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United States Department of State
Bureau of Consular Affairs
Office of Legal Affairs, Passport Services
Attn: Jonathan M. Rolbin, Director
Legal Affairs and Law Enforcement Liaison
2201 C Street, N.W.
Washington, D.C. 20520-0001

PETITION FOR MODIFICATION TO FINAL RULE PURSUANT TO 5 U.S.C. § 553(e):
FEDERAL REGISTER NO. 2016-21087;
FEDERAL REGISTER VOL. 81, NO. 171, p. 60608 (Published Sept. 2, 2016)

Dear Mr. Rolbin:

This petition for modification of the final rule published on September 2, 2016, at Federal Register No. 2016-21087; Federal Register Vol. 81, No. 171, p. 60608 (hereinafter, the "Rule") is submitted pursuant to 5 U.S.C. section 553(e).

The Rule amends 22 C.F.R. section 51.60 and thereby purports to implement Section 8 of the Act of Congress known as the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, P.L. 114-119, 130 Stat. 16 (Feb. 8 2016) (hereinafter, the "IML"). In brief, Section 8 of the IML accomplishes two things: First, the IML mandates that the Department of State (hereinafter, the "Department") shall not issue passports to certain "covered sex offenders" unless those passports bear a "conspicuous unique identifier" which discloses that individual's status as a "covered sex offender." (hereinafter, the "Identifier"). (See IML § 8, codified at 22 U.S.C. § 212b(b)(1).) Second, the IML authorizes, but does not require, the Department to revoke the existing passports of "covered sex offenders" that do not currently bear the Identifier, and to reissue passports that bear the Identifier. (See IML § 8, codified at 22 U.S.C. § 212b(b)(1)-(2).) The IML does not, however, authorize the Department to take any other action concerning passports issued to "covered sex offenders."

As discussed herein, the Rule incorporates an incorrect and overbroad definition of "covered sex offender" that would require the affixation of an Identifier to the passports of thousands of individuals who are not "covered sex offenders" as defined by Section 8 of the IML, and on whose passports the IML does not authorize or require the Department to affix Identifiers. Additionally, the Rule improperly denies "passport cards" to "covered sex offenders" when the IML contains no provision that addresses passport cards or their availability. Finally, in connection with its issuance of the Rule, the Department improperly avoided the public notice and comment period required by 5 U.S.C. section 553(b) by not providing the required "statement of the reasons . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." (See 5 U.S.C. § 553(b)(3)(B).)

For these reasons, the undersigned respectfully submits this Petition to modify the Rule as proposed herein.

I. The Rule Incorporates an Incorrect and Overbroad Definition of "Covered Sex Offender" and Thereby Exceeds the Authority Granted by the IML

The purpose of the IML is to notify foreign governments that certain individuals who reside in the United States and were previously convicted of sex offenses involving minors are traveling internationally. The IML purports to accomplish this through two primary means. The first, dubbed the "Notification Provision," authorizes the Department of Homeland Security and the United States Marshals Service to notify foreign governments of the travel plans of "covered sex offenders." (See IML §§3-6, codified at 42 U.S.C. §16935a through §16935c [IML §§3-5], and 42 U.S.C. § 16914(a)(7) and subd. (c) [IML §6].) The second, dubbed the "Passport Identifier Provision," authorizes the Department of State to affix a "conspicuous unique identifier" to the passports of a subset of the "covered sex offenders" who are subject to the above-referenced "Notification Provision." (IML §8, codified at 22 U.S.C. § 212b.)[1]

A. The Definition of "Covered Sex Offender" in 42 U.S.C. § 16935a Applies to Travel Notifications and not to Passport Identifiers

Critically, the IML's definition of "covered sex offender" is different for both the Notification Provision and for the Passport Identifier Provision. Whereas Sections 3 through 6 of the IML authorize international travel notifications for any individual previously convicted of certain enumerated sex offenses against minors, Section 8 of the IML authorizes passport Identifiers only for those previously convicted of such offenses who are "currently required to register under the sex offender registration program of any jurisdiction." (See 22 U.S.C. § 212b(c)(1) (emphasis added).)

