

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF HOMELAND SECURITY

### Bureau of Customs and Border Protection

#### 8 CFR Chapter I

[DHS 2005-0023]

RIN 1651-AA66

## DEPARTMENT OF STATE

#### 22 CFR Chapter I

RIN 1400-AC10

### Documents Required for Travel Within the Western Hemisphere

**AGENCY:** Bureau of Customs and Border Protection, Department of Homeland Security, Bureau of Consular Affairs, Department of State.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** Under the Immigration and Nationality Act (INA), nonimmigrant aliens and United States citizens are generally required to present passports to enter the United States. The Secretary of Homeland Security and the Secretary of State have the joint authority to waive this requirement for nonimmigrant aliens under certain circumstances and the Secretary of State has the authority to make exceptions to the requirement for United States citizens. In accordance with those authorities, current regulations permit United States citizens and nonimmigrant aliens from Canada, Bermuda and Mexico to enter the United States from certain Western Hemisphere countries without presenting a passport.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Section 7209 of this statute limits the Secretaries' discretion to waive or to make exceptions to the passport requirements under the INA and expressly provides that, by January 1, 2008, United States citizens and nonimmigrant aliens may enter the

United States only with passports or such alternatives as the Secretary of Homeland Security may designate as satisfactorily establishing identity and citizenship. In the future, as a result of the implementation of the new statute, travel to the United States by United States citizens and others from the Western Hemisphere will require a passport or acceptable alternative documents in circumstances where travel was previously permitted without such documents.

Section 7209 directs that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan relating to the new requirements "as expeditiously as possible." The statute provides that this plan shall be implemented no later than January 1, 2008. The Secretary of Homeland Security, in consultation with the Secretary of State, will be deciding how to implement the new law. This Advance Notice of Proposed Rulemaking announces the rulemakings that are expected to implement the new law, invites comments on the possible means of implementation and specifically invites comments on the documents other than passports that should be accepted under section 7209 as sufficient to establish citizenship and identity.

**DATES:** Written comments must be submitted on or before October 31, 2005.

**ADDRESSES:** Comments, identified by docket number or RIN number, may be submitted by one of the following methods:

- EPA Federal Partner EDOCKET Web Site: <http://www.epa.gov/feddoCKET>. Follow instructions for submitting comments on the Web site.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Comments by mail are to be addressed to the Bureau of Customs and Border Protection, Office of Regulations and Rulings, Regulations Branch, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. Submitted comments by mail may be inspected at the Bureau of Customs and Border Protection at 799 9th Street, NW., Washington, DC. To inspect comments, please call (202) 572-8768 to arrange for an appointment.

*Instructions:* All submissions must include the agency name and docket

number or Regulatory Information Number (RIN) for this rulemaking. All comments will be posted without change to <http://www.epa.gov/feddoCKET>, including any personal information sent with each comment. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation in Rulemaking Process" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** For access to the docket to read background documents or submitted comments, go to <http://www.epa.gov/feddoCKET>. You may also access the Federal eRulemaking Portal at <http://www.regulations.gov>. Submitted comments may also be inspected at the Bureau of Customs and Border Protection at 799 9th Street, NW., Washington, DC. To inspect comments, please call (202) 572-8768 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Department of Homeland Security: Theresa Brown, Office of Policy and Planning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 4.4-D, Washington, DC 20229, telephone number (202) 344-3022.

Department of State: Sharon Palmer-Royston, Office of Passport Policy, Planning and Advisory Services, Bureau of Consular Affairs, telephone number (202) 663-2662.

### SUPPLEMENTARY INFORMATION:

#### Abbreviations and Terms Used in This Document

ANPRM—Advance Notice of Proposed Rulemaking  
 BCC—Form DSP-150, B-1/B-2 Visa and Border Crossing Card  
 CBP—Bureau of Customs and Border Protection  
 DHS—Department of Homeland Security  
 DOS—Department of State  
 FAST—Free and Secure Trade  
 INA—Immigration and Nationality Act  
 IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004  
 LPR—Lawful Permanent Resident  
 SENTRI—Secure Electronic Network for Travelers Rapid Inspection

### Background

#### *Enactment of Intelligence Reform and Terrorism Prevention Act of 2004*

The President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108-458, 118 Stat. 3638, on December 17, 2004. The

statute obligates the Secretary of Homeland Security to develop and implement a plan to require United States citizens and nationals of certain Western Hemisphere countries to present a passport or other identity and citizenship documents when entering the United States from countries in the Western Hemisphere.<sup>1</sup> As a result of the enactment of section 7209 of IRTPA, the Secretary of Homeland Security, in consultation with the Secretary of State, must develop and implement the plan by January 1, 2008.

#### *Current Entry Requirements for United States Citizens*

In general, under federal law it is "unlawful for any citizen of the United States to depart from or enter \* \* \* the United States unless he bears a valid United States passport."<sup>2</sup> However, United States citizens now are exempt from the statutory passport requirement when coming from the Western Hemisphere other than from Cuba.<sup>3</sup> Currently, a United States citizen entering the United States from the Western Hemisphere, other than from Cuba, is inspected at the border by a Bureau of Customs and Border Protection (CBP) officer. To lawfully enter the United States, the arriving individual need only satisfy the CBP officer of his or her United States citizenship. In addition to examining whatever documentation the individual submits, the CBP officer may ask for additional identification and proof of citizenship until such time as the CBP officer is satisfied that the entering individual is a United States citizen.

As a result of this procedure, United States citizens arriving from within the Western Hemisphere now may provide other documents in lieu of a passport to satisfy a CBP officer. A driver's license issued by a state motor vehicle administration or other competent state government authority is the most common form of identity document now accepted at the border. The citizenship documents now accepted at the border include birth certificates issued by a United States jurisdiction, Certificates of Naturalization, and Certificates of Citizenship.

<sup>1</sup> Section 7209 does not apply to Lawful Permanent Residents (LPR), who will continue to be able to enter the United States upon presentation of a valid Form I-551, Alien Registration Card, or other valid evidence of permanent resident status. Section 211(b) of the INA, 8 U.S.C. 1181(b). It also does not apply to military personnel traveling under orders. Section 284 of INA, 8 U.S.C. 1354.

<sup>2</sup> See section 215(b) of the INA, 8 U.S.C. 1185(b).

<sup>3</sup> See 22 CFR 53.2(b), which waived the passport requirement pursuant to section 215(b) of the INA, 8 U.S.C. 1185(b).

#### *Current Entry Requirements for Nonimmigrant Aliens*

Currently, each nonimmigrant alien arriving in the United States must present to the CBP officer at the border a valid unexpired passport issued by his or her country of citizenship and a valid unexpired visa issued by a United States embassy or consulate abroad.<sup>4</sup> The only current general exception to the passport requirement applies to the admission of (1) nationals of Canada and Bermuda arriving from anywhere in the Western Hemisphere other than Cuba and (2) Mexican nationals with a Border Crossing Card (BCC) arriving from contiguous territory.

#### *Canadian Citizens and Citizens of the British Overseas Territory of Bermuda*

When entering the United States as nonimmigrant visitors from countries in the Western Hemisphere other than Cuba, Canadian citizens and citizens of the British Overseas Territory of Bermuda need not present a valid passport and visa.<sup>5</sup> They currently are required, however, to satisfy the inspecting CBP officer of their identity and citizenship at the time of application for admission. The entering alien may present any proof of citizenship in his or her possession. An individual who initially fails to satisfy the examining CBP officer that he or she is a Canadian citizen or citizen of the British Overseas Territory of Bermuda may then be required by CBP to provide further identification and proof of citizenship such as a birth certificate, passport, or citizenship card.

#### *Mexican Citizens*

Mexican citizens traveling to the United States for pleasure or for business who are in possession of a Form DSP-150, B-1/B-2 Visa and Border Crossing Card (BCC) are not required to present a valid passport when coming from contiguous territory.<sup>6</sup> A BCC is a machine-readable, biometric card, issued by the U.S. Department of State, Bureau of Consular Affairs. DHS anticipates that BCCs will continue to be acceptable under IRTPA.

<sup>4</sup> See INA § 212(a)(7)(B)(i), 8 U.S.C. 1182(a)(7)(B)(i).

<sup>5</sup> See 8 CFR 212.1(a)(1)(Canadian citizens) and 212.1(a)(2)(Citizens of Bermuda).

<sup>6</sup> See 8 CFR 212.1(c)(1)(i). There are other very narrow exceptions for Mexican citizens such as a Mexican citizen who is entering the United States from Mexico solely to apply for a Mexican passport or other "official Mexican document" at a Mexican consulate in the United States. See 8 CFR 212.1(c)(1)(ii).

#### *Travel Document Requirements Under the Intelligence Reform and Terrorism Prevention Act of 2004*

Under section 7209 of IRTPA, both United States citizens and nonimmigrant aliens who currently do not require passports to enter the United States, will require a valid passport or other identity and citizenship document to enter the United States.<sup>7</sup> At that time, United States citizens and nonimmigrant aliens will need to present documents when traveling from countries within the Western Hemisphere to the United States that have not been required in the past. The principal groups affected are United States citizens, Canadian citizens, citizens of the British Overseas Territory of Bermuda, and Mexican citizens. These are the groups currently exempt from the general passport requirement when entering the United States from within the Western Hemisphere. Section 7209 sets January 1, 2008 as the deadline for the development and implementation of the plan relating to the new requirements.

Section 7209 of IRTPA also requires that the Secretaries of Homeland Security and State expedite the travel of frequent travelers, including those who reside in border communities. Section 7209 specifically requires that the Secretaries make readily available a registered traveler program as one means to expedite travel for frequent travelers. DHS currently operates registered traveler programs that benefit United States citizens and foreign nationals entering the United States from Canada and Mexico, such as the Secure Electronic Network for Travelers Rapid Inspection (SENTRI) program and the joint United States-Canadian NEXUS program. In addition, the Free and Secure Trade (FAST) program allows expedited clearance of registered commercial vehicle drivers. DHS will continue to improve and expand travel facilitation programs consistent with the requirements of IRTPA.

According to IRTPA, following the complete implementation of this plan, neither the Secretary of State nor the Secretary of Homeland Security may waive these document requirements for classes of nonimmigrant aliens traveling to the United States.<sup>8</sup> For United States

<sup>7</sup> Section 7209 requires this change by limiting the authority previously used by the Secretaries to waive the generally applicable document requirements. This authority is set out in Section 212(d)(4)(B) of the INA, 8 U.S.C. 1182(d)(4)(B), and section 215(b) of the INA, 8 U.S.C. 1185(d)(4)(B) (delegated to the Secretary of State under Executive Order 13323, 69 FR 241 (Dec. 30, 2003)).

<sup>8</sup> Other statutory waiver authority is not affected so that waivers may still be granted in individual

citizens, the new document requirements may be waived but only in three circumstances specifically spelled out in section 7209: (1) When the Secretary of Homeland Security determines that "alternative documentation" different from that then being required under section 7209 is sufficient; (2) in an individual case of an unforeseen emergency; or (3) in an individual case based on "humanitarian or national interest reasons."

To comply with IRTPA, DHS and DOS plan to amend to their respective regulations. Prior to promulgating such regulations, DHS and DOS, through this advance notice of proposed rulemaking (ANPRM), are soliciting comments from the public on the implementation of section 7209. Comments received by DHS and DOS on the ANPRM will be addressed in the future rulemaking actions that promulgate any regulations necessary to implement the requirements of IRTPA.

The Secretary of Homeland Security, in consultation with the Secretary of State, must determine what documents, other than a valid passport, are acceptable under section 7209 because they are "sufficient to denote identity and citizenship." At the conclusion of this public rulemaking process, a notice setting forth the acceptable documents will be published in the **Federal Register**.

