



**4710-06**

**DEPARTMENT OF STATE**

**22 CFR Part 41**

**[Public Notice 9580]**

**RIN 1400-AD30**

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

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This final rule clarifies procedures for waiver of documentary requirements due to an unforeseen emergency for nonimmigrants seeking admission to the United States.

**DATES:** This rule is effective on [insert date 30 days from publication in the *Federal Register*].

**FOR FURTHER INFORMATION CONTACT:** Megan B. Herndon, 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) 485-7440.

**SUPPLEMENTARY INFORMATION:**

**Background**

This rulemaking finalizes procedures in 22 CFR 41.2, regarding waiver of documentary requirements, due to an unforeseen emergency, for nonimmigrants seeking admission to the United States. The notice of proposed rulemaking (NPRM) was

published on March 8, 2016, with a 60-day public comment period. 81 FR 12050.

Responses to the comments are summarized below.

This rulemaking substantially reinstates a 1999 Department of State regulatory amendment that was invalidated by court order in United Airlines, Inc. v. Brien, 588 F.3d 158 (2d Cir. 2009). Additional background is contained in the Department of State NPRM. 81 FR at 12050. Further background is in the parallel NPRM from the Department of Homeland Security (DHS). 81 FR 12032. The Department is acting jointly with DHS in issuing these final rules.

#### Public Comments

The Department of State received six public comments on this rule. One was supportive. Three were criticisms of U.S. immigration policy, and thus outside the scope of this rulemaking.

One commenter requested that the Department provide a "detailed comparison of the rule that was rejected by the Court of Appeals." The 1994 rule that was reinstated by the Court of Appeals provided that a visa and passport are not required if, prior to the alien's embarkation abroad or upon arrival at a port of entry, the INS concludes that the alien is unable to present the required documents because of an unforeseen emergency. The 1999 rule removed that text and provided that, except in cases cited in other subsections of §41.2, all nonimmigrants are required to present a valid, unexpired visa and passport upon arrival in the United States. The 1999 rule allowed aliens to apply for a waiver of these requirements (i.e., the requirements were waived, but not removed) if, prior to embarkation or upon arrival at a port of entry, the INS determined they were unable to present the required documents because of an unforeseen emergency. The former (1994)

rule did not adequately implement section 273 of the Immigration and Nationality Act (INA), 8 U.S.C. 1323, which authorized the legacy INS to fine carriers that transported nonimmigrants without the appropriate documentation. The 1999 rule corrected this, and provided support for DHS to impose fines. This rule substantially reinstates the 1999 rule, which was invalidated by the Court of Appeals only on procedural grounds relating to the way the 1994 rule was amended.

The commenter also requested an explanation of the term, "officer in charge of the port of entry." The term "officer in charge of the port of entry" refers to a U.S. Customs and Border Protection (CBP) district director. Individuals seeking admission into the United States are inspected at ports of entry by CBP officers who determine their admissibility. The CBP officer is responsible for reviewing travel documents, visas, and other credentials. The rule has been amended to refer to the CBP district director instead of the officer in charge or the DHS district director.

Another commenter stated that it was unclear why this rule punishes carriers for transporting individuals without proper documentation, some of whom will be admitted legally into the United States. This rule is an implementation of section 273 of the INA, 8 U.S.C. 1323, which provides for penalties against carriers that transport an individual without proper documentation. Under the statute, a penalty may be remitted or refunded if the Secretary of Homeland Security is satisfied that, *prior to the departure of the vessel or aircraft from the last port outside the United States*, the carrier did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a valid passport or visa was required. See 8 U.S.C.

1323(c). Accordingly, the eventual admission of the individual to the United States does not preclude the imposition of the fine.

### Summary

After consideration of the public comments, the Department of State is clarifying the title of the responsible CBP official but otherwise adopts the proposed rule as final. DHS is finalizing its parallel rule in today's *Federal Register*.

### **Regulatory Findings**

#### **A. Administrative Procedure Act (APA)**

The Department of State published this rule as an NPRM on March 8, 2016, and provided 60 days for public comment. 81 FR 12050. The rule will be effective 30 days after publication, in accordance with the APA.

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

The Department of State has reviewed this rulemaking 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 Orders 12866 and 13771**

The Department of State does not assess or collect fines under INA section 273. Neither this 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, see the parallel DHS final rule for 8 CFR 212.1(g), RIN 1651-AA97, published in this issue of the *Federal Register*. The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs.” See OMB Memorandum M-17-21, “Guidance Implementing Executive Order 13771” of April 5, 2017.

#### **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 12372 and 13132.

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

The Department of State 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, 22 CFR part 41 is amended 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; 8 U.S.C. 1323; 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 Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) district director concludes that the nonimmigrant is unable to present the required documents because of an unforeseen emergency. The CBP 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 CBP district director concludes that the 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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