[1] The IML's remaining sections contain congressional findings, appropriations, and other provisions that are not relevant to the Rule.

That is, regarding the Notification Provision, the IML provides for a broad definition of "covered sex offender" that is not limited to those currently required to register as a sex offender. Section 3 of the IML, codified at 42 U.S.C. section 16935a, states:

> In this Act [42 U.S.C. §§16935, *et seq.*]: . . . (3) Covered sex offender. Except as otherwise provided, the term "covered sex offender" means an individual who is a sex offender by reason of having been convicted of a sex offense against a minor.

That same section of the IML goes on to define the term "sex offense against a minor" as any number of enumerated and specific sex offenses listed in the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911, *et seq*. Additionally, Section 4 of the IML, which governs travel notifications sent by the Department of Homeland Security, provides that:

> In this section, the term "sex offender" means – (1) a covered sex offender; **or** (2) an individual required to register under the sex offender registration program of any jurisdiction or included in the National Sex Offender Registry, on the basis of an offense against a minor.

42 U.S.C. § 16935(b)(f) (emphasis added). Thus, the IML's Notification Provision authorizes travel notifications for any individual who has been "convicted of a sex offense against a minor" (*i.e.*, a "covered sex offender") or who is currently required to register as a sex offender in any jurisdiction on the basis of an offense against a minor.

Separately, the IML's Passport Identifier Provision applies to a narrower group of individuals: those who have been "convicted of a sex offense against a minor" **and** who are required to register as a sex offender in any jurisdiction. Section 8 of the IML, codified at 22 U.S.C. § 212b, states:

> (c) Defined terms. **In this section** [*i.e.*, the Passport Identifier Provision] --
>
> (1) the term "covered sex offender" means an individual who –
>
> (A) is a sex offender, as defined in section 4(f) of the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [*i.e.*, 42 U.S.C. § 16935(b)(f), quoted immediately above]; **and**
>
> (B) is currently required to register under the sex offender registration program of any jurisdiction.

22 U.S.C. § 212b(c)(1) (emphasis added). In other words, the IML does not authorize the Department to affix Identifiers to the passports of "covered sex offenders" unless those individuals are also "currently required to register under the sex offender registration program of any jurisdiction."

B. Many Thousands of Individuals Are Not Currently Required to Register as Sex Offenders Despite Being Previously Convicted of Sex Offenses

The distinction between the definitions of "covered sex offender" in the IML's Notification Provision and in the Passport Identifier Provision is significant. There are many offenses which constitute a "sex offense against a minor" as defined by the IML that do not currently require an individual to register as a sex offender in any jurisdiction. This is principally because the majority of state sex offender registration laws allow for discretionary or automatic deregistration after certain periods of time. For example, the Texas registry (the nation's second largest) automatically excludes certain Registrants after ten years. Tex. Code Crim. Proc. § 62.101(b). In New York (the nation's fourth largest registry), tens of thousands of Registrants were automatically removed from the registry in 2016 alone because 20 years had elapsed since their registration requirement was first imposed. See N.Y. Corrections Law § 168-h(a). Even California (the nation's largest registry) removes individuals from its lifetime registration requirement if they petition for and receive a "certificate of rehabilitation," among other qualifications. Cal. Penal Code § 290.5(a).

If these individuals were convicted of sex offenses against minors, they would all meet the definition of "covered sex offender" as set forth in the IML's Notification Provision. However, none of these individuals would meet the definition of "covered sex offender" contained in the IML's Passport Identifier Provision because they are not currently required to register as a sex offender. There are tens of thousands and perhaps hundreds of thousands of such individuals who, although having been convicted of a sex offense against a minor, are not currently required to register as sex offenders. And while such individuals may be the subject of international travel notifications under the IML's Notification Provision, the IML does not authorize the Department to affix Identifiers to their passports.

