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U.S. Department of State
A/GIS/DIR
SA-22
Washington, DC 20522-2201

Submitted via www.regulations.gov

Re: Department of State Retrospective Review under E.O. 13563, 76 Fed. Reg. 13931 (Mar. 15, 2011)
Docket No.: DOS–2011–0047

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the request for information on the Department of State's (DOS) implementation of Executive Order 13563, "Improving Regulation and Regulatory Review," issued by the President on January 18, 2011.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the implementation of Executive Order 13563 as it pertains to U.S. visa law, policy, and procedure, contained in various parts of Title 22 of the Code of Federal Regulations. We believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

The Abbreviated Comment Period Is Inadequate for the Submission of Meaningful Remarks

Although we applaud DOS for reaching out to the public to solicit information and comments on the retrospective review of existing regulations, we point out that a 17-day comment period is grossly inadequate for the provision of thoughtful and considered remarks. The

President's Executive Order was issued on January 18, 2011, directing agencies to develop and submit to the OMB's Office of Information and Regulatory Affairs (OIRA), a preliminary plan for periodic review of existing regulations within 120 days (May 18, 2011). The Executive Order was followed by a February 2, 2011, memorandum from OIRA providing additional guidance to agencies and requesting draft plans within 100 days (May 13, 2011). While the time period for plan submission seems disproportionate to the monumental undertaking assigned to the agencies, DOS neglected to publish notice of its request for public comment until March 15, 2011, and as a result, has provided a mere 17 days for comment.

We note that in commencing this regulatory review, the Department is embarking upon a significant and important project, the results of which have the potential for far-reaching impact on the lives of individuals who seek to enter the United States temporarily as tourists, students, or for temporary employment, as well as those coming to live permanently in the United States with their American families or to work for a U.S. employer. As such, DOS regulations have a major impact on international travel and tourism, family unity principles, and the economic interests of U.S. employers and the country as a whole. Given the extremely abbreviated comment period, it is virtually impossible to provide extensive, meaningful remarks at this time. We note, however, and appreciate that the Department has established an e-mail box on its website, to which interested parties can submit comments on additional regulations for future review.

How Can the Department Best Promote Meaningful Periodic Reviews of Its Existing Rules and How Can It Best Identify Those Rules That Might Be Modified, Streamlined, Expanded, or Repealed?

The Regulatory Flexibility Act requires agencies to conduct a decennial review of existing regulations. 5 USC §610. As it has done here, the Department should solicit input from the public when conducting its periodic reviews. However, in order for DOS to receive meaningful and thoughtful comments, an adequate comment period—a minimum of 90 days—must be provided. In order to reduce the burden on both the agency and the public, the Department should also consider staggering its periodic reviews and requests for public input according to the various Titles of the Code of Federal Regulations (CFR) (e.g., review Title 22 separately from Title 28). Moreover, proposed regulations that result from the reviews should be published in the Federal Register with a full 120-day comment period to achieve the highest level of public participation.

It is important to note that visa policy and procedures are detailed in large part by Part 9 of the *Foreign Affairs Manual* (FAM). Changes to the FAM are not subject to the notice and comment requirements of the Administrative Procedure Act. However, any meaningful review of visa policy and procedure must include a thorough review of the FAM provisions, in conjunction with Title 22 of the CFR.

Factors to Consider in Selecting and Prioritizing Rules and Reporting Requirements for Review

The Department should conduct its regulatory review in a methodical manner with a focus on substance. Factors to consider in selecting and prioritizing rules should include (1) the impact/benefit to the public; (2) significant economic considerations; (3) historical context; (4) nexus to the underlying statute/congressional intent; and (5) national interest considerations. In addition, DOS should consider conducting its review by individual CFR Title, as opposed to reviewing all DOS regulations at one time.

Regulations that Should Be Modified, Streamlined, Expanded, or Repealed

Our focus is on regulations pertaining to U.S. visa law, policy, and procedure, contained in various parts of Title 22 of the Code of Federal Regulations. The list of regulations that we have identified herein is not exhaustive. Although the FAM plays a large role, as described above, in guiding consular officers in interpreting and carrying out U.S. visa policy, due to time constraints, the scope of these comments do not include an analysis of the FAM provisions that should be modified, streamlined, expanded, or repealed.

- **22 CFR §41.111(b): Issuance of Nonimmigrant Visas in the United States.** As of July 16, 2004, DOS ceased visa reissuance (visa revalidation) for the C, E, H, I, L, O, and P nonimmigrant visa (NIV) categories due to the requirement of biometrics capture for these categories as a result of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. No. 107-173). *See* 69 Fed. Reg. 35121 (June 23, 2004). Visa revalidation greatly enhanced and facilitated international business travel and should be reinstated for the above-referenced visa categories. Biometrics for visa revalidations could be captured by USCIS Application Support Centers.

