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DEPARTMENT OF STATE

22 CFR Part 41

[Public Notice: 5646]

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

AGENCY: State Department.

ACTION: Final rule.

SUMMARY: This final rule amends guidance to consular offices for the waiver of personal appearance of applicants for nonimmigrant visas contained at 22 CFR 41.102, to conform to the requirements of Section 222(h) of the Immigration and Nationality Act, as added by section 5301 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). The final rule replaces the interim rule published in the Federal Register on July 7, 2003 and reflects legislation enacted subsequent to that rule.

DATES: This rule is effective on December 18, 2006.

FOR FURTHER INFORMATION CONTACT: Charles Robertson, Legislation and Regulations Division, Visa Services, Department of State, Washington, DC 20520-0106, (202) 663-1221, e-mail (robertsonce3@state.gov).

SUPPLEMENTARY INFORMATION:

Why is the Department promulgating this rule?

Section 5301 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) added a new Section 222(h) to the Immigration and Nationality Act (INA). Section 222(h) sets out detailed statutory requirements for personal interviews of non-immigrant visa applicants in the INA for the first time. Previously, INA Section 222(e) left the question of personal appearance of nonimmigrant visa applicants to be defined by regulation. The Department's interim rule published on July 7, 2003 (68 FR 40168) defined the requirements for personal appearance. This final rule replaces the previous interim rule to reflect the requirements of IRTPA and the new INA Section 222(h). Most of new Section 222(h) can be implemented through the Department's existing personal appearance regulations and current requirements for fingerprint collection, but a few changes in the regulations are needed

to conform fully to the new interview requirements. The most significant change is that a consular officer must now interview persons in the same age ranges as persons covered by the biometric collection requirement. In addition to the existing list of situations in which an interview may not be waived, the personal interview requirement may not be waived for NIV applicants from third countries and applicants who have been previously refused visas or found ineligible for visas, where that ineligibility was not overcome.

Are there any exceptions to these new requirements?

Section 5301 of IRTPA provides for some exceptions from the new interview requirements. In addition, as the President noted in the signing statement for IRTPA, the interview requirement is viewed ``as advisory'' with respect to foreign diplomats or foreign officials, because it otherwise would impermissibly burden the President's constitutional authority to conduct foreign relations. Therefore, the regulations continue to permit exemptions from the interview requirements of persons in A-1, A-2, C-2, C-3, G-1, G-2, G-3 G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO 6 classifications, and applicants for diplomatic or officials visas as described in 22 CFR 41.26 and 41.27.

Regulatory Findings

Administrative Procedure Act

This regulation involves a foreign affairs function of the United States and, therefore, in accordance with 5 U.S.C. 553 (a)(1), is not subject to the rule making procedures set forth at 5 U.S.C. 553.

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Regulatory Flexibility Act/Executive Order 13272: Small Business

This rule is not subject to the notice-and-comment rulemaking provisions of the Administrative Procedure Act or any other act, and, accordingly it does not require analysis under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) and Executive Order 13272, section 3(b).

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Pub. L. 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.

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, Pub. L. 104-121. 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.

Executive Order 12866: Regulatory Review

The Department of State has reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866 and has determined that the benefits of the proposed regulation justify its costs. The Department does not consider the rule to be an economically significant action within the scope of section 3(f)(1) of the Executive Order since it is not likely to have an annual effect on the economy of \$100 million or more or to adversely affect in a material way the economy, a sector of the economy, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

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.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the proposed regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act

This rule does not impose information collection requirements under 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, Nonimmigrants, Passports and visas, Students.

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For the reasons stated in the preamble, the Department of State amends 22 CFR part 41 as follows:

PART 41--[AMENDED]

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1. The authority citation for part 41 shall continue to read:

Authority: 8 U.S.C. 1104; Pub. L. 105-277, 112 Stat. 2681-795 through 2681-801. Additional authority is derived from Section 104 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. 104-208, 110 Stat. 3546.

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2. Amend Sec. 41.102 as follows:

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A. Revise paragraph (b),

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B. Amend paragraph (c) by adding the phrase ``Except as provided in paragraph (d) of this section'' to the beginning of the second sentence.

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C. Redesignate paragraph (d) as (e) and add a new paragraph (d).

The new and revised text reads as follows:

Sec. 41.102 Personal appearance of applicant

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(b) Waivers of personal appearance by consular officers. Except as provided in paragraph (d) of this section or as otherwise instructed by the Deputy Assistant Secretary of State for Visa Services, a consular officer may waive the requirement of personal appearance in the case of any alien who the consular officer concludes presents no national security concerns requiring an interview and who:

(1) Is a child under 14 years of age;

(2) Is a person over 79 years of age;

(3) Is within a class of nonimmigrants classifiable under the visa symbols A-1, A-2, C-2, C-3 (except attendants, servants, or personal employees of accredited officials), G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, or NATO-6 and who is seeking a visa in such classification;

(4) Is an applicant for a diplomatic or official visa as described in Sec. Sec. 41.26 or 41.27 of this chapter, respectively;

(5) Is an applicant who within 12 months of the expiration of the applicant's previously issued visa is seeking re-issuance of a nonimmigrant biometric visa in the same classification at the consular post of the applicant's usual residence, and for whom the consular officer has no indication of visa ineligibility or of noncompliance with U.S. immigration laws and regulations; or

(6) Is an alien for whom a waiver of personal appearance is warranted in the national interest or because of unusual circumstances.

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(d) Cases in which personal appearance may not be waived. A consular officer or the Deputy Assistant Secretary of State may not waive personal appearance for:

(1) Any NIV applicant who is not a national or resident of the country in which he or she is applying, unless the applicant is eligible for a waiver of the interview under paragraphs (b)(3) or (b)(4) of this section.

(2) Any NIV applicant who was previously refused a visa, is listed in CLASS, or who otherwise requires a Security Advisory Opinion, unless:

(i) The visa was refused temporarily and the refusal was subsequently overcome;

(ii) The alien was found inadmissible, but the inadmissibility was waived; or

(iii) The applicant is eligible for a waiver of the interview under

paragraphs (b)(3) or (b)(4) of this section.

(3) Any NIV applicant who is from a country designated by the Secretary of State as a state sponsor of terrorism, regardless of age, or in a group designated by the Secretary of State under section 222(h)(2)(F) of the Immigration and Nationality Act, unless the applicant is eligible for a waiver under paragraphs (b)(3) or (b)(4) of this section.

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Dated: November 30, 2006.

Maura Harty,

Assistant Secretary for Consular Affairs, Department of State.

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