#### **Plan for Two Stage Implementation of IRTPA Requirements**

DHS and DOS envision implementing the new requirements in the following two stages to ensure that the transition is orderly, to provide affected persons with adequate notice to obtain necessary documents, to designate the alternate documents that will satisfy the requirements, and to ensure that adequate resources are available to issue additional passports or other authorized documents.

a. *Air and Sea Crossings*: Beginning December 31, 2006, all individuals traveling to the United States by air or sea will be asked to present a valid passport or other document, or combination of documents that have been deemed by the Secretary of Homeland Security to be sufficient to establish identity and citizenship. A valid passport will satisfy this requirement and other documents will be considered as possible alternatives to passports in advance of this implementation date. DHS and DOS

anticipate soliciting comments through a notice of proposed rulemaking in order to fully consider possible alternatives to passports. This rulemaking process will take place sufficiently in advance of the implementation date for this phase of the program.

b. *Land Crossings*: Beginning December 31, 2007, all individuals arriving at United States land border crossings will have to present either a valid passport or another document, or combination of documents, deemed by the Secretary of Homeland Security to be sufficient to establish identity and citizenship. We expect that BCCs and registered traveler programs such as SENTRI, NEXUS, and FAST will be accepted. DHS and DOS also anticipate soliciting comments on the implementation of this phase of the program well prior to December 31, 2007 through a notice of proposed rulemaking.

Persons traveling during the implementation of IRTPA should plan to depart from the United States with documents sufficient to meet any new requirements that will be in place when they return.

#### **Rulemaking To Establish Document Requirements Under IRTPA**

While a valid passport will always satisfy IRTPA, DHS is currently considering what other documents may be deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship. Based on the section 7209 requirement that the Secretaries of Homeland Security and State shall seek to expedite the travel of frequent travelers and make readily available a registered traveler program, DHS and DOS expect that NEXUS cards, SENTRI cards, BCCs, and FAST driver identification cards may be accepted in lieu of a passport.

#### **Public Participation in Rulemaking Process**

The new requirements set forth by IRTPA will result in changes to the types of documents that United States citizens and certain Western Hemisphere nonimmigrant aliens must have when traveling from countries in the Western Hemisphere to the United States. The public is invited to comment specifically on this aspect of the implementation plan in order to assist the Secretary of Homeland Security, in consultation with the Secretary of State, in making a final determination on what documents will be accepted to satisfy section 7209 of IRTPA.

Interested persons are invited to participate generally in this rulemaking

process by submitting written data, views, or arguments on all aspects of this advance notice of proposed rulemaking. See **ADDRESSES** above for information on how to submit comments. In addition, public hearings may be held at strategic locations to provide an open forum pertaining to the proposed changes.

Comments that will provide the most assistance to DHS in this rulemaking include, but are not limited to:

a. The types of documents denoting identity and citizenship that should be acceptable as alternatives to a passport under section 7209 of IRTPA;

b. The economic impact (both long-term and short-term, quantifiable and qualitative) of the implementation of section 7209 of IRTPA, including potential impacts on State, local, and tribal governments of the United States; potential impacts on cross-border trade along United States-Canada and United States-Mexico borders; potential impacts on travel, travelers and the travel industry; and potential impacts on small businesses;

c. The monetary and other costs anticipated to be incurred by United States citizens and others as a result of the new document requirements such as the costs in time and money that an individual may incur to obtain a passport or other document(s) determined to be sufficient. These costs may or may not be quantifiable and may include actual monetary outlays, transitional costs incurred to obtain alternative documents, and the costs that will be incurred in connection with delays at the border;

d. The benefits of this rulemaking;

e. Any alternative methods of complying with the legislation; and

f. The proposed stages for implementation of the requirements of section 7209 of IRTPA.

Dated: August 26, 2005.

**Michael Chertoff,**

*Secretary of Homeland Security, Department of Homeland Security.*

**Condoleezza Rice,**

*Secretary of State, Department of State.*

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cases of unforeseen emergency pursuant to section 212(d)(4)(A) of the INA, 8 U.S.C. 1182(d)(4)(A), and pursuant to section 212(d)(4)(C) of the INA, 8 U.S.C. 1182(d)(4)(C), for persons transiting the United States.