Indeed, the undersigned represents seven individuals who are challenging the IML in a lawsuit currently pending in the United States District Court for the Northern District of California. (See *John Doe #1, et al. v. John Kerry, et al.* (N.D. Cal. Case No. 4:16-cv-654-PJH), filed on February 9, 2016.) One such individual, Plaintiff John Doe #3, is a California resident who was convicted of a sex offense against a minor but who is no longer required to register as a sex offender. (See Dkt. 31, First Amended Complaint ¶15.) Plaintiff John Doe #3 is therefore subject to the IML's Notification Provision but is not subject to the Passport Identifier Provision.

The Department should be aware that, during the above-referenced litigation, the Department's counsel confirmed that the Passport Identifier Provision does not authorize the Department to affix Identifiers to the passports of individuals unless they are currently listed on a sex offender registry. (Doc. 30, at p. 14:5-12 ("In regard to Plaintiffs' challenge to the IML's passport identifier provision . . . . [John] Doe #3 would not be subject to this provision since he is not a registered sex offender."). (See also Dkt. 43, p. 14:17-20 (same); Dkt. 30, at p. 11:18-21

(same, quoting definition of "covered sex offender" set forth in 22 U.S.C. § 212b(c)(1), not 42 U.S.C. § 16935a.)

II. The Rule Erroneously References the Definition of "Covered Sex Offender" Applicable to the IML's Notification Provision and Improperly Authorizes Passport Identifiers for Non-Registrants

Based on the above, the Rule erroneously incorporates the definition of "covered sex offender" applicable to the IML's Notification Provision (*i.e.*, 42 U.S.C. § 16935a), rather than the correct definition contained in 22 U.S.C. § 212b(c)(1). That is, the Rule amends 22 C.F.R. § 51.60 to mandate that passports be denied when "[t]he applicant is a covered sex offender as defined in 42 U.S.C. 16935a, unless the passport, not matter what type, contains the conspicuous identifier placed by the Department as required by 22 U.S.C. 212b" (emphasis added). The Rule's reference to the definition of "covered sex offender as defined in 42 U.S.C. 16935a" is incorrect because 42 U.S.C. § 16935a is the definition applicable to the IML's Notification Provision and is not limited to those currently required to register as sex offenders. To conform with Section 8 of the IML, codified at 22 U.S.C. § 212b, the Rule should be modified to read:

> §51.60 Denial of passports.
>
> (a) * * *
>
> . . . .
>
> (4) The applicant is a covered sex offender **as defined in 22 U.S.C. § 212b(c)(1)**, unless the passport, no matter what type, contains the conspicuous identifier placed by the Department as required by 22 U.S.C. § 212b.

III. The Rule's Provision Denying "Passport Cards" to "Covered Sex Offenders" is not Authorized by the IML

The Rule also amends 22 C.F.R. section 51.60 to mandate that passport cards be denied to "covered sex offenders" as follows: "(g) The Department shall not issue a passport card to an applicant who is a covered sex offender as defined in 42 U.S.C. § 16935a." The Rule reasons that it "provides for the denial of passport cards to these same covered sex offender, as passport cards are not able to contain the unique identifier required by 22 U.S.C. § 212b."

This amendment to 22 C.F.R. section 51.60 is improper for two reasons. First, the IML contains no provision authorizing the Department to deny passport cards to any individual, and therefore does not authorize this provision of the Rule. Second, even if the IML authorized the Department to restrict an applicant's entitlement to passport cards, the Rule again relies on the incorrect and overbroad definition of "covered sex offenders" set forth in 42 U.S.C. § 16935a.

At a minimum, the Rule should be modified to permit "covered sex offenders" to apply for and receive passport cards if they are not currently required to register as a sex offender in any jurisdiction, as follows:

> §51.60 Denial of passports.
>
> (a) * * *
>
> . . . .
>
> (g) The Department shall not issue a passport card to an applicant who is a covered sex offender **as defined in 22 U.S.C. § 212b(c)(1)**.

