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**Passport Requirements to Change in 2007 as Part of the
Western Hemisphere Travel Initiative**

The Intelligence Reform and Terrorism Prevention Act of 2004 requires that by January 1, 2008, U.S. Citizens and nonimmigrant aliens will only be able to enter the United States with passports or with alternative documents designated by the Secretary of Homeland Security. On August 11, 2006, the Department of Homeland Security and Department of State published a [Notice of Proposed Rulemaking](#) (NPRM) in the Federal Register that, if made into a final rule, would begin the phase-in of the new passport requirement, also known as the Western Hemisphere Travel Initiative (WHTI). The NPRM applies *only* to air and sea ports of entry and *not* to land ports of entry.

Individuals Affected By WHTI Requirements as of January 2007

Under the NPRM, starting January 8, 2007, all U.S. citizens and nonimmigrant aliens would be required to present a passport or alternative identity document whenever entering the U.S. at an airport or seaport, even from within the Western Hemisphere. U.S. Permanent Residents are not affected by the Western Hemisphere Travel Initiative, and would not need to present passports to enter the U.S. They could continue to present I-551 "green cards" or other evidence of permanent resident status.

Individuals Exempted From WHTI Requirements

Specifically exempted from the passport requirement would be individuals on pleasure vessels used exclusively for pleasure and which are not for the transportation of persons or property for compensation or hire. (A day sailor or bareboat charter that is rented without a captain or crew and is used for recreational or personal purposes would be considered a pleasure vessel). Also exempted would be travelers by ferry and U.S. citizen members of the armed forces on active duty. Spouses and dependents of military members would, however, be required to present a passport or other acceptable entry document.

Other Acceptable Identity Documents

Other documents deemed acceptable to denote citizenship and identity, in lieu of a passport, would include a Merchant Mariner Document (or "z-card") for U.S. citizen crewmembers; and a NEXUS Air Program Membership card. It should be noted that Mexican BCC card holders are *not* exempt from the passport requirement.

Application to Native Americans

The NPRM includes American- and Canadian-born Native Americans in the groups of people who will be required to present a passport or other acceptable entry document to enter the U.S. at an airport or seaport. This requirement arguably violates the Jay Treaty and Section 289 of the Immigration and Nationality Act, which states,

Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

INA 289 has previously been interpreted by one Federal District Court as intending to

preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by them on either side of the American and Canadian border, and thus, to exempt Canadian-born Indians from *all* immigration restrictions imposed on aliens by the Immigration and Nationality Act.

See, Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974). This logic has been recognized by the Board of Immigration Appeals in Matter of Yellowquill, 16 I & N Dec. 576 (BIA 1978), holding that,

We have decided to accept the reasoning in Akins v. Saxbe, supra, as being correct and applicable to the deportation provisions of the Act. American Indians born in Canada who are within the protection of section 289 of the Act are not subject to deportation on any ground.

The NPRM distinguishes the passport requirement for airport and seaport admissions from previous litigation under INA 289 based on the fact that, "Historically, the courts have addressed the right of Native Americans born in Canada to 'pass the borders of the United States' in the context of land border crossings. Subsequent case law has not expressly addressed the extension of the right to 'pass the border' without sufficient proof of identity and citizenship." (See page 46163 of the NPRM). It remains to be seen whether this logic is persuasive or not. Anyone with a vested interest in the ability of Native Americans to enter the U.S. at air and sea ports of entry without passports may wish to submit a written comment to the NPRM per the instructions in the NPRM. Comments to the NPRM are due by September 25, 2006.

USCIS Clarifies Language in Child Status Protection Act

Section 6 of the Child Status Protection Act (CSPA) provides that where an I-130 petition was "initially filed" for a family-based "2B" category for an unmarried

son or daughter (over age 21) of a Permanent Resident, and the petitioning parent later naturalizes, the petition shall automatically be upgraded to family-based first preference as the unmarried son or daughter of a U.S. citizen.

