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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 870

RIN 3206–AN21

Federal Employees' Group Life Insurance Program: Filing Deadlines for Court Review of Administrative Final Decisions; Withdrawal of Proposed Rule

AGENCY: U.S. Office of Personnel Management.

ACTION: Withdrawal of proposed rule.

SUMMARY: The United States Office of Personnel Management (OPM) issued a proposed rule on January 12, 2016 to amend the Federal Employees' Group Life Insurance (FEGLI) Program regulations to establish a timeframe for filing civil actions or claims against the United States based on 5 U.S.C. chapter 870 (Life Insurance). OPM is withdrawing the proposed rule to undertake further analysis of the subject matter referenced in the proposed rule.

DATES: The proposed rule published on January 12, 2016 at 81 FR 1336 is withdrawn effective March 8, 2016.

FOR FURTHER INFORMATION CONTACT: Ronald Brown, Policy Analyst, Planning and Policy Analysis, U.S. Office of Personnel Management, Room 4312, 1900 E Street NW., Washington, DC 20415; or FAX to 202–606–0636 Attn: Ronald Brown.

SUPPLEMENTARY INFORMATION: The United States Office of Personnel Management (OPM) issued a proposed rule on January 12, 2016, at 81 FR 1336. This proposed rule was intended to: (1) Establish a timeframe for filing legal action for judicial review of OPM or employing agency final action on FEGLI claims; and (2) provide a 3-year time limit for filing a court claim for review of agency or retirement system final decisions.

The OPM is withdrawing this proposed rule to undertake further analysis of the subject matter referenced in the proposed rule.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

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DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

8 CFR Part 212

RIN 1651–AA97

[USCBP–2016–0006]

Waiver of Passport and Visa Requirements Due to an Unforeseen Emergency

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to reinstate a 1996 amendment to a regulation in title 8 of the Code of Federal Regulations regarding a discretionary waiver of certain documentary requirements for nonimmigrants seeking admission to the United States. The 1996 amendment allowed the legacy Immigration and Naturalization Service (INS) (now U.S. Customs and Border Protection) to waive passport and visa requirements for nonimmigrants due to an unforeseen emergency while preserving its ability to fine carriers for unlawfully bringing aliens who do not have a valid passport or visa to the United States. The U.S. Court of Appeals for the Second Circuit ruled that the legacy INS and the U.S. Department of State (State Department) did not satisfy a statutory requirement to act jointly when the amendment was promulgated. As a result, the court found that the 1996 amendment to the regulation was procedurally deficient and reimposed an earlier version of the regulation that legacy INS and the State Department promulgated in 1994.

This rule proposes to reinstate the 1996 amendment with some technical amendments. DHS and the State Department have acted jointly in this matter and the State Department is publishing a parallel proposed rule to amend its regulation in today's edition of the **Federal Register**.

DATES: Comments must be received on or before May 9, 2016.

FOR FURTHER INFORMATION CONTACT: Joseph O'Donnell, Fines, Penalties and Forfeitures, Office of Field Operations, 202–344–1691.

ADDRESSES: You may submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2016–0006.
- *Mail:* Border Security Regulations Branch, Office of Regulations and Rulings, U.S. Customs and Border Protection, 90 K Street NE.,10th Floor, Washington, DC 20229–1177.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Office of International Trade, Regulations and Rulings, U.S. Customs and Border Protection, 90 K Street NE.,10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. U.S. Customs and Border Protection (CBP) also invites comments that relate to the economic, environmental or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

In general, nonimmigrant aliens must present an unexpired passport and, if required, a valid unexpired visa in order to be admitted to the United States. *See* section 212(a)(7)(B)(i) of the Immigration and Nationality Act, as amended (INA) (8 U.S.C. 1182(a)(7)(B)(i)). The Secretary of Homeland Security and the Secretary of State, acting jointly, in specified situations, as provided in section 212(d)(4) of the INA (8 U.S.C. 1182(d)(4)), may waive either or both of these requirements.[1] One of these situations is when the the agencies determine ''in individual cases'' that the nonimmigrant is unable to present the required documents due to an unforeseen emergency. *See* section 212(d)(4)(A) of the INA (8 U.S.C. 1182(d)(4)(A)). DHS regulations list those classes of persons who are not required to present a visa (or passport, in some cases) in 8 CFR 212.1. The unforeseen emergency waiver is provided for in 8 CFR 212.1(g).[2] The State Department has a similar provision in 22 CFR part 41.