IV. The Department Made No Attempt to Justify Foregoing a Public Notice and Comment Period for this Rule

Rather than post a notice of proposed rulemaking in the Federal Register and accept public comment on this Rule, the Department invoked the "good cause" exception of U.S.C. section 553(b) when it issued a final rule. That exception applies when "the agency for good cause finds (**and incorporates the finding and a brief statement of the reasons therefor in the rules issued**) that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest." (5 U.S.C. § 553(b)(3)(B) (emphasis added).) Courts have "repeatedly held [that] exceptions to the notice and comment requirements [of the APA] will be narrowly construed and only reluctantly countenanced." E.g., Action on Smoking & Health v. Civil Aeronautics Board, 713 F.2d 795, 800 (D.C. Cir. 1983) (citing cases).

Here, the Rule reflects no such finding and contains no statement of the reasons why the good cause exception applies to this Rule. Instead, the Rule merely repeats the three potential bases for the good cause exception and states them in the conjunctive, suggesting that all three in fact apply: "The Department believes that public comment on this rulemaking would be unnecessary, impractical, and contrary to the public interest." This boilerplate invocation of the "good cause" exception is categorically insufficient to obviate the Department's statutory obligation to post notice and receive public comment. Action on Smoking, 713 F.2d at 800 ("Bald assertions that the agency does not believe comments would be useful cannot create good cause to forego notice and comment procedures."); N.R.D.C. v. Evans, 316 F.3d 904, 911 (9th Cir. 2003) ("good cause" exceptions appropriate only when "delay would do real harm" or "the agency cannot both follow section 553 and exercise its statutory duties").

Furthermore, it is difficult to believe that public notice and comment on this rule is simultaneously "unnecessary, impractical, and contrary to the public interest," as the Department claims. While public notice may have been unnecessary if the Department had issued a rule that simply repeated the substance of the IML, the Department's Rule blatantly exceeds the authority

granted by the IML by including reference to passport cards. Moreover, comment on the Rule will not contradict the purpose of the Rule itself and presents no other threat to the public interest. Indeed, the public interest would be served by comment on the Rule because the Rule implicates the freedoms and safety of hundreds of thousands of covered individuals and their families. Finally, it is not credible to claim that public notice of the Rule is "impractical" when there is no deadline or other emergency that militates against comment, and when the subject matter of the Rule is straightforward and involves a limited number of interested parties.

Accordingly, the Department's dismissive decision to forego public notice and comment is unauthorized by 5 U.S.C. section 533(b). The undersigned notes that, had the Department issued proper notice of the rulemaking and permitted public comment, the above-referenced errors would have been identified and potentially corrected prior to issuance of a final rule.

V. Conclusion

In sum, there are at least four significant deficiencies in the Department's amendment to 22 C.F.R. § 51.60 as contained in the Final Rule published on September 2, 2016 at Federal Register No. 2016-21087:

(1) Incorrect statutory reference in amendment to 22 C.F.R. § 51.60(a)(4); the reference to 42 U.S.C. § 16935a should be replaced with reference to 22 U.S.C. § 212b(c)(1);.

(2) The Department lacks authority to add 22 C.F.R. § 51.60(g);

(3) If the Department has authority to add 22 C.F.R. § 51.60(g), its reference to 42 U.S.C. § 16935a should be replaced with reference to 22 U.S.C. § 212b(c)(1); and

(4) The Department failed to comply with 5 U.S.C. § 553(b)(3)(B) when foregoing notice of this rulemaking in the Federal Register and accepting public comment.

For the reasons set forth above, the undersigned requests that the Department modify the Rule as proposed above and issue a notice of proposed rulemaking in the Federal Register pursuant to 5 U.S.C. § 553(b) in connection with future rules purporting to implement Section 8 of the IML.

Respectfully submitted,

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