The words "initially filed" in the statute are problematic. In a case where a petition is *initially filed* in the family-based "2A" category for an unmarried child (under age 21), it automatically becomes downgraded to a family-based "2B" category petition when the minor child turns 21. In the past, USCIS interpreted section 6 of the Child Status Protection Act as not permitting the automatic upgrade of a petition that was *initially filed* as a family-based "2A" petition, that was later downgraded to a "2B" petition because the child turned 21, and where the petitioning parent then naturalized. The rationale was that because the petition was *initially filed* as a family based "2A" petition, CSPA section 6 did not apply.

In a memo published by USCIS on June 14, 2006, USCIS has reinterpreted the words "initially filed" in CSPA section 6 to mean that "the petition must have been initially filed for an alien *who is now* in the unmarried son or daughter classification," rather than for someone who was over age 21 at the time the I-130 was filed.

Texas Service Center Clarifies Policy on Multiple I-140 Petitions

In a recent meeting with the American Immigration Lawyers Association, the Texas Service Center stated its policy that multiple I-140 petitions can be filed for the same beneficiary, and that more than one I-140 can be filed based on the same approved labor certification. They further stated that there does not need to be a withdrawal of one I-140 petition for adjudication of a subsequent I-140. However, they recommend that if another I-140 is filed that copies of any approved I-140 for a different classification based on the same labor certification also be submitted.

However, under the current [bispecialization rules](#), it is impossible to predict whether an I-140 petition will be adjudicated by the Nebraska or the Texas Service Center. All I-140 petitions are submitted to Nebraska and are split up so that half are sent to Texas for adjudication. It is unclear whether the Nebraska Service Center has taken the same position on the filing of multiple I-140 petitions based on the same labor certification application.

USCIS Memo Provides Guidance on Eligibility for Exemption from the H-1B Cap Under AC21 Section 103

Section 103 of the American Competitiveness in the Twenty First Century Act (AC21) makes exempt from the H-1B cap aliens who are offered employment at an institution of higher education, a related or affiliated nonprofit entity, a

nonprofit research organization, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization.

In an internal memorandum published by USCIS on June 6, 2006, USCIS clarifies that in order to be considered exempt from the cap under section 103, the alien need only be employed *at* a qualifying institution, and need not necessarily be employed *by* such an institution, so long as the alien's employment "directly and predominately furthers the essential purposes of the qualifying institution." In other words, the memo states, there must be a "logical nexus between the work performed predominately by the beneficiary and the normal, primary or essential work performed by the qualifying institution."

USCIS to Disclose Certain Criminal Information About I-130 Petitioners to I-130 Beneficiaries

Per an internal USCIS memorandum circulated May 3, 2006, USCIS has advised adjudicators to disclose certain information relating to a visa petitioner's criminal history to potential visa beneficiaries or their legal guardians. Disclosure will be limited to those portions of the petitioner's criminal history involving violence or sex offenses that are directly relevant to the "health or safety" of the potential beneficiary. The memo gives the example that the conviction of a petitioner as a sexual predator should be revealed to the guardian of a minor child who would reside with the sexual predator.

If the information is publicly available such as in a public conviction record, the adjudicator may share it with the beneficiary with appropriate supervisory approval. Otherwise, where there is adverse information in the USCIS records related to the petitioner's criminal history, the adjudicator must obtain permission to disclose the information from the government agency that provided the adverse information. The beneficiary will be notified at an in-person interview where possible, and the visa petitioner must be informed of the disclosure in writing. Disclosure of such information does not necessarily result in denial if the beneficiary gives informed consent to continue with the petition.

Vermont Service Center Transfers Thousands of Cases to the Texas and California Service Centers

USCIS published a [Public Notice](#) on July 26, 2006 stating that due to an unusually high workload at the Vermont Service Center, they have recently transferred 5,000 petitions for nonimmigrant workers (I-129) to the Texas Service Center and 22,000 I-130 immigrant petitions to the California Service Center for adjudication. In practice, it appears that some I-360 petitions have also been transferred from Vermont to the California Service Center, though this was not announced.

Why the heavy workload, you ask? It doesn't take much to speculate that the new [bispecialization program](#) is not quite as efficient as USCIS had hoped.

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