1994 Regulatory Amendment

On January 11, 1994, the legacy INS and the State Department each issued final rules amending their respective regulations to simplify the administrative procedure for granting unforeseen emergency waivers. See 59 FR 1467 and 59 FR 1473 (Jan. 11, 1994). The amended INS regulation (referred to in this document as the 1994 version of 212.1(g)) provided that the district director would have authority to grant a waiver of the passport and/or visa requirements under section 212(d)(4)(A) of the INA without the prior concurrence of the Department of State. Previously, the legacy INS needed to seek the concurrence of the State Department Visa Office prior to granting a waiver. The amended regulation also provided that a visa and a passport are not required of a nonimmigrant who satisfies the district director that the documents cannot be presented due to an unforeseen emergency. Specifically, the legacy INS amended 8 CFR 212.1(g) to provide that a visa and a passport are not required of a nonimmigrant who, either prior to his or her embarkation at a foreign port or place or at the time of arrival at a port of entry in the United States, satisfies the district director at the port of entry that, because of an unforeseen emergency, he or she is unable to present the required documents, in which case a waiver application shall be made on Form I–193. The amended regulation also provided that the district director may approve a waiver of documents in each case in which he or she is satisfied that the nonimmigrant cannot present the required documents because of an unforeseen emergency and the waiver would be appropriate in the circumstances. *See* 59 FR 1467–68.

The amended State Department regulation, 22 CFR 41.2(j), contained similar provisions.[3]

1996 Regulatory Amendment

On March 22, 1996, the legacy INS published a final rule that amended the unforeseen emergency waiver in 8 CFR 212.1(g). *See* 61 FR 11717. Among other things, the legacy INS final rule removed the statement that a ''visa and a passport are not required of a nonimmigrant who . . . satisfies the district director at the port of entry that, because of an unforeseen emergency, he or she is unable to present the required documents. . . .'' The legacy INS replaced this language with general language about the documentary requirements for a nonimmigrant seeking admission to the United States, a statement authorizing the legacy INS to waive the documentary requirements because of an unforeseen emergency, and a statement authorizing the legacy INS to revoke such a waiver. The amended text (referred to in this document as the 1996 version of 212.1(g)) provided that a nonimmigrant seeking admission to the United States must present an unexpired visa and a passport valid for the amount of time set forth in section 212(a)(7)(B) of the Act, or a valid border crossing identification card at the time of application for admission, unless the nonimmigrant satisfies the requirements described in one or more of the paragraphs (a) through (f) or (i) of 8 CFR 212.1. The amended text also provided that upon a nonimmigrant's application on Form I–193, a district director at a port of entry may, in the exercise of his or her discretion, on a case-by-case basis, waive the documentary requirements, if satisfied that the nonimmigrant cannot present the required documents because of an unforeseen emergency. Finally, the amended text provided that the district director or the Deputy Commissioner may at any time revoke a waiver previously authorized pursuant to this paragraph and notify the nonimmigrant in writing to that effect. *See* 61 FR 11720–21.

One important distinction between the 1994 and 1996 versions of section 212.1(g) is that the 1994 version specifies that a visa and passport ''are not required'' of a nonimmigrant if the legacy INS (now CBP) concludes that the nonimmigrant is unable to present the required documents because of an unforeseen emergency. In contrast, the 1996 version does not include the phrase ''are not required.'' The absence of that language supported the legacy INS' authority to fine carriers that transported aliens without a valid passport or visa even where the alien is granted a discretionary waiver under section 212(d)(4) of the INA.[4] Section 273 of the INA (8 U.S.C. 1323) makes it unlawful for any person or company to bring an alien to the United States (other

[1] Previously, the Attorney General acting jointly with the Secretary of State was authorized to waive the documentary requirements due to an unforeseen emergency. However, pursuant to the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (HSA), as of March 1, 2003, functions of the legacy INS of the Department of Justice and the legacy U.S. Customs Service of the Department of the Treasury were transferred to DHS. Specifically, pursuant to sections 102(a), 441, 1512(d) and 1517 of the HSA and 8 CFR 2.1, the authorities of the Attorney General, as described in section 212 of the INA (8 U.S.C. 1182), were transferred to the Secretary of Homeland Security, and the reference to the Attorney General in the statute is deemed to refer to the Secretary. Thus, the waiver authority in section 212 of the INA therefore now resides with the Secretary of Homeland Security acting jointly with the Secretary of State.

