



## DEPARTMENT OF STATE

### 22 CFR Part 41

**Public Notice:** 10642

**RIN** 1400-AE21

### **Visas: Eligibility for Diplomatic and Official Visas**

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** This rule is promulgated for two reasons: to revise the definition of “equivalent of a diplomatic passport” to include non-national passports issued by a competent authority other than a foreign government and as designated by the Secretary of State; and to clarify the categories of nonimmigrants who may be eligible for a “diplomatic type” or “official type” visa, irrespective of the nonimmigrant visa classification. These technical revisions provide greater clarity and consistency with existing U.S. law and practices regarding the entities that the United States considers eligible to issue travel documents and the individuals who may qualify for “diplomatic type” or “official type” visas, irrespective of the nonimmigrant visa classification.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Megan Herndon, Senior Regulatory Coordinator, Office of Visa Services, Bureau of Consular Affairs, 600 19th Street NW., Washington, DC 20522, 202-485-8910, [VisaRegs@state.gov](mailto:VisaRegs@state.gov).

### **SUPPLEMENTARY INFORMATION:**

#### *Equivalent of a Diplomatic Passport*

This rule revises the definition of “equivalent of a diplomatic passport” at 22 CFR 41.26(a)(3) to include a travel document issued by a competent authority that does not

issue diplomatic passports, and is designated by the Secretary as the equivalent of a diplomatic passport.

Section 101(a)(30) of the Immigration and Nationality Act (“INA”), 8 U.S.C. 1101(a)(30), defines a passport as “any travel document issued by [a] competent authority showing the bearer’s origin, identity, and nationality if any, which is valid for the admission of the bearer into a foreign country.” The Department of State (“Department”) has clarified its interpretation of this definition in regulations at 22 CFR 41.104(a), specifying that a passport is not limited to a national passport or to any single document.

The Department also defines what it considers to be the “equivalent of a diplomatic passport” in 22 CFR 41.26(a)(3). This definition was previously limited to a national passport issued by a competent authority of a foreign government, which generally does not issue diplomatic passports to its career diplomatic and consular officers. This definition, however, did not account for other travel documents that the Department encounters, including those issued by a competent authority other than a foreign government to indicate the holder’s status as an official or officer of the issuing entity. For example, an officer of the United Nations (“UN”) might present a UN Laissez-Passer, which meets the legal definition of a passport under INA section 101(a)(30), 8 U.S.C. 1101(a)(30), since UN member states will generally admit individuals bearing the Laissez-Passer. Under this rule, the Secretary can designate travel documents issued by a competent authority other than that of a foreign government as the equivalent of a diplomatic passport, when appropriate.

*Categories of Individuals Who May Qualify for a “Diplomatic Type” or “Official Type” Visa, Irrespective of Visa Classification*

The Department is also revising its regulations on “diplomatic type” and “official type” visas at 22 CFR 41.26 and 41.27, respectively, to ensure consistency with U.S. laws

and policies that have taken effect since the last substantive revisions in 1959.

### *Visa Classification versus Visa Type*

Visa classification is not the same as visa type. Section 101(a)(15) of the INA, 8 U.S.C. 1101(a)(15), defines classes of nonimmigrants based upon the purpose of travel. Implementing regulations at 22 CFR 41.12 assign classification symbols to these nonimmigrants to correspond to the INA 101(a)(15) subsection classification. The visa classification symbol is recorded in each nonimmigrant's visa record and printed on the front of every issued nonimmigrant visa as "Visa Class." For example, a visa issued to a nonimmigrant who is classifiable under INA section 101(a)(15)(A)(i), 8 U.S.C. 1101(a)(15)(A)(i), is assigned the visa classification symbol "A1."

The Department issues three "types" of nonimmigrant visas: diplomatic, official, and regular. The visa type is recorded in each nonimmigrant's visa record and printed on the front of every issued nonimmigrant visa as "Visa Type." Section 101(a)(11) of the INA, 8 U.S.C. 1101(a)(11), defines "diplomatic visa" as a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe. Implementing regulations at 22 CFR 41.26(c) clarify that a nonimmigrant is eligible to receive a "diplomatic visa," irrespective of visa classification, if he or she is otherwise qualified and possesses a diplomatic passport, or its equivalent, and falls within the categories listed in 22 CFR 41.26(c). The INA does not define "official visa" but the term is referenced at INA section 222(h)(1)(A)(iv), 8 U.S.C. 1202(h)(1)(A)(iv), along with diplomatic visas. Implementing regulations at 22 CFR 41.27(c) clarify that a nonimmigrant is eligible to receive an "official visa," irrespective of visa classification, if he or she is otherwise qualified and falls within the categories listed in 22 CFR 41.27(c). A "regular visa" is defined in 22 CFR 41.101(e) as a nonimmigrant visa of any classification which does not bear the title "Diplomatic" or "Official" and clarifies that a nonimmigrant visa is issued as a regular visa, unless the

alien falls within one of the classes entitled to a diplomatic or official visa. The appropriate visa type – diplomatic, official, or regular – is recorded in each nonimmigrant’s visa record and designated on the front of every issued nonimmigrant visa as “Visa Type” with a “D,” “O,” or “R” symbol, respectively.

As described above, the terms “diplomatic visa” and “official visa” are used in the INA and in Department regulations to refer to visa type, not visa classification. *See* INA 101(a)(11), 8 U.S.C. 1101(a)(11); *see also* 22 CFR 41.26-27. Thus, for instance, a nonimmigrant classifiable under INA 101(a)(15)(B) who has a diplomatic passport and falls within one of the categories specified in 22 CFR 41.26(c)(1) may be issued a diplomatic type B1/B2 visa if found eligible for the B1/B2 visa classification. However, the public often uses and understands the terms “diplomatic visa” and “official visa” to refer to visa classification, in particular the A1, A2, C3, G1, G2, G3, G4, NATO1, NATO2, NATO3, NATO4, NATO5, and NATO6 visa classifications. To avoid confusion, this rule uses the terms “diplomatic type,” “official type,” and “regular type” to clarify when a reference is to visa type and not to visa classification.

*Changes to Categories of Individuals Who May Qualify for a “Diplomatic Type” or “Official Type” Visa, Irrespective of Visa Classification*

Specifically, this rule will update terminology in 22 CFR 41.26(c)(1)(xii) from “officers of a diplomatic mission of a temporary character” to “officers of a foreign government.” The rule will also update the terminology in 22 CFR 41.27(c)(1)(ix), 41.27(c)(1)(x), and 41.27(c)(1)(xi) from “clerical and custodial employees” to “administrative, service, and similar employees” and update the terminology referring to “diplomatic mission” to “foreign-government delegation.” These updates reflect more consistent application of similar terminology used within the Department for government officials and employees traveling to the United States for official duties.

The rule also replaces 22 CFR 41.27(c)(1)(xiii), which previously provided that

attendants, servants, and personal employees of foreign government officials and staff of international organizations (i.e., nonimmigrants classifiable A3 and G5) were eligible to receive official type visas. Removing this category ensures that such applicants will be interviewed when applying for A3 or G5 nonimmigrant visas, a change consistent with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. 1375c(b)(1)(B). That law mandates visa interviews for these applicants, whereas 22 CFR 41.102(b)(2) otherwise permits waivers of the interview requirement for applicants for an official type visa. Such attendants, servants, and personal employees will continue to be classifiable as A3 or G5.

This rule also corrects previous errors in a number of other provisions in 22 CFR 41.26 and 41.27. Section 41.26(c)(2)(vi)(A) is updated to correct a typographical error. Sections 41.26(c)(1)(xiv), 41.26(c)(2)(xiii), and 41.27(c)(1)(xiii), the categories for immediate family, are updated to correct numbering of the subsections and to ensure consistency in language used to describe these categories. Section 41.27(c)(1)(i) is updated to correct an error in the referenced category of individuals to whom this section applies. Sections 41.27(c)(1)(ii) and (iii) are updated to clarify that these categories only cover aliens classifiable under INA sections 101(a)(15)(A)(i); 101(a)(15)(A)(ii); 101(a)(15)(G)(i); 101(a)(15)(G)(ii); 101(a)(15)(G)(iv); 8 U.S.C. 1101(a)(15)(A)(i); 1101(a)(15)(A)(ii); 1101(a)(15)(G)(i); 1101(a)(15)(G)(ii); 1101(a)(15)(G)(iv), and not to aliens classifiable under INA section 101(a)(15)(A)(iii) or INA section 101(a)(15)(G)(v); 8 U.S.C. 1101(a)(15)(A)(iii) or 8 U.S.C. 1101(a)(15)(G)(v). Aliens classifiable under INA section 101(a)(15)(G)(iii), 8 U.S.C. 1101(a)(15)(G)(iii), are covered in a new 22 CFR 41.27(c)(1)(iv). Because of the addition of a new 22 CFR 41.27(c)(1)(iv), the numbering for subsections following 22 CFR 41.27(c)(1)(iv) is updated.

Section 41.26(c) is also updated to include the requirement of presenting a diplomatic passport or its equivalent for all subsections of 22 CFR 41.26(c), consistent

with 22 CFR 41.104(d), which requires that every applicant for a diplomatic type visa present a diplomatic passport or the equivalent thereof.

### **Regulatory Findings:**

#### *Administrative Procedure Act*

This rule is exempt from notice and comment under the foreign affairs exception of the Administrative Procedure Act (“APA”), 5 U.S.C. 553(a)(1). As the federal agency responsible for carrying out U.S. foreign policy, the Department has exclusive authority to determine when an applicant can be issued a diplomatic type or official type visa. As discussed above, INA section 101(a)(11) defines a “diplomatic visa” as “a nonimmigrant visa bearing that title and issued to a nonimmigrant in accordance with such regulations as the Secretary of State may prescribe.” 8 U.S.C. 1101(a)(11). The Department exercises its statutory discretion when issuing diplomatic type visas. Issuance of diplomatic type visas is limited to a narrow category of individuals holding certain positions within a foreign government, such as heads of states, cabinet ministers, ambassadors and public ministers. Further, the Department exercises its statutory discretion when issuing official type visas. For example, aliens who are not eligible to receive a diplomatic type visa and are classifiable under INA 101(a)(15)(A), 8 U.S.C. 1101(a)(15)(A), are eligible to receive official type visas. Aliens classifiable under INA 101(a)(15)(A), 8 U.S.C. 1101(a)(15)(A), must be “accepted” by the Secretary of State. 8 U.S.C. 1101(a)(15)(A)(i) and (ii). Thus, the Secretary’s discretion in promulgating regulations as they relate to issuing diplomatic type and official type visas “involve[s]...a foreign affairs function of the United States.” 5 U.S.C. 553(a)(1). In *Raoof v. Sullivan*, the court found that the Department properly exercised the foreign affairs exception under the APA when it “did not engage in formal rule-making” for the J-1 nonimmigrant visa two-year foreign residence requirement because the “the exchange visitor program—

with its statutory mandate for international interaction through nonimmigrants—certainly relates to foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department.” 315 F.Supp.3d 34, 44 (D.D.C. 2018). This rule, which codifies Department policy regarding which aliens are treated as diplomats in the issuance of a visa, directly relates to the Department’s authority to carry out diplomatic duties and inherently involves the Secretary of State’s foreign affairs functions.

This rule clearly and directly impacts foreign affairs functions of the United States and “implicat[es] matters of diplomacy directly.” *City of N.Y. v. Permanent Mission of India to the U.N.*, 618 F.3d 172, 201 (2d Cir. 2010). The foreign-affairs exception covers this final rule, as it is “linked intimately with the Government’s overall political agenda concerning relations with another country.” *Am. Ass’n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985). Opening this process to public comment would most directly affect a particular group of individuals, foreign government officials and officers of international organizations, who were eligible for diplomatic type or official type visas under the prior rule and who may still qualify for diplomatic type or official type visas, regardless of their purpose of travel or visa classification. Eligibility for such visa types, which is the subject of this rule, may determine whether the applicant is required to go to a U.S. Embassy or Consulate for a visa interview, and potentially be eligible for certain courtesies at the port of entry to the United States. The rule discusses standards to be applied by consular officers, which will determine the type of visa (but not the visa classification) the visa applicant will receive. Because the above-referenced stakes are very significant to individuals who already receive any courtesies attached to the visa type, public comment on eligibility to receive a diplomatic type or official type visa would provoke immediate and strident response from the diplomatic community, in particular certain high ranking foreign government officials that may be important to the United States’ ability to achieve bilateral objectives.

Accordingly, this situation is comparable to the situation in *Am. Ass'n of Exps. & Imps.—Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (ruling that stricter import restrictions would provoke immediate response from foreign manufacturers). Therefore, this regulation is exempt from 5 U.S.C. 553 because it involves a foreign affairs function of the United States.

*Regulatory Flexibility Act/Executive Order 13272: Small Business*

Because this final rule is exempt from notice and comment rulemaking under 5 U.S.C. 553, it is exempt from the regulatory flexibility analysis requirements set forth by the Regulatory Flexibility Act (5 U.S.C. 603 and 604). Nonetheless, consistent with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act, as amended, is not required.

*Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995, 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.

*Congressional Review Act*

This rule is not a major rule as defined in 5 U.S.C. 804. The Department is aware of no monetary effect on the economy that would directly result from this rulemaking, nor will there be any 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.

*Executive Orders 12866 and 13563*



Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). This rule will not affect the economy by \$100 million or more annually. These Executive Orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has examined this rule in light of Executive Order 13563, and has determined that the rulemaking is consistent with the guidance therein. The Department has reviewed this rulemaking to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866. The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant rulemaking under Executive Order 12866 and, consequently, reviewed this rulemaking.

The Department notes that this regulatory change only impacts the visa type (regular, diplomatic or official); it does not affect visa classification which is based on purpose of travel. Domestic workers of foreign government officials and international organization officers (aliens classifiable A-3 or G-5) are the only category of individuals being removed from the categories of individuals eligible for official type visas under this regulation. Such individuals do not typically have a diplomatic or official passport; they travel on regular passports. Although qualification for an official type visa may provide some courtesies such as exemption from visa fees, such courtesies are already attached to the A3 and G5 domestic worker visa classifications, so they are not losing a benefit. Moreover, even though official type visa applicants applying with an official passport may have their interview waived, the Trafficking Victims Protections Reauthorization Act of 2003 (TVPRA), Pub. L. 108-193, requires an interview for all A3 and G5 nonimmigrants so such courtesy may not be extended to an A3 or G5 nonimmigrant.