- **22 CFR §41.111(d): Automatic Extension of Validity at Ports of Entry.** This provision permits a nonimmigrant with an unexpired I-94 Arrival/Departure Record, who is returning to the United States from a contiguous territory after an absence of not more than 30 days, to be readmitted notwithstanding the fact that the underlying nonimmigrant visa has expired, unless the individual has applied for (and presumably been denied) a nonimmigrant visa while abroad. This provision should be amended to permit such individuals to reenter the United States for the period of admission remaining on his or her I-94 card.

- **22 CFR §41.81: Fiancé(e) or Spouse of a U.S. Citizen and Derivative Children.** DOS announced that effective February 1, 2010, it would no longer allow a K-3 applicant to choose whether to proceed with K-3 processing at an NIV consulate or the I-130/immigrant visa (IV) processing at an IV consulate where the National Visa Center (NVC) has received approval notices for both the K-3 and the I-130 petitions. Given the difference in processing times for K-3 NIVs versus IVs at certain consular posts, and the resulting delay in family reunification caused by this recent change,

this regulation should be amended to permit the applicant to choose between proceeding with the K-3 or IV application under these circumstances.

- **22 CFR §41.103(b)(3): Filing an Electronic NIV Application—Electronic Signature.** On April 29, 2008, DOS amended the regulations relating to NIV applications to offer an electronic application procedure on Form DS-160. *See* 73 Fed. Reg. 23067. The supplementary information to the final rule states that while a third party may assist the applicant in preparing the DS-160, the applicant must electronically sign the application him- or herself. This requires the applicant to physically click the "submit" button and does not permit an authorized attorney or representative to do so on the applicant's behalf. This is extremely burdensome for applicants who may not have a computer, access to a computer, or cannot sufficiently complete the electronic form. This provision should be amended to permit a third party to sign the electronic DS-160 with the express consent of the applicant.

- **22 CFR §41.105(a): NIV Supporting Documents, and §41.121(b): Refusal Procedure.** 22 CFR §41.105(a) states that "[a]ll documents and other evidence presented by the alien, including briefs submitted by attorneys and other representatives, shall be considered by the consular officer." Though 22 CFR §41.121(b) requires a consular officer to "inform the alien of the ground(s) of ineligibility" when a visa is refused, the information provided in the denial letter is often of a very general nature. The regulations should be amended to require consular officers to provide a detailed statement of ineligibility to demonstrate that all submitted documents were reviewed and considered in accordance with §41.105(a).

- **22 CFR §42.65: IV Supporting Documents.** Immigrant visa applicants are required to submit originals of essential documents such as birth certificates, marriage certificates, and police certificates to the NVC. The physical case file, including the original documents, is forwarded to the consulate, but documents can get lost in the file transfer process. This practice should be amended to permit IV applicants to submit good, clear copies of original documents to the NVC and to permit the applicant to bring original documents to the interview for inspection by the consular officer.

- **22 CFR §42.21(b): Immigrant Visas for Surviving Beneficiaries/Spouses of Deceased U.S. Citizens.** USCIS regulations promulgated in 2006, 8 CFR §204.2(i)(1)(iv), allow for the automatic conversion of an I-130 petition to an I-360 petition upon the petitioner's death in the case of a spouse (widow) of a U.S. citizen. Section 568(c) of the FY2010 Appropriations Act, Pub. L. No. 111-83, included provisions permitting widows married less than two years to similarly self-petition, as well as provisions for benefits for other surviving relatives. Under INA §204(l), such individuals are eligible for survivor benefits if they can show a U.S. residence at the time of the petitioner's death, even where they have proceeded abroad for the sole purpose of consular processing. However, it appears that DOS has yet to issue guidance or regulations on the treatment of surviving beneficiaries, and may in fact be

treating widow petitions as automatically revoked under 8 CFR §205.1(a)(3), in cases where the petitioner dies before the beneficiary has immigrated to the United States. We ask that regulations and/or guidance be implemented in this regard.

- **Right to Counsel at U.S. Embassies and Consulates.** Persons attending an appointment or interview at a U.S. embassy or consulate should have the right to be represented by counsel. Current DOS guidance, under 9 FAM 40.4 N12.4, provides that, "[e]ach post has the discretion to establish its own policies regarding the extent to which attorneys and other representatives may have physical access to the Consulate or attend visa interviews." Consulates, as a matter of discretion, often do not permit attorneys to accompany their clients inside the consulate, which can negatively impact an approvable case. Additionally, DOS policy conflicts with USCIS regulations, granting the right to representation during an examination. 8 CFR §292.5(b). Regulations governing the right to counsel in a consular setting should be promulgated and opened for public comment.

Conclusion

We appreciate the opportunity to comment on this request for information and look forward to a continuing dialogue with the Department during the regulatory review process.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION