the Immigration and Nationality Act (INA), a nonimmigrant is inadmissible to the United States if he or she does not present an unexpired passport and valid visa at the time of application for admission. 8 U.S.C. 1182(a)(7)(B)(i). Either or both of these requirements may be waived by the Secretary of Homeland Security and the Secretary of State, acting jointly, in specified situations, as provided in INA section 212(d)(4) (8 U.S.C. 1182(d)(4)). One circumstance in which this requirement may be waived is when a nonimmigrant is unable to present a valid visa or unexpired passport due to an unforeseen emergency. In accordance with INA section 212(d)(4) (8 U.S.C. 1182(d)(4)), the Department of State and the Department of Homeland Security have consulted and are acting jointly to propose amendments to 8 CFR 212.1 and 22 CFR 41.2.

### **Former Regulations**

The Department of State and the former Immigration and Naturalization Service (INS) published parallel regulations in 1994 to consolidate and simplify procedures for processing waivers of documentary requirements in cases of emergency circumstances. INS amended its regulation in 1996, preserving its authority to impose fines on carriers for transporting nonimmigrants who did not present a valid visa and passport, even in cases where the INS granted a waiver. In 1999, the Department of State published a regulation to accompany the INS amendment, also allowing the INS to fine carriers who transported individuals who later received waivers of the visa and passport requirement. In a 2009 decision, the U.S. Court of Appeals for the Second Circuit found the 1999 State

Department amendment invalid as it lacked joint action and was not promulgated with a period for public notice and comment. Accordingly, the Department of State and DHS have consulted and are acting jointly to propose reinstating the amendments.

Because of the court's ruling, the 1994 rule is in effect until the Department of State issues a final rule. The 1994 version of the text, which is available to the public through the Government Printing Office, stipulated that in cases of unforeseen emergencies, a visa and passport are not required of an alien if, either prior to the alien's embarkation abroad or upon arrival at a port of entry, the responsible district director of the Immigration and Naturalization Service in charge of the port of entry concludes that the alien is unable to present the required documents because of an unforeseen emergency. The 1994 rule also stipulated that any waiver of the visa or passport requirement may be granted by the INS district director pursuant to INA 212(d)(4)(A) without the prior concurrence of the Department of State in each case in which the district director concludes that the alien's claim of emergency circumstances is legitimate and bona fide and that approval of the waiver would be appropriate under all of the attendant facts and circumstances.

The Department of Homeland Security is proposing a parallel Notice of Proposed Rulemaking to amend 8 CFR 212.1(g), published in today's *Federal Register*.

## **Regulatory Findings**

### **A. Administrative Procedure Act**

The Department is publishing this notice of proposed rulemaking with a 60-day period of notice and comment.

### **B. Regulatory Flexibility Act/Executive Order 13272: Small Business**

The Department of State has reviewed this regulation and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

**C. The Unfunded Mandates Reform Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of \$100 million or more by State, local, or tribal governments, or by the private sector. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

**D. The Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996. 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 adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and import markets.

**E. Executive Order 12866**

The Department of State does not assess or collect fines under INA section 273. Neither this proposed Department of State rule, nor prior versions of this regulation, address fines against carriers. However, the November 20, 2009, opinion from the United States Circuit Court of Appeals for the Second Circuit requires joint rulemaking by the Department of State and DHS for the DHS rule to take effect. *United Airlines, Inc. v. Brien*, 588 F.3d 158, 179 (2d Cir. 2009). For a full economic analysis of the jointly proposed DHS rule, including Regulatory Flexibility and Regulatory Impact Analyses,

see the U.S. Customs and Border Protection Notice of Proposed Rulemaking for 8 CFR 212.1(g), RIN 1651-AA97.

**F. Executive Order 13563**

The Department of State has considered this rule in light of Executive Order 13563 and affirms that this regulation is consistent with the guidance therein.

**G. Executive Orders 12372 and 13132: Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

**H. Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments**

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 section 5 of Executive Order 13175 do not apply to this rulemaking.

**I. Paperwork Reduction Act**

This rule does not impose or revise information collections subject to the provisions of the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

**List of Subjects in 22 CFR Part 41**

**Aliens, Foreign officials, Immigration, Passports and Visas, Students**

Accordingly, for the reasons set forth in the preamble, the State Department proposes to amend 22 CFR Part 41 as follows:

**PART 41 VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED**

1. The authority citation for part 41 is revised to read as follows:

Authority: 22 U.S.C. 2651a; 8 U.S.C. 1104; Pub. L. 105-277, 112 Stat. 2681-795 through 2681-801; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458, as amended by section 546 of Pub. L. 109-295).

2. Section 41.2 is amended by revising paragraph (i) to read as follows:

**§ 41.2 Exemption or Waiver by Secretary of State and Secretary of Homeland Security of passport and/or visa requirements for certain categories of nonimmigrants.**

\* \* \* \* \*

(i) Individual cases of unforeseen emergencies. Except as provided in paragraphs (a) through (h) and (j) through (l) of this section, all nonimmigrants are required to present a valid, unexpired visa and passport upon arrival in the United States. A nonimmigrant may apply for a waiver of the visa and passport requirement if, either prior to the nonimmigrant's embarkation abroad or upon arrival at a port of entry, the officer in charge of the port of entry concludes that the nonimmigrant is unable to present the required documents because of an unforeseen emergency. The DHS district director may grant a waiver of the visa or passport requirement pursuant to INA 212(d)(4)(A), without the prior concurrence of the Department of State, if the DHS district director concludes that the a nonimmigrant's claim of emergency circumstances is legitimate and that

approval of the waiver would be appropriate under all of the attendant facts and circumstances.

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\_Dated: February 24, 2016.

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David T. Donahue,  
Acting Assistant Secretary for Consular  
Affairs, Department of State.

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