*Executive Orders 12372 and 13132: Federalism*

This regulation will not have substantial direct effect 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. The rule will not have federalism implications warranting the application of Executive Orders 12372 and 13132.

*Executive Order 12988: Civil Justice Reform*

The Department has reviewed the rule in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

*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.

*Executive Order 13771*

This rule is not subject to the requirements of Executive Order 13771, because its likely impact is de minimis.

*Paperwork Reduction Act*

This rule does not impose any new reporting or record-keeping requirements subject to 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

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**

The authority citation for part 41 continues 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. Amend § 41.26 by:

a. Revising paragraphs (a)(3), (c) introductory text, (c)(1) introductory text, and (c)(1)(xii) and (xiv);

b. Removing the period at the end of paragraph (c)(1)(xvi) and adding “; or” in its place; and

c. Revising paragraphs (c)(2) introductory text, (c)(2)(vi)(A), and (c)(2)(xiii).

The revisions read as follows:

**§ 41.26 Diplomatic visas.**

(a) \* \* \*.

(3) *Equivalent of a diplomatic passport* means a passport that:

(i) Is issued by a competent authority that does not issue diplomatic passports and

(ii) Has been designated by the Secretary as the equivalent of a diplomatic passport.

\* \* \* \* \*

(c) *Classes of aliens eligible to receive diplomatic visas.* A nonimmigrant alien who presents a diplomatic passport or its equivalent shall, if otherwise qualified, be eligible to receive a diplomatic visa if:

(1) The nonimmigrant alien is within one of the following categories, irrespective of the classification of the visa under § 41.12:

\* \* \* \* \*

(xii) Officers of a foreign government proceeding to the United States on a temporary basis or through the United States in the performance of their official duties;

\* \* \* \* \*

(xiv) Members of the immediate family of a principal alien who is within one of the classes described in paragraphs (c)(1)(i) through (xi) of this section;

\* \* \* \* \*

(2) The alien is classifiable as a G-4 and is accompanying any of these officers:

(vi) \* \* \*

(A) United Nations Children's Fund;

\* \* \* \* \*

(xiii) Members of the immediate family accompanying or following to join any principal nonimmigrant alien listed in paragraphs (c)(2)(i) through (xii) of this section.

\* \* \* \* \*

3. Amend § 41.27 by revising paragraphs (c)(1)(i) through (xiii) to read as follows:

**§41.27 Official visas.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Aliens within a category described in § 41.26(c)(1) who are ineligible to receive a diplomatic visa because they are not in possession of a diplomatic passport or its equivalent;

(ii) Aliens classifiable under INA section 101(a)(15)(A)(i) or (ii), 8 U.S.C. 1101(a)(15)(A)(i) or (ii);

(iii) Aliens who are classifiable under INA section 101(a)(15)(G)(i), (ii), or (iv), 8 U.S.C. 1101(a)(15)(G)(i), (ii), or (iv);

(iv) Aliens who are classifiable under INA section 101(a)(15)(G)(iii), 8 U.S.C. 1101(a)(15)(G)(iii), as representatives of a foreign government traveling to an

international organization so designated by Executive Order, where such foreign government is not a member of the international organization;

(v) Aliens classifiable under INA section 101(a)(15)(C), 8 U.S.C. 1101(a)(15)(C), as nonimmigrants described in INA section 212(d)(8), 8 U.S.C. 1182(d)(8);

(vi) Members and members-elect of national legislative bodies;

(vii) Justices of the lesser national and the highest state courts of a foreign country;

(viii) Officers and employees of national legislative bodies proceeding to or through the United States in the performance of their official duties;

(ix) Administrative, service, and similar employees attached to foreign-government delegations to, and employees of, international bodies of an official nature, other than international organizations so designated by Executive Order, proceeding to or through the United States in the performance of their official duties;

(x) Administrative, service, and similar employees of a foreign government proceeding to the United States on temporary duty or through the United States on a temporary basis in the performance of their official duties;

(xi) Administrative, service, and similar employees attached to foreign-government delegations proceeding to or from a specific international conference of an official nature;

(xii) Officers and employees of foreign governments recognized *de jure* by the United States who are stationed in foreign contiguous territories or adjacent islands;

(xiii) Members of the immediate family when accompanying or following to join a principal alien who is within one of the classes referred to or described in paragraphs (c)(1)(i) through (xii) of this section;

\* \* \* \* \*

**Zachary Parker**

*Director,*

*Office of Directives Management,*

*Department of State.*

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