[2] An example of an unforeseen emergency may be where a nonimmigrant loses his or her passport and/or visa or has these documents stolen immediately prior to departure for the United States, and does not have time to obtain replacement documents.

[3] The amended State Department regulation provided that a visa and passport are not required of an alien if, either prior to the alien's embarkation abroad or upon arrival at a port of entry, the responsible district director of the Immigration and Naturalization Service in charge of the port of entry concludes that the alien is unable to present the required documents because of an unforeseen emergency. The amended State Department regulation further provided that any waiver of the visa or passport requirement may be granted by the INS district director pursuant to INA 212(d)(4)(A) without the prior concurrence of the Department of State in each case in which the district director concludes that the alien's claim of emergency circumstances is legitimate and bona fide and that approval of the waiver would be appropriate under all of the attendant facts and circumstances. *See* 59 FR 1473 (Jan. 11, 1994).

[4] The Board of Immigration Appeals (Board) supported legacy INS' interpretations of both the 1994 and 1996 versions of 8 CFR 212.1(g). Prior to the 1996 amendment to the regulation, the Board had held ''that liability to fine was not incurred . . . for bringing to the United States a nonimmigrant alien without a valid visa when such alien was paroled into the United States *and was subsequently granted a waiver of the nonimmigrant visa.'' Matter of United Airlines Flight UA802,* 22 I&N Dec. 777, 780 (BIA 1999) (*citing Matter of ''Flight SR–4'',* 10 I&N Dec. 197 (BIA 1963)). However, in *Matter of Finnair Flight AY103,* 23 I&N Dec. 140 (BIA 2001), the Board held that a carrier was subject to a fine for bringing an alien passenger to the United States without a valid nonimmigrant visa even though the passenger was subsequently granted a waiver of the documentary requirements under the 1996–amended version of the regulation.

than from a foreign contiguous territory) who does not have a valid passport and an unexpired visa (if a visa is required), including under controlling regulations, and authorizes a fine against the carrier for each alien unlawfully brought into the United States.[5] On May 28, 1999, the State Department amended 22 CFR 41.2(j) in a similar manner.[6] See 64 FR 28915.

Litigation Challenging the 1996 Regulation

Numerous airlines challenged the 1996 version of 212.1(g) in the U.S. District Court for the Eastern District of New York. Legacy INS had fined certain airlines for bringing undocumented aliens into the United States in violation of section 273 of the INA (8 U.S.C. 1323) even though some of the undocumented aliens had been granted unforeseen emergency waivers pursuant to 8 CFR 212.1(g) after the aliens arrived in the United States. Section 273 of the INA makes it unlawful for any person or company to bring an alien to the United States (other than from a foreign contiguous territory) who does not have a valid passport and an unexpired visa, if a visa was required, and authorizes a $4,300 fine against the carrier for each alien unlawfully brought into the United States.[7] Legacy INS believed that granting unforeseen emergency waivers did not preclude the imposition of fines under section 273 of the INA on the airlines transporting such waiver recipients.

Several of the airlines that legacy INS fined claimed that the fines were not authorized because the 1996 version of 212.1(g) was void due to procedural defects. Specifically, they claimed that the INA required joint action between the legacy INS and State Department and that the 1996 version of 212.1(g) was deficient because the legacy INS acted on its own when promulgating the regulation. If the 1996 version was void, the 1994 version of 212.1(g) would control. As described above, the 1994 version specified that ''a visa and passport are not required'' of a nonimmigrant if the INS concludes that the nonimmigrant is unable to present the required documents because of an unforeseen emergency. Under this version, the legacy INS did not assess carrier fines for bringing in aliens who were unable to present a valid, unexpired visa and passport due to an unforeseen emergency.

1996 Regulation Found to Have Been Improperly Promulgated

The district court ruled in favor of the legacy INS on this issue and the airlines appealed. On November 20, 2009, the United States Court of Appeals for the Second Circuit issued its opinion in *United Airlines, Inc.* v. *Brien*, 588 F.3d 158 (2d Cir. 2009), a consolidated appeal from three final orders of the lower court. Although the Second Circuit agreed with the Government's view that the 1996 version of 8 CFR 212.1(g) would not have precluded the assessment of carrier fines when an unforeseen emergency waiver had been granted, it held that the 1996 amendment was void because it was improperly promulgated. The Court stated that section 212(d)(4)(A) of the INA ''requires joint action, and the two agencies acted jointly when enacting the pre-1996 version of the regulation.'' *United Airlines*, 588 F.3d at 179. The Court further stated that ''[t]he INS's attempt to amend the jointly enacted regulation on its own, therefore, [wa]s ineffective, and the pre-1996 version remains in effect'' and that ''[t]he INS's failure to coordinate with the State Department in the amendment of the regulations render[ed] the 1996 amendment void.'' *Id.* The Court also found that the 1999 State Department amendment of its regulation violated the joint action requirement, that the amendment should have undergone notice and comment rulemaking before being adopted, and that ''the prior versions of both agencies' regulations remain effective until the two agencies act *jointly* to amend them.'' *Id.* at 180 (emphasis in original). As a result, the Court invalidated the 1996 amendment to 8 CFR 212.1(g), as well as subsequent amendments to the regulation made in 2002 and 2007.[8] The Court reinstated the 1994 version of the regulation.

Proposal

DHS is now proposing to reinstate the 1996, 2002 and 2007 amendments to 8 CFR 212.1(g). DHS and the State Department have consulted and are each proposing parallel and simultaneous amendments to 8 CFR 212.1(g) and 22 CFR 41.2(i), respectively, to reinstate the 1996, 2002 and 2007 amendments to 8 CFR 212.1(g) and the 1999 amendments to 22 CFR 41.2(i).[9] The State Department's Notice of Proposed Rulemaking is published in today's **Federal Register**. The issuance of parallel regulations was specifically sanctioned by the Court in *United Airlines* when it noted that ''[t]he 1999 State Department amendment, like the 1996 INS amendment, violated the joint action requirement, and the prior versions of both agencies' regulations remain effective until the two agencies act jointly to amend them.'' 588 F.3d at 180.

With these amendments, DHS will be able to assess carrier fines under section 273 of the INA in appropriate cases notwithstanding that an ''unforeseen emergency'' waiver had been granted under section 212(d)(4)(A) of the Act and 8 CFR 212.1(g).[10]

Regulatory Analyses

A. Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess the 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, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a ''significant regulatory action,'' although not an economically significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has reviewed this regulation.

In 1996, the legacy INS published a final rule (61 FR 11717) amending 8 CFR 212.1(g) which allowed for the waiver of the requirement of proper entry documentation for a

[5] Section 212(a)(7)(B)(i) of the INA, which concerns only nonimmgrants, uses the term ''nonimmigrant.'' Section 273 of the INA, which concerns immigrant and nonimmigrant aliens, uses the term ''alien.'' This document will generally use the term ''nonimmigrant'' when discussing the waiver provision contained in section 212(d)(4) of the INA or 8 CFR 212.1(g) and use the term ''alien'' when discussing the fines provision contained in section 273.

[6] The legacy INS amended 8 CFR 212.1(g) on two occasions in 2002. First, it added a reference to section 212.1(o). 67 FR 4784 (Jan. 31, 2002). Second, it updated the documentary requirements by adding the phrase '', issued by the DOS on Form DSP 150.'' Finally, DHS amended this provision in 2007 to add U nonimmigrants to the list of nonimmigrants who are not required to satisfy the visa and passport requirement under section 212(a)(7)(B) of the INA consistent with other regulatory provisions. *See* 8 CFR 212.1(p).

[7] DHS adjusted the statutory fine of $3,000 to $4,300 to account for inflation. *See* 76 FR 74625 (Dec. 1, 2011).

[8] The INS amended the regulation in 2002 to update documentary requirements, and DHS amended the regulation in 2007 to include U nonimmigrants among those who could seek a waiver. *See* 67 FR 71443 (Dec. 2, 2002) and 72 FR 53014 (Sept. 17, 2007).

[9] 22 CFR 41.2(j) was redesignated as 22 CFR 41.2(i) in 2016. *See* 81 FR 5908.

[10] CBP generally would not consider it appropriate to apply a fine if CBP granted the waiver prior to the nonimmigrant alien's boarding.

nonimmigrant in an unforeseen emergency while still retaining the ability to fine the carrier for transporting an alien to the United States without proper entry documentation. In 2009, the U.S. Court of Appeals for the Second Circuit issued an opinion in *United Airlines, Inc.* v. *Brien,* 588 F.3d 158 (2d Cir. 2009) which held that the regulation amending 8 CFR 212.1(g) was improperly promulgated because the State Department and the legacy INS did not jointly promulgate the rule. In its ruling, the Court upheld CBP's right to issue fines under section 273 of the INA when aliens do not receive a waiver but are otherwise allowed to enter the United States without proper documents, such as when they are paroled into the United States.[11] This has led to a situation where carriers are being penalized inconsistently when they transport aliens to the United States without proper documentation. If an alien qualifies for parole, the carrier is fined. If an alien does not qualify for parole but receives a waiver, the carrier is not fined. Since the carrier is equally violative in these situations, CBP believes the penalties should be the same for each.

As such, DHS (functions of the legacy INS were transferred to DHS in 2003) and the State Department are now jointly promulgating rules to allow CBP to waive the requirement to present entry documents for nonimmigrants under an unforeseen emergency while still retaining the ability to fine the carrier a maximum penalty of $4,300 for transporting an alien to the United States without proper entry documentation.

From FY 2010–2015, if this proposed rule had been in effect, carriers would have been subject to penalties averaging $1.7 million per year for 950 violations to section 273 of the INA. This $1.7 million represents a transfer from violative carriers to the United States government. To avoid the penalties imposed by this rule and existing penalties, carriers may adopt further oversight. CBP requests comment on any additional oversight costs that could result from this rule.

CBP currently issues penalties under this provision to any carriers that transport aliens without proper documents who are inadmissible, including when these aliens qualify for parole. Therefore, CBP will not have to set up a new process to fine carriers as a result of this rule. A penalty under this provision takes CBP approximately 2.5 hours to process. Therefore, on average this rule would take approximately 2,375 hours a year for CBP to administer.

Currently, carriers are penalized for violations of section 273 inconsistently. When a carrier transports an alien without proper documentation, whether it is penalized depends not on the nature of the carrier's violation, but on whether the alien it transported qualifies for a waiver. CBP believes it is more equitable to penalize carriers who violate section 273 equally. Additionally, CBP believes that the penalty provisions in the proposed regulation provide an economic incentive to enforce the statutory requirements of section 273 of the INA.

For additional analysis on the impacts of this rule on small entities and a discussion of alternatives, see section B. Regulatory Flexibility Act.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

As discussed above, DHS and the State Department are proposing parallel and simultaneous amendments to 8 CFR 212.1(g) and 22 CFR 41.2(i) respectively, that would allow CBP to waive the passport and/or visa requirements for nonimmigrants due to an unforeseen emergency while retaining the ability to enforce the statutory requirement imposing a maximum penalty of $4,300 on a carrier for transporting an alien to the United States without proper documentation.

The Regulatory Flexibility Act does not specify thresholds for economic significance but instead gives agencies flexibility to determine the appropriate threshold for a particular rule. CBP believes that a maximum penalty of $4,300 may be considered a significant economic impact given the wide range of companies subject to the requirements of this rule and that it is possible that a specific small entity may receive more than one penalty in a year. Therefore CBP is preparing an Initial Regulatory Flexibility Analysis under section 603 of the Regulatory Flexibility Act.

It is unlawful under section 273 of the INA for any person or company to transport an alien to the United States (other than from a foreign contiguous territory) who does not have a valid passport and an unexpired visa (if a visa is required). 8 U.S.C. 1323. As such, it is possible that any person or company engaged in the transportation of aliens may be affected by the proposed rule. Below, Table 1 presents data on the industries CBP has identified that could be affected by this rule. While CBP finds that only 41 small entities have violated section 273 of the INA from FY 2008 to FY 2012, CBP is unable to certify that substantial number of small entities will not be affected by the proposed regulation in the future.[12]

CBP is choosing not to certify that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, CBP has conducted the following Initial Regulatory Flexibility Analysis.

1. A Description of the Reasons Why Action by the Agency Is Being Considered

In 1996, the legacy INS published a final rule (61 FR 11717) amending 8 CFR 212.1(g) which allowed for the waiver of the requirement of proper entry documentation for a nonimmigrant in an unforeseen emergency while still retaining the ability to fine the carrier for transporting an alien to the United States without proper entry documentation. In 2009, the U.S. Court of Appeals for the Second Circuit issued an opinion in *United Airlines, Inc.* v. *Brien,* 588 F.3d 158 (2d Cir. 2009) which held that the regulation amending 8 CFR 212.1(g) was improperly promulgated because the State Department and the legacy INS did not jointly promulgate the rule. As such, DHS (functions of the legacy INS were transferred to DHS in 2003) and the State Department are now jointly promulgating rules to allow CBP to waive the requirement to present entry documents for nonimmigrants under an unforeseen emergency while still

[11] An alien may be paroled into the United States when he or she appears to be inadmissible to the inspecting officer but is allowed into the United States for urgent humanitarian reasons or when that alien's entry is determined to be for significant public benefit. Parole does not constitute an admission to the United States and shall be terminated when, *inter alia,* the purpose of parole is accomplished or neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States. *See* 8 CFR 212.5(e). *See http://www.dhs.gov/definition-terms* for information on various types of parole.

[12] Since November 20, 2009 CBP has been unable to impose a penalty when a section 212(d)(4)(A) waiver has been granted to an alien without proper documentation. Nevertheless, the small entities listed in Table 1 transported aliens who received such waivers. The small entities responsible for transporting the aliens were not assessed a penalty.

retaining the ability to fine the carrier for transporting an alien to the United States without proper entry documentation. CBP believes that the penalty provisions in the proposed regulation provide the necessary economic incentive to enforce the statutory requirements of section 273 of the INA.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of this regulation is to allow CBP to waive the requirement of proper entry documents for nonimmigrants in an unforeseen emergency while still retaining the ability to fine the carrier for transporting an alien to the United States without proper entry documentation. In general, nonimmigrant aliens must present an unexpired passport and, if required, a valid unexpired visa in order to be admitted to the United States. See section 212(a)(7)(B)(i) of the INA (8 U.S.C. 1182(a)(7)(B)(i)). The Secretary of Homeland Security and the Secretary of State, acting jointly, in specified situations, as provided in section 212(d)(4) of the INA (8 U.S.C. 1182(d)(4)), may waive either or both of these requirements. One of these situations is when the nonimmigrant is unable to present the required documents due to an unforeseen emergency. See section 212(d)(4)(A) of the INA. DHS regulations list those classes of persons who are not required to present a visa (or passport, in some cases) in 8 CFR 212.1. The unforeseen emergency waiver is provided for in 8 CFR 212.1(g). The State Department has a similar provision in 22 CFR part 41.

3. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

It is unlawful under section 273 of the INA for any person or company to transport an alien to the United States (other than from a foreign contiguous territory) who does not have a valid passport and an unexpired visa (if a visa is required). As such, it is possible that any person or company engaged in the transportation of aliens may be affected by this rule. Below, Table 1 presents data on the industries CBP estimates could be affected by this rule. The data include the NAICS codes of an industry, a description of the industry, and the Small Business Administration's (SBA) guidance on what qualifies an entity to be considered small in the respective industry. Additionally, Table 1 includes the number small entities in the respective industry that have violated section 273 of the INA from FY 2008 through FY 2012.[13] Of the industries that could be affected, only four industries have had small entities that have violated section 273 of the INA from FY 2008 through FY 2012.

TABLE 1

NAICS	Industry description	SBA size standard	Small entities that have violated section 273 of the INA
481111	Scheduled Passenger Air Transportation	<1,500 employees	0
481112	Scheduled Freight Air Transportation	<1,500 employees	0
481211	Nonscheduled Chartered Passenger Air Transportation	<1,500 employees	16
481212	Nonscheduled Chartered Freight Air Transportation	<1,500 employees	0
481219	Other Nonscheduled Air Transportation	<$14 million in revenue	0
482111	Line-Haul Railroads	<1,500 employees	0
482112	Short Line Railroads	<500 employees	0
483111	Deep Sea Freight Transportation	<500 employees	1
483112	Deep See Passenger Transportation	<500 employees	0
483113	Coastal and Great Lakes Freight Transportation	<500 employees	0
483114	Coastal and Great Lakes Passenger Transportation	<500 employees	0
483211	Inland Water Freight Transportation	<500 employees	0
483212	Inland Water Passenger Transportation	<500 employees	1
484230	Specialized Freight (except, Used Goods) Trucking, Long-Distance	<$25.5 million in revenue	0
485991	Special Needs Transportation	<$14 million in revenue	0
487110	Scenic and Sightseeing Transportation, Land	<$7 million in revenue	0
488330	Navigational Services to Shipping	<$35.5 million in revenue	0
541614	Process, Physical Distribution and Logistics Consulting Services	<$14 million in revenue	23
621910	Ambulance Services	<$14 million in revenue	0

Sources: U.S. Census Bureau, Small Business Administration, and CBP.

To estimate the number of small entities to which the proposed rule will apply, CBP needs an estimate of the total number of small entities within an industry and the number of these small entities that are, or will be, engaged in the transportation of aliens.

The U.S. Census Bureau (Census) provides estimates of the number of entities within an industry. The Census organizes an industry by various intervals of annual revenue and number of employees.[14] Using these intervals and the SBA's small entity standards, CBP can estimate the number of small entities within an industry. However, the Census intervals do not necessarily correspond exactly with the SBA's small entity size standards. As an example, as shown in Table 2 below, the SBA's small entity size standards state that an entity classified under NAICS code 481211 is small if it has fewer than 1,500 employees. The Census, however, only has the following intervals of employees: 0–4 employees, 5–9 employees, 10–19 employees, 20–99 employees, 100–499 employees, and 500+ employees. It is not possible to differentiate between the entities in the 500+ employee interval that would be considered small under SBA's small entity size standards (entities with fewer

[13] Since November 20, 2009, CBP has been unable to impose a penalty when a 212.1(g) waiver has been granted to an alien without proper documentation. Nevertheless, the small entities listed in Table 1 transported aliens who received 212.1(g) waivers. The small entities responsible for transporting the aliens were not assessed a penalty.

[14] *http://www.census.gov/econ/susb/.*

than 1,500 employees) and those entities the SBA does not consider small (entities with more than 1,500 employees). We therefore, sought an alternative data source to supplement the Census data. Any scheduled airline with a capacity of carrying over 18,000 pounds is required to report employee information to the Department of Transportation.[15] Using this data, we were able to identify carriers with over 1,500 employees, who are not considered small entities under the SBA size standards. We subtracted these airlines from the total small entities in each NAICS code to estimate the total small entities that could be affected by this rule. We note that these estimates could include businesses with over 1,500 employees that have a payload of less than 18,000 pounds or that do not offer scheduled flights. As there are a large number of small businesses with over 18,000 pounds of capacity, as shown in DOT's data, we do not believe there are many, if any, large carriers that are not included in DOT's data. We request comment on this matter.

Although CBP can use the Census and DOT data to provide an estimate of the number of small entities that have the potential to be affected by this rule, CBP cannot use the Census data to determine the number of small entities that are, or will be, engaged in the transportation of aliens within a reasonable degree of accuracy.[16] As shown in both Tables 1 and 2, however, CBP's internal records show that only 41 small entities from FY 2008 to FY 2012 violated section 273 of the INA and thus would have been subject to a penalty if this rule were in effect. CBP seeks comment on the number of small entities that are, or will be, engaged in the transportation of aliens.

TABLE 2

NAICS	Industry description	SBA Size Standard	Total number of entities	Total number of small entities	Small entities that have violated section 273 of the INA
481111	Scheduled Passenger Air Transportation	<1,500 employees	258	233	0
481112	Scheduled Freight Air Transportation	<1,500 employees	232	227	0
481211	Nonscheduled Chartered Passenger Air Transportation.	<1,500 employees	1498	1498	16
481212	Nonscheduled Chartered Freight Air Transportation.	<1,500 employees	171	171	0
481219	Other Nonscheduled Air Transportation	$14 million in revenue.	476	477	0
482111	Line-Haul Railroads	<1,500 employees	not available	not available	0
482112	Short Line railroads	<500 employees	not available	not available	0
483111	Deep Sea Freight Transportation	<500 employees	231	213	1
483112	Deep See Passenger Transportation	<500 employees	48	41	0
483113	Coastal and Great Lakes Freight Transportation.	<500 employees	376	350	0
483114	Coastal and Great Lakes Passenger Transportation.	<500 employees	170	170	0
483211	Inland Water Freight Transportation	<500 employees	319	294	0
483212	Inland Water Passenger Transportation	<500 employees	235	233	1
484230	Specialized Freight (except, Used Goods) Trucking, Long-Distance.	$25.5 million in revenue.	9,839	9,476	0
485991	Special Needs Transportation	$14 million in revenue.	2,130	2,026	0
487110	Scenic and Sightseeing Transportation, Land.	$7 million in revenue	646	121	0
488330	Navigational Services to Shipping	$35.5 million in revenue.	728	693	0
541614	Process, Physical Distribution and Logistics Consulting Services.	$14 million in revenue.	6,379	6,058	23
621910	Ambulance Services	$14 million in revenue.	3,150	2,941	0

Sources: U.S. Census Bureau, Small Business Administration, and CBP.

4. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed regulation does not propose changes to any required reporting, recordkeeping, or compliance requirements. The objective of the proposed rule is to allow CBP in an unforeseen emergency to waive the requirement that a nonimmigrant present proper entry documents in order to be admitted into the United States while retaining the ability to fine the carrier that did not comply with the requirements pertaining to the proper transportation of an alien to the United States. When the nonimmigrant without proper documentation is not admitted, including when he or she is granted parole, CBP already has the authority to fine the carrier that did not comply with the requirements. This rule would only affect the carriers transporting aliens for whom CBP waives the document requirement. As discussed above, the proposed rule could affect any small entity that transports an alien without proper entry documentation.

[15] *http://transtats.bts.gov/Employment/.*

[16] For instance, CBP cannot tell which scheduled passenger air transportation entities do, or will, transport aliens and which do, or will, not transport aliens.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

The State Department is jointly promulgating this rule with DHS. DHS does not view this as duplicative, overlapping, or in conflict with this proposed rule as it is a judicial requirement stemming from the opinion in *United Airlines, Inc.* v. *Brien,* 588 F.3d 158 (2d Cir. 2009), which held that the 8 CFR 212.1(g) was improperly promulgated because the State Department and the legacy INS did not promulgate the rule jointly.

6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Alternative 1 (chosen alternative): Allows CBP to waive the requirement for nonimmigrants to present valid documentation for entry into the United States in an unforeseen emergency while retaining the ability to enforce the statutory requirement imposing a maximum penalty of $4,300 on a carrier, regardless of size, for transporting an alien to the United States without proper documentation. When the nonimmigrant without proper documentation is not admitted, including when he or she is granted parole, CBP already has the authority to fine the carrier that did not comply with the requirements.

Alternative 2: Same as Alternative 1, but waive the penalty in Alternative 1 for small entities.

Alternative 3: No regulatory action (*i.e.* the world as it is now).

CBP has chosen to implement Alternative 1. CBP believes that a penalty mechanism is necessary in order to enforce the statutory prohibition on transporting aliens into the United States without proper documentation. In addition, this rule would end the current inconsistency in fines for violations of section 273. Finally, CBP believes that the penalty provisions in the proposed regulation provide an economic incentive to enforce the statutory requirements of section 273 of the INA.

Alternative 2 would eliminate the economic impact of the proposed rule on noncompliant small entities. CBP believes that it would also eliminate economic incentive to enforce the statutory requirement for small entities. Furthermore, 8 CFR 273.5 sets forth the mitigation criteria for the mitigation of fines under § 273(e) of the INA and applies the administrative procedures provided for in 8 CFR 280.12 and 280.51. In determining the amount of the mitigation, CBP may take into account the effectiveness of the carrier's screening procedures, the carrier's history of fines, and the existence of extenuating circumstances. This mitigation is available to any carrier, including small entities.

Alternative 3 would eliminate the economic impact of the proposed rule for all noncompliant carriers, regardless of size. In addition, the current inconsistency in fines for violations of section 273 would continue—carriers who transport aliens who qualify for parole would be fined if they do not adhere to the requirements of section 273, but those who transport aliens who qualify for unforeseen emergency waivers would not be fined.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.,* requires agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507) an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The collections of information for this NPRM are included in an existing collection for DHS Form I–193 (OMB control number 1651–0107).

List Of Subjects in 8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

Amendments to the Regulations

For the reasons stated in the preamble, DHS proposes to amend part 212 of title 8 of the Code of Federal Regulations (8 CFR part 212), as set forth below:

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANT; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 1. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); 8 CFR part 2.

■ 2. Section 212.1(g) is revised to read as follows:

§ 212.1 Documentary Requirements for Nonimmigrants.

* * * * *

(g) *Unforeseen emergency.* A nonimmigrant seeking admission to the United States must present an unexpired visa and passport valid for the amount of time set forth in section 212(a)(7)(B)(i) of the Act, 8 U.S.C. 1182(a)(7)(B)(i), or a valid biometric border crossing card issued by the DOS on Form DSP–150, at the time of application for admission, unless the nonimmigrant satisfies the requirements described in one or more of paragraphs (a) through (f) or (i), (o), or (p) of this section. Upon a nonimmigrant's application on Form I–193, or successor form, ''Application for Waiver of Passport and/or Visa,'' a district director may, in the exercise of its discretion, on a case-by-case basis, waive either or both of the documentary requirements of section 212(a)(7)(B)(i) if satisfied that the nonimmigrant cannot present the required documents because of an unforeseen emergency. The district director may at any time revoke a waiver previously authorized pursuant to this paragraph and notify the nonimmigrant in writing to that effect.

* * * * *

Dated: February 29, 2016.

Jeh Charles Johnson,

